In praise, and defence, of diversity in tribunal appointments

*Janine Pritchard**

In this article I propose to address the concept of diversity as it applies to the membership of tribunals in this country. There are two aspects to this diversity on which I wish to focus. The first is diversity in the *personal characteristics* of tribunal members — matters such as their gender or gender identity, age, caring responsibilities, disability, sexual orientation, race, religion, cultural background, socio-economic background, and so on. The second aspect of diversity on which I want to focus concerns *professional qualifications* — that is, diversity in the professional background and qualifications of tribunal members — and, specifically, the appointment of non-lawyers, as well as lawyers, as members of tribunals.

In considering the question of diversity in tribunal membership, my focus is primarily on diversity in the non-sessional members appointed to tribunals, as opposed to diversity in the sessional (sometimes known as occasional) members. I do so because the non-sessional members, the large majority of whom are full time appointments, represent the core membership of tribunals and carry out most of their work.

Furthermore, my focus is on the non-sessional members of the major civil and administrative tribunals in this country, the Administrative Appeals Tribunal ('AAT') and the state and territory Civil and Administrative Tribunals ('CATs'): the New South Wales Civil and Administrative Tribunal ('NCAT'), the Victorian Civil and Administrative Tribunal ('VCAT'), the Queensland Civil and Administrative Tribunal ('QCAT'), the Western Australian State Administrative Tribunal ('WASAT'), the South Australian Civil and Administrative Tribunal ('SACAT'), the Tasmanian Civil and Administrative Tribunal ('TASCAT'), the Australian Capital Territory Civil and Administrative Tribunal ('ACAT') and the Northern Territory Civil and Administrative Tribunal ('NTCAT').

Why bother to discuss diversity in tribunal appointments? As I will shortly illustrate, the membership of the AAT and the CATs is reasonably diverse on some limited measures of diversity (gender and professional diversity). That is to be celebrated. However, there is a danger that the achievement of diversity on those measures might be viewed as an indication that there is no more work to do to achieve diversity in tribunal appointments. In my view, it is important to continue to strive for personal diversity and professional diversity in the membership of tribunals, because there exist some risks that the importance of that diversity will be overlooked or, even worse, consciously rejected.

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With that background in mind, the objectives of this article are to:

- provide a snapshot of the membership of the major Australian tribunals — the AAT and the CATs — to highlight the criteria for the appointment of their members, consider some of the publicly available data about diversity in the non-sessional membership of those tribunals, and consider some of the implications and limitations of that data;
- identify the evidence that suggests some risk that the importance of diversity in the membership of tribunals might be overlooked or rejected;
- recall why diversity in the appointment of tribunal members is so important; and
- discuss how greater diversity in tribunal membership might be achieved.

Overview of membership of the AAT and the CATs

Criteria for appointment

At the outset, it is useful to bear in mind the legislative requirements for the appointment of members of the AAT and the CATs.

The constituting legislation of the AAT[1] and most of the CATs[2] requires that members either be qualified as lawyers (usually with a minimum period of experience, in the order of between five and eight years) or have special knowledge or skills relevant to dealing with the work of the tribunal in question. The constituting legislation for the ACAT adopts a more prescriptive approach.[3] In short, the constituting legislation of the AAT and the CATs permits diversity in terms of the professional qualifications and experience of members: not all of the members of those tribunals must be lawyers. On the other hand, with two exceptions (the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') and the *South Australian Civil and Administrative Tribunal Act 2013* (SA) ('SACAT Act')) the constituting legislation of the AAT and the CATs does not require other aspects of diversity to be taken into account in the appointment of members of tribunals. I will consider the relevant provisions of the QCAT Act and the SACAT Act later in the article.

1 *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act') s 7(3).

2 *Civil and Administrative Tribunal Act 2013 No 2* (NSW) ('NCAT Act') s 13; *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('VCAT Act') s 13, 14; *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('QCAT Act') s 183; *State Administrative Tribunal Act 2004* (WA) ('SAT Act') s 117; *South Australian Civil and Administrative Tribunal Act 2013* (SA) ('SACAT Act') s 19(3); *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) ('TASCAT Act') s 44(2); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) ('NTCAT Act') s 16.

3 The *ACT Civil and Administrative Tribunal Act 2008* ('ACAT Act') s 96 simply requires that the Attorney-General appoint persons they are satisfied have the experience or expertise to qualify them to exercise the functions of a senior member or ordinary member. However, r 6 of the *ACT Civil and Administrative Tribunal Regulation 2009* ('ACAT Regulations') requires the Attorney-General, considering whether to appoint a person, to take reasonable steps to ensure the ACAT has sufficient members with relevant interests, qualifications or experience to allow it to exercise its functions, and specifies a minimum number of members who must meet certain criteria in terms of qualifications or experience. The specified qualifications and experience are not confined to law but include qualifications or experience in consumer affairs, in the provision of credit, in business, in the health professions, in dealing with mentally dysfunctional people, and in dealing with the needs of people who require assistance or protection from abuse, exploitation or neglect.

With that background in mind, I turn now to consider what can be discerned from publicly available information about the diversity of the membership of the AAT and the CATs.

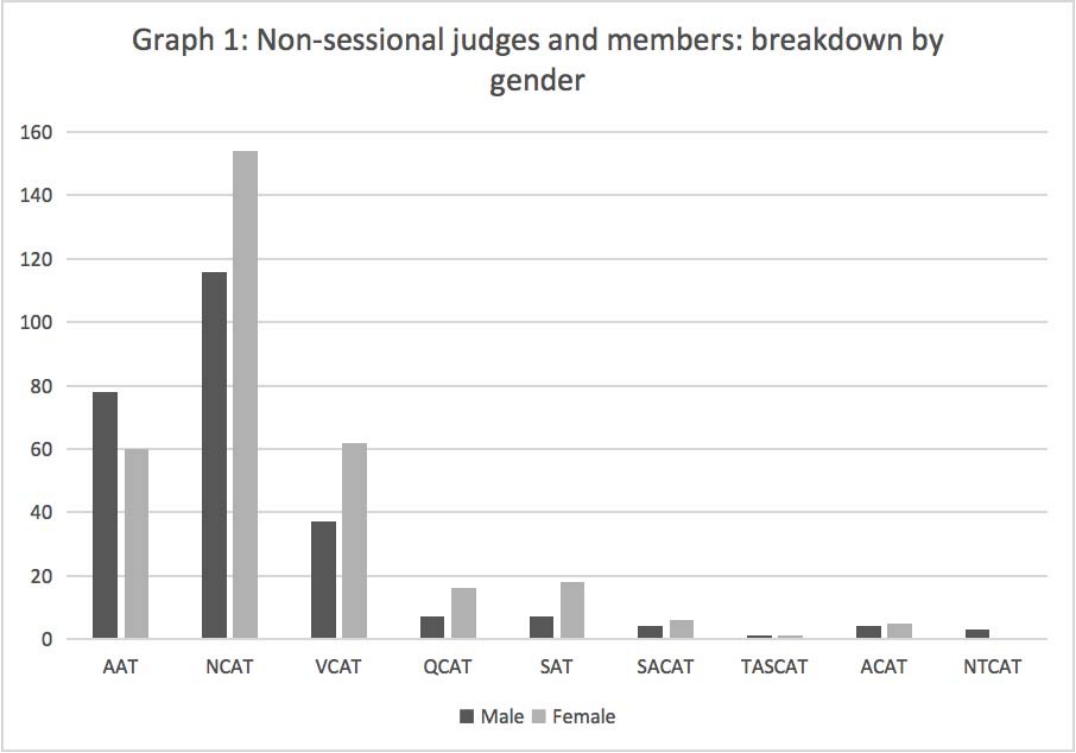
Publicly available data as to diversity in tribunal membership

What data is available to the public about diversity in the membership of the AAT and the CATs? In order to determine that question, the SAT's legislation research officers endeavoured to collate publicly available data about the current non-sessional members of Australian tribunals. (For ease of collation of the data, judges were included, as the small number of judicial appointments in each jurisdiction was not so significant as to skew the overall results.) The source material searched comprised the webpages of the AAT and the CATs, together with their most recent annual reports. The webpages and annual reports were searched for information in relation to professional diversity (for example, as to which non-sessional members were legally qualified and as to the qualifications and experience of those members who were not lawyers) and for any information in relation to diversity in the personal characteristics of the non-sessional members. In relation to gender, the gender of members was deduced solely on the basis of their names or by gleaning other information from the relevant webpage or annual report. As it can be difficult to discern gender merely from a person's name, it is possible that the data is not absolutely accurate for that reason. Furthermore, in relation to the professional diversity of members, the qualifications or expertise of non-sessional members was not always readily able to be identified from the webpages and annual reports, which in turn made it impossible to calculate the total number of lawyers and non-lawyers appointed to some tribunals or to be certain about the range of professional backgrounds of the non-legal members. In the absence of adequate data, I have endeavoured to give examples of the non-legal qualifications of the members of the relevant tribunal.

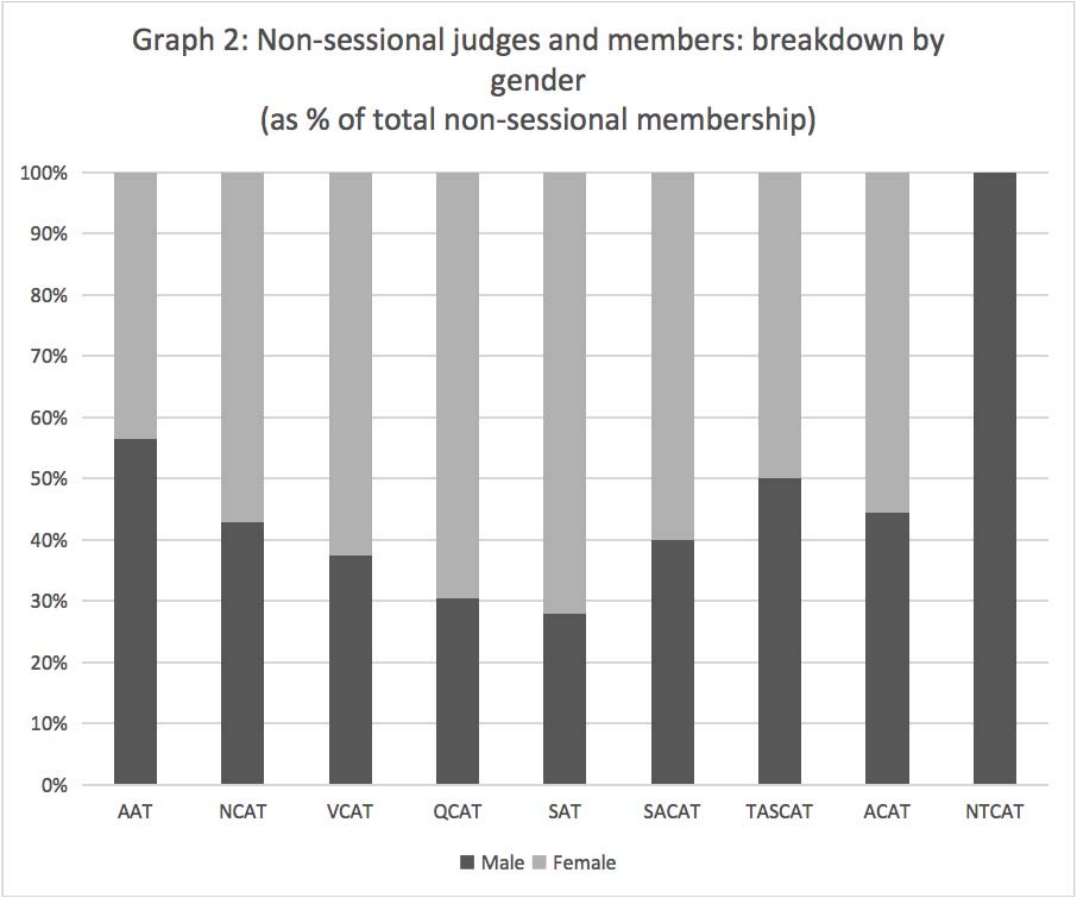
My objective in reporting on the data is not the precision of the numbers but, rather, the overall impression that can be discerned in relation to each of the tribunals.

Gender diversity in non-sessional members

Graph 1 shows the gender breakdown, by number, of the non-sessional judges and members of the AAT and the CATs.



Graph 2 represents the same data as a proportion of overall tribunal membership.

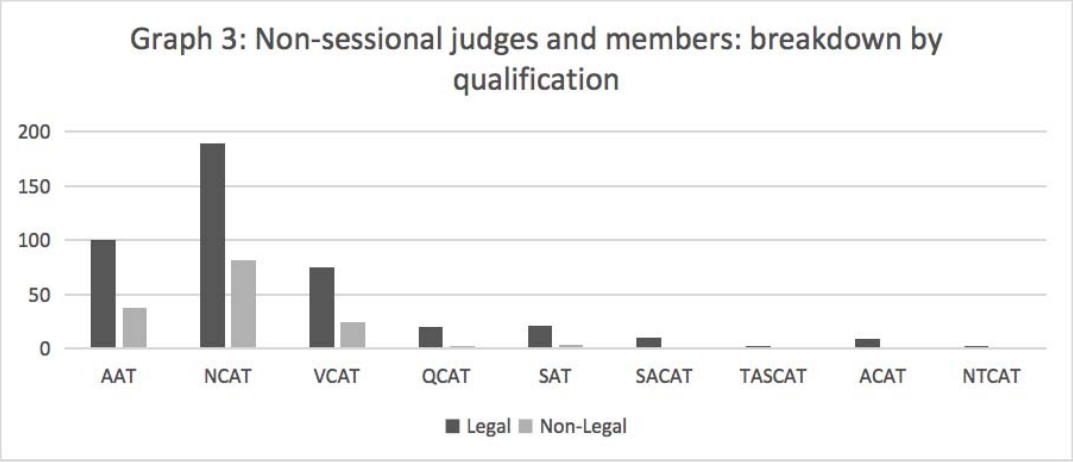


The data reveals that, in the majority of the state CATs, and in the ACAT, female judges and non-sessional members outnumber male judges and non-sessional members, and often by a quite considerable margin. In the AAT, males outnumber women but by only a modest margin. In the TASCAT the numbers are even. The NTCAT is the only CAT without any women judges or non-sessional members (three men). Women judges and non-sessional members thus make up a substantial proportion of the overall number of non-sessional members of all of the Australian tribunals apart from the NTCAT.

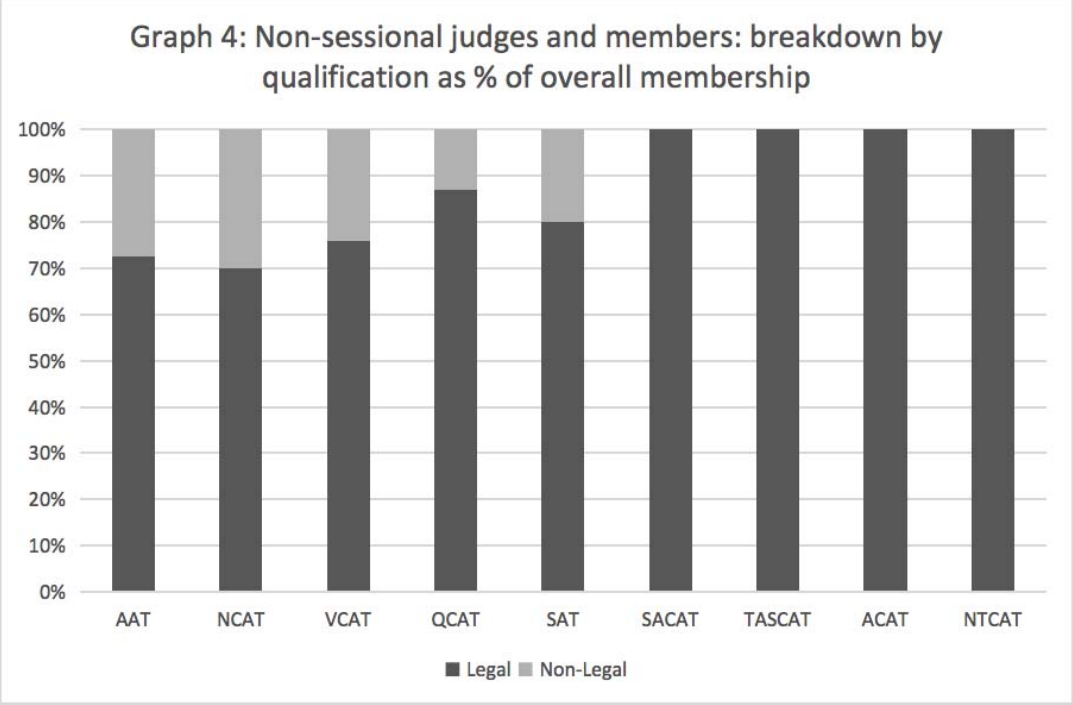
As for other aspects of personal diversity of non-sessional tribunals, there is a dearth of publicly available information in the tribunal webpages and annual reports.

Professional diversity in non-sessional members

Graph 3 depicts the professional diversity for non-sessional members — by reference to legal and non-legal qualifications and experience.



Graph 4 depicts the same data as a proportion of overall non-sessional membership.



The data reveals that, in each of the AAT, the NCAT, VCAT, QCAT and the WASAT, there is a not insubstantial number of non-sessional members who have qualifications and expertise in areas other than law. On the other hand, in the smaller tribunals, all of the non-sessional members are legally qualified. That is likely to be a consequence of the small numbers of non-sessional members in those tribunals.

As I have already mentioned, the data on which I have drawn is confined to the non-sessional members of the AAT and the CATs. Each of the CATs, in particular, has a comparatively large pool of sessional or occasional members who can be drawn on to sit on individual matters which involve specialist or technical knowledge, such as in vocational regulation matters, planning reviews or building disputes.

Accurate data in relation to the professional backgrounds of non-sessional members was difficult to locate. For that reason, for present purposes, all that can reliably be said is that the non-sessional tribunal members who are not legally trained appear, typically, to be drawn from the following professions: medical and allied health; planning, building and construction (for example, builders, architects, town planners); accounting; social work; and, in the case of the AAT, from the ranks of former public servants, politicians or political advisers, and from the defence forces.

Some conclusions from the data

What conclusions can be drawn from the data in relation to diversity in the personal characteristics of non-sessional members? In so far as gender is concerned, as institutions within the justice system, Australian tribunals may be said to have reached the 'holy grail' of gender representation, in that the number and proportion of female non-sessional members in most of those tribunals is at least equal to, if not greater than, the number of male non-sessional members. That represents a quite extraordinary achievement within the justice system, the significance of which cannot be understated.

The reasons for that achievement warrant more detailed, and separate, consideration. Three possible reasons immediately spring to mind. First, most of the CATs fill membership positions by inviting expressions of interest and/or considering applications through a merit-based recruitment process. This permits applicants who might not otherwise be identified by Attorneys-General and heads of jurisdiction to apply. I will return to the issue of appointments later in the article. A second possible reason for the larger number of female non-sessional tribunal members is one of perception — namely, an erroneous perception, held by some in the legal profession, that tribunals do not deal with serious disputes or difficult legal questions. A third possible explanation is the disparity in salary and conditions. A limited tenure combined, in many cases, with lesser salaries than are paid to magistrates may deters some candidates for appointment from applying.

Other than for gender diversity, there is no readily available public data about diversity in the personal characteristics of non-sessional tribunal members. It may be that such data is not being collected.

As for diversity in the professional backgrounds of non-sessional members, the data demonstrates that, at present, in the larger tribunals at least, the importance of that aspect of diversity in tribunal membership is accepted.

Is the importance of diversity in tribunal membership in danger of being overlooked and if so, why?

Despite the diversity which exists in the gender and professional backgrounds of non-sessional members of the AAT and the CATs, we should not become complacent about the importance of diversity. In my view, there remains a risk that the importance of diversity might be overlooked or even rejected, for two reasons.

First, the achievement of substantial gender diversity in tribunal membership risks blinding us to the absence of diversity in other respects. That conclusion derives some support from the fact that there does not appear to be any publicly available data about other kinds of personal characteristics diversity in the composition of the AAT and the CATs. As I have already observed, the absence of data suggests it may not be being collected at all or, at the least, that it is not being collected with a view to publication.

Secondly, there is a risk that the importance of diversity in professional qualifications may be overlooked or rejected in the course of the consideration of reform of the AAT.

As you will recall, in 2018, a review of the AAT was conducted by Ian Callinan AC QC for the purpose of assessing the success of the amalgamation of the various divisions of the AAT ('Callinan Review'). The terms of reference for the Callinan Review included whether the AAT met its statutory objectives, including to promote trust and confidence in the decision-making of the AAT and whether its operations and efficiency could be improved through further legislative or non-legislative amendments. In the course of the review, Mr Callinan considered the manner in which members of the AAT were appointed. He noted that:

> much of the work of the AAT is difficult, factually and legally. Capacity to undertake forensic analysis and to write reasoned judgments is essential. The better qualified, legally and otherwise, an appointee is, the more opportunity there will be for that appointee to sit in a number of Divisions and, therefore, to facilitate the amalgamation.[4]

Mr Callinan concluded that 'as conscientious and well-meaning as "nonlegal" appointees may be, they labour under the disadvantage of lacking these skills or expertise'.[5] Consequently, Mr Callinan recommended that all further appointments, reappointments and renewals of appointment to the membership of the AAT should be of lawyers, admitted or qualified for admission in one of the Australian jurisdictions, and on the basis of merit.[6]

Mr Callinan's view was that, if special expertise to assist the AAT, such as medical, aviation or education, was required then the AAT could readily gain access to it by engaging an appropriate expert witness. With the greatest of respect to Mr Callinan, that suggestion failed

4 Hon Ian Callinan AC QC, *Report on the Statutory Review of the Tribunals Amalgamation Act 2015* (Final Report, 23 July 2019) para 1.8.
5 Ibid para 7.9.
6 Ibid Measure 6.

to appreciate that the role of a nonlegally qualified tribunal member is not the same as that of an expert witness. The member does not give expert evidence or act as a substitute witness. Rather, the member brings his or her specialist expertise to bear in assisting the tribunal to quickly get to the heart of the issues in dispute, understand the evidence given by experts in a case and, in appropriate cases, appreciate the standards of conduct or the performance of work in particular professions or fields of endeavour. The importance of that role in the efficient discharge of the work of tribunals, including the AAT, is reflected in the fact that the constituting legislation for the AAT and the CATs permits the appointment of persons with special knowledge or skills, apart from law, which are relevant to the work of those tribunals.

Presumably for the same reason, Mr Callinan himself conceded the need for some exceptions to his recommendation concerning the appointment of members. He recognised that competent accountants may be suitable for appointment to the Taxation and Commercial Division and that, in respect of claims arising out of military service, the particular disciplines, traditions and risks of military service were well understood by those who had served in the military.

It cannot be disputed that in many areas of the civil and merits review jurisdiction conferred on the AAT and the CATs, it is essential that there be a large pool — probably the majority of members — who have legal training and experience. That is so in high-volume areas of jurisdiction, as much as it is in cases involving factual or legal complexity or in merits review, in which questions of statutory construction may be involved. There is no doubt that the attraction of appointing only lawyers to tribunals lies in the expectation that they will be capable of undertaking a wide variety of work. That thinking clearly underlined the recommendation of the Callinan Review. However, with respect, the difficulty with that reasoning is that it assumes that all lawyers know how to deal with all kinds of legal matters. That is no longer the case, if it ever was. Most lawyers now tend to specialise in particular areas of the law. Appointing only legally qualified members to a tribunal does not guarantee that each of those persons will be suitable and equipped to act as decision-makers in every area of a tribunal's jurisdiction. The contrary is often the case.

The report of the Callinan Review was delivered four years ago and, since then, non-legally qualified members have continued to be appointed to the AAT. From that perspective, it might be assumed that the recommendations of the Callinan Review pose no risk to the diversity of the membership of the AAT. However, reform of the AAT remains a live issue. Last year, the Senate Legal and Constitutional Affairs References Committee examined the performance and integrity of Australia's administrative review system and of the AAT's operations in particular. In its report, the Committee made some significant recommendations relating to the membership of the AAT, including that the Attorney-General 'disassemble the current Administrative Appeals Tribunal and re-establish a new, federal administrative review system, by no later than 1 July 2023'.[7] There have been reports that the federal Attorney-General, the Hon Mr Dreyfus KC MP, is considering the Committee's recommendations.[8]

7 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia*, The Performance and Integrity of Australia's Administrative Review System* (March 2022) para 7.56.

8 Paul Karp, 'Labor-led Senate Inquiry to Call for Axing of Liberal-dominated AAT', *The Guardian* (online, 29 June 2022) <https://www.theguardian.com/australia-news/2022/jun/29/labor-led-senate-inquiry-to-call-for-axing-of-liberal-dominated-aat>.

The background to the Committee's review, and to the latter recommendation in particular, included concerns about the efficiency of the AAT's operations, its backlog of cases, and a perception that the then government had appointed political advisers or former politicians to the AAT, when they were not the best qualified persons to carry out the work of the AAT.

My concern is that, in seeking to address the latter perception, the federal government may in future be tempted to decline to appoint members who are not legally qualified. One commentator[9] recently suggested that, if a new administrative review body were to be established, all of its members should be legally qualified, because that was the recommendation of the Callinan Review and it would be an easy way to avoid the problem of political appointments to that body.

I do not seek to express any view on the legitimacy of the concerns recently raised about the AAT. I have no direct knowledge or experience of its operations. The point I seek to make is simply that, if the federal government gives serious consideration to disassembling the AAT, it may have cause to reconsider the appointment of existing members to any replacement tribunal and, in doing so, there is a risk that the benefits and desirability of diversity in the professional qualifications of the members of that tribunal may be overlooked in favour of the perceived desirability of appointing only legally qualified members.

To my mind, that would be to throw the baby out with the bathwater. If a member of a tribunal is not regarded as qualified or suitable to undertake particular aspects of the work of the tribunal in question, there are other ways to address that problem, including by allocating different kinds of work to that member or by providing training and education to that member.

In my view, a decision to refrain from appointing non-lawyers as members of the AAT would represent a significant backward step for that tribunal and, given its role as one of the oldest and largest tribunals in this country, it would be a backward step for Australian tribunals generally. I turn, next, to explain why I hold that view.

Why is diversity in the appointment of tribunal members important?

In my view, there are three primary reasons why diversity in the non-sessional members appointed to tribunals is important.

First, diversity in the appointment of the non-sessional tribunal members — especially personal characteristics diversity — is essential to maintain public confidence in tribunals as decision-making bodies. As is the case in relation to the judiciary, diversity in these tribunal appointments is desirable because it helps promote public confidence in tribunals. There is no doubt that public trust and confidence in the decision-making of any tribunal depends on the appointment (as non-sessional members who make up the core of a tribunal) of people who have the necessary qualifications and skills to act as tribunal decision-makers and who are provided with sufficient tenure that they can, independently from government, apply the

9 Paul Karp, journalist with *The Guardian* Australia, appearing on the *Australian Politics* podcast: 'Dutton's move to the right, the new parliament and kingmakers: your questions answered', *Australian Politics* (The Guardian, 9 July 2022).

law in a manner which is fair, which accords with the substantial merits of the case and which is undertaken with as little formality and technicality, and with as little cost, as is possible.

However, in order to maintain public trust and confidence in the decisions of tribunals, it is also essential that the non-sessional members who are appointed to tribunals reflect the diverse society in which we live, by virtue of diversity in their personal characteristics. Decisions made by tribunal members with diverse personal characteristics carry a greater legitimacy than decisions made by members whose life experiences are entirely removed from those of the parties who appear before them. That is because members of the community see important decisions being made about their lives by non-sessional members whose backgrounds and life experiences reflect the range of backgrounds and life experiences of the members of our society. Furthermore, the development of the law is also likely to be enhanced if a tribunal's decisions are made by members with a wide variety of backgrounds and life experiences.

The second reason why diversity in appointments is important relates to the professional backgrounds of tribunal members. The appointment of specialist non-legal members of tribunals has historically been one of the key distinguishing features of tribunals. One of the reasons why decision-making functions were historically given to tribunals, rather than to courts, was that decision makers with specialist expertise relevant to the work of the tribunal were thought to be better equipped than lawyers to make decisions about the merits of certain kinds of disputes, and to do so quickly and efficiently. In short, the appointment of specialist non-legal members of tribunals has historically been seen as an integral part of the raison d'être of tribunals.

That was certainly the case for modern Australian tribunals. The genesis of the concept of amalgamated 'super' tribunals in Australia lies in the report of the Administrative Review Committee ('Kerr Committee'), published almost 50 years ago. The Kerr Committee favoured the adoption of a general policy of providing for a review of administrative decisions, which should be undertaken by one tribunal, rather than by a multitude of specialist tribunals, as had previously been the case. The Kerr Committee's attention was focused on tribunals with jurisdiction to conduct merits reviews of decisions made by government decision-makers. No doubt that reflected the fact that it was not then common for tribunals to be conferred with jurisdiction to determine inter partes disputes. The Kerr Committee report recommended that members of tribunals should be chosen for their expertise in a particular field — that is, they would be specialist members, and not necessarily lawyers — although the chair of the tribunal should be legally qualified.[10]

It is fair to say that the amalgamation of civil and administrative tribunals around Australia which occurred after the Kerr Committee report was primarily driven by the anticipated benefit of amalgamation — in practical and process terms — for government and for litigants. The primary anticipated benefits for government in amalgamating specialist tribunals into the super tribunals now represented by the AAT and the CATs lay in greater efficiency and costeffectiveness of their operations. For litigants, the anticipated benefits of the super tribunals included greater accessibility, fairness, flexibility and simplicity of procedures;

10 Commonwealth Administrative Review Committee, *Report*, Parliamentary Paper No. 144/1971 (August 1971) paras 32 and 321.

cost-effective and speedier outcomes; and better quality decisions.[11] The achievement of all of these benefits was thought likely to be assisted by the continued involvement of tribunal members with specialist, non-legal expertise. For that reason, the constituting legislation for the AAT and each of the CATs contains provisions which permit the appointment of specialist members who are not lawyers.

In a paper I gave at the conference of the Council of Australasian Tribunals ('COAT'**)** last year, I proposed that the philosophical foundation for these super tribunals might be encapsulated in a statement along the following lines:

> [Civil and Administrative Tribunals (CATs)] exist to act as independent decision makers in any of a wide variety of roles which may be conferred on them by statute: to conduct merits reviews, to act as an original decision maker, or in adjudicative or inquisitorial roles. The legal, or other specialist, expertise of their members, and their flexible and informal processes, enable CATs to focus on achieving a just outcome, and on making decisions of the highest quality, as efficiently, simply, speedily and cost-effectively as is possible, having regard to the circumstances of each case.

In my view, diversity in the professional backgrounds and expertise of non-sessional tribunal members is a key component of that tribunal philosophy. The appointment to the AAT and the CATs of non-sessional members who are not lawyers but who are specialists in other fields related to the work of those tribunals are integral to the ability of those tribunals to undertake their work consistently with the philosophy underpinning their existence.

The third reason why personal characteristics and professional qualification diversity is important for tribunals is that it can improve the quality of the tribunal's decision-making and the litigants' experience of the process of resolving their dispute.

In some areas of tribunal jurisdiction, legal expertise is not the key expertise which is required to enable a tribunal member to reach the correct or preferable decision in a review or to speedily and efficiently resolve a dispute. There are many areas in which the nomination of a specialist member, either as the sole decision-maker or as a member of a panel of decision-makers, will benefit the determination of the dispute, assist in other ways to resolve the dispute or improve the dispute resolution experience for all involved. The following examples will suffice to illustrate the point:

- In some areas of tribunal jurisdiction — such as the vocational regulation jurisdiction of the state and territory CATs — the involvement of specialist decision-makers is mandated by legislation[12] and their involvement undoubtedly assists the tribunal to grasp the issues and evidence more quickly.
- In the protective guardianship jurisdiction, doctors, social workers and psychologists can bring both professional experience suitable to determining questions of decision-

11 These expected benefits are enshrined in the constituting legislation of the CATs, all of which are similar: see, for example, s 3 of the NCAT Act, which sets out a variety of objects, including to ensure that the NCAT is accessible and responsive to the needs of all of its users, to enable the NCAT to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible, and to ensure that the decisions of the NCAT are timely, fair, consistent and of a high quality.

12 See, for example, s 11 of the WASAT Act and s 204 of *the Legal Profession Uniform Law Application Act 2022* (WA).

making competency; and life experience which enables them to deal sensitively with the parties (many of whom will not be legally represented) in proceedings which are highly emotionally charged.

- The participation of specialist non-legal members in disputes involving technical subject matter (such as in the merits review of planning decisions or in building disputes) facilitates the efficient conduct of a tribunal's work: the member can immediately understand the nature of the dispute and the evidence adduced in response to it; and, in the context of facilitated (or alternative) dispute resolution, will best be able to assist the parties to explore possible compromises.
- The expertise of specialist non-legal members can also be extremely valuable in pre-hearing expert conferrals, where the specialist expertise of the member can quickly and efficiently assist to identify the areas of agreement and disagreement from complex expert reports.

Furthermore, the effect on the quality of decisions reached by panels comprised of specialist members who have expertise outside the law, together with members who are legally trained, should not be underestimated. The quality of those decisions can be enhanced by the contribution of different perspectives, not all of which are informed by legal qualifications or experience.

Having identified how and why diversity in tribunals is important to the work of tribunals, I turn now to consider what can be done to protect and increase the diversity of membership of tribunals in this country.

How can greater diversity in tribunal membership be achieved?

There are a number of ways in which greater diversity can be achieved in tribunal membership. I propose to focus on four readily achievable steps, which in my view would make a meaningful difference to greater diversity in tribunal membership:

1. Move beyond the merit versus diversity dichotomy.
2. Adopt an open and transparent appointment process.
3. Encourage people from diverse backgrounds to apply for tribunal appointment.
4. Collect and publish data about diversity in tribunal membership.

Move beyond the merit versus diversity dichotomy

There is a persistent view that pursuit of diversity in appointments to any position will be at the expense of merit-based appointment. We saw this for many years in the context of judicial appointments, where the pursuit of gender diversity in the courts was controversial because it was perceived to be contrary to the appointment of judges on merit. There continues to be some sensitivity about that issue: when a female judge is appointed, there is often an excessive emphasis on her merit to avoid any suggestion that she is being appointed because of her gender. The sensitivity of the issue has slowly decreased as more women have been appointed. However, I suspect the diversity versus merit issue would be quickly reignited if other kinds of diversity were openly acknowledged as informing the appointment of judges.

As we have seen, the major tribunals in Australia have achieved a large measure of gender diversity, but the extent to which other diversity has been achieved is unclear. The diversity versus merit issue would also likely meet resistance if the pursuit of other kinds of personal characteristics diversity was acknowledged in the context of tribunal appointments.

The problem, however, is that the merit versus diversity dichotomy is a false dichotomy. It assumes that there will be one candidate for appointment who is more meritorious than the others. That assumption ignores the reality that in any appointment process for any job there will ordinarily be a number of candidates who are meritorious but who will have other differentiating qualities. By way of example, in a tribunal context, some possible appointees may have excellent personal communication skills which will equip them to engage effectively with self-represented litigants, some may be talented mediators, and some may have technical skills or qualifications relevant to the work of the tribunal — such as in town planning, building or medicine. To suggest that those skills or qualities will, or should, be ignored in identifying the 'best' candidate for any position is wholly irrational. That being the case, why should diverse personal characteristics be any different?

In some jurisdictions, the merit versus diversity false dichotomy has been overcome through legislation. In the United Kingdom, concern about the 'pale, stale and male' composition of the courts led to a legislative response being adopted to expressly address the merit versus diversity issue. The *Constitutional Reform Act 2005* (UK) provides that, while appointments to the judiciary are to be made 'solely' on merit, the Judicial Appointments Commission is expressly required to have regard to the need to encourage diversity in the range of persons available for selection for appointments. Sections 63 and 64 of the *Constitutional Reform Act 2005* (UK) provide a useful illustration of how achieving diversity might be reconciled with merit-based appointments:

> **63 Merit and good character**
>
> 1. Subsections (2) to (4) apply to any selection under this Part by the Commission or a selection panel (the selecting body).
>
> 2. Selection must be solely on merit.

3. A person must not be selected unless the selecting body is satisfied that he is of good character.

4. Neither 'solely' in subsection (2), nor Part 5 of the *Equality Act 2010* (public appointments) prevents the selecting body, where two persons are of equal merit from preferring one of them over the other for the purpose of increasing diversity within —

   (a) the group of persons who hold offices for which there is a selection under this Part;

   or

   (b) a sub-group of that group.

64 Encouragement of diversity

1. The Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

2. This section is subject to section 63.

Furthermore, the Commission and the most senior law officers are responsible for facilitating the achievement of diversity in the judiciary. So, for example, s 65 provides:

65 Guidance about procedures

1. The Lord Chancellor may issue guidance about procedures for the performance by the Commission or a selection panel of its functions of —

   (a) identifying persons willing to be considered for selection under this Part, and

   (b) assessing such persons for the purposes of selection.

2. The guidance may, among other things, relate to consultation or other steps in determining such procedures.

3. The purposes for which guidance may be issued under this section include the encouragement of diversity in the range of persons available for selection.

4. The Commission and any selection panel must have regard to the guidance in matters to which it relates.

Since 2013, there has been a similar obligation on the Lord Chancellor and the Lord Chief Justice of England and Wales:

137A Encouragement of diversity

Each of the Lord Chancellor and the Lord Chief Justice of England and Wales must take such steps as that office-holder considers appropriate for the purpose of encouraging judicial diversity.

The constituting statutes for some of the Australian CATs refer to diversity as a relevant consideration in the selection and appointment of members. Subsection 19(4) of the SACAT Act provides:

In recommending persons for appointment as members, the Minister must have regard to —

[Any selection criteria];

[Any advice provided by the selection panel appointed to assess candidates];

The following:

(i) The need for balanced gender representation in the membership of the Tribunal;

(ii) The need for the membership of the Tribunal to reflect social and cultural diversity;

(iii) The range of knowledge, expertise and experience required within the membership of the Tribunal.

Similarly, under s 183(5) of the QCAT Act, in recommending persons for appointment as members, the responsible Minister must have regard to the following:

a. The need for balanced gender representation in the membership of the tribunal;

b. The need for membership of the tribunal to include Aboriginal people and Torres Strait Islanders;

c. The need for the membership of the tribunal to reflect the social and cultural diversity of the general community;

d. The range of knowledge, expertise and experience of members of the tribunal.

However, even without such legislative endorsement, there is no reason why the desirability of diversity in a tribunal's membership cannot be taken into in account in selecting an appropriate appointment from a pool of candidates who meet all the selection criteria and are thus eligible for appointment on merit. For example, if a specialist applies for appointment and they may fit a particular need in the tribunal — whether for more decision-makers with qualifications and expertise in town planning or more decision-makers with expertise in building — then that can be taken into account. I do not see any reason why the desirability of having a diverse range of personal characteristics within the membership of the tribunal — cultural background, race, age and so on — cannot also be taken into account in appointing a person from a pool of meritorious candidates.

Adopt an open and transparent appointment process

The second way in which diversity in tribunal membership can be achieved is by the adoption of an open and transparent appointment process in which vacant positions are advertised and suitable candidates may apply for those positions and be assessed according to the same criteria. This is an easily achieved solution because the COAT has set out what such an appointment process should involve in its *Tribunal Independence in Appointments: A Best Practice Guide*. The features of that process recommended by the COAT are as follows.

Selection on the basis of merit

This requires that the appointee possess the knowledge, skills and personal attributes required to perform the duties of the position. The COAT recommends that these characteristics be assessed by reference to the competencies of tribunal members, and most tribunals have these set out in a competency framework.

An open, merit-based and transparent recruitment and assessment process

The COAT recommends open recruitment, in which the tribunal advertises positions and invites applications. The assessment of applicants should be undertaken by a panel, against the assessment criteria, and should result in a report assessing all applicants and ranking them.

Selection and nomination

The COAT recommends that once the assessment panel makes its report, the Minister should select one candidate for each position and seek Cabinet approval. Subject to good character, the COAT recommends that 'merit' should be the dominant consideration in selection but acknowledges that 'gender balance and diversity in the membership should be considered by the Minister in selecting among applicants of equal merit. Political considerations should be excluded as discriminatory and irrelevant'.[13]

Tenure, remuneration and reappointment

The COAT notes that tribunal members are normally appointed for a fixed term of years and are eligible for reappointment. Independence requires that a member's tenure and remuneration be secure for the term. The COAT notes that 'reappointment may be by way of application in an open competitive process'[14] but that it is 'also consistent with best practice to reappoint on the Head's recommendation where the member's performance demonstrates that the member meets the assessment criteria'.[15]

An appointment process by which candidates may apply for vacant positions permits a range of persons to apply. The assessment of candidates by reference to transparent criteria signals to the public that tribunal appointments will be made from a wide and inclusive pool of applicants, through a competitive, merit-based and transparent process. The adoption of an open and transparent appointment process is important in encouraging people from diverse backgrounds to be sufficiently confident in the integrity of the process as to bother applying.

Encourage people from diverse backgrounds to apply for tribunal appointment

Increasing diversity in the personal characteristics and professional backgrounds of tribunal members requires a conscious effort by heads of jurisdiction and those involved in the appointment process, such as responsible ministers.

The obligation on the Lord Chief Justice under s 137A of the *Constitutional Reform Act 2005* (UK) required that he take positive steps to encourage diversity in judicial appointments. In 2020, he launched a Judicial Diversity and Inclusion Strategy which set out practical steps

13 Council of Australasian Tribunals, *Tribunal Independence in Appointments: A Best Practice Guide* (August 2016) 10.
14 Ibid 14.
15 Ibid.

for how diversity in the judiciary might be achieved. The practical steps identified in that strategy document could easily be adopted in relation to Australian tribunals.

The aim of the strategy is to increase the personal and professional diversity of the judiciary at all levels over the five-year period from 2020 to 2025, by 'increasing the number of well qualified applicants for judicial appointment from diverse backgrounds and by supporting their inclusion, retention and progress in the judiciary'.[16] The strategy has four core objectives:

- creating an environment in which there is a greater responsibility for and reporting on progress in achieving diversity and inclusion;
- supporting and building a more inclusive and respectful culture and working environment within the judiciary;
- supporting and developing the career potential of existing judges; and
- supporting greater understanding of judicial roles and achieving greater diversity in the pool of applicants for judicial roles.

Specific actions and deadlines are set out against each of these objectives. So, for example, under the objective of creating an environment in which there is greater responsibility for and reporting on progress in achieving diversity and inclusion, some of the actions include that, by the Spring of 2022, a core group of leadership judges responsible for taking actions to achieve diversity would be established and, by the Autumn of 2022, those judges were to report the actions they had taken to support greater diversity.

Another specified action is to attract, encourage and support applications for judicial office from the widest and most diverse pool of well-qualified candidates possible. The actions to be taken include digital and face-to-face outreach to candidates from under-represented groups, using visible role models to publicise the diversity of the judiciary, and the adoption of work-shadowing and mentoring schemes so potential candidates are able to obtain a real insight into what a judicial role might involve.

Some of these strategies are probably already being pursued by the heads of Australian tribunals, albeit in an informal and less structured way. By way of example, it is not uncommon for suitable candidates for appointment to be encouraged to apply for tribunal membership. But much more can be done to target those from backgrounds who might not consider themselves suitable for appointment.

Collect and publish data about diversity in tribunal membership

Another of the ways in which people from diverse backgrounds might be encouraged to have confidence that they are suitable for appointment, and by which to support the public's confidence in tribunals as decision-making bodies, would be to publish data about the diverse characteristics and backgrounds from which tribunal members are drawn.

16 Courts and Tribunals Judiciary, *Judicial Diversity and Inclusion Strategy 2020 — 2025* (5 November 2020) available at <www.judiciary.uk> 10.

As I have already observed, trying to find data about the gender of tribunal members, much less about any other aspect of the diversity of tribunal members in this country, is extremely difficult. Such data is not published and is not easy to find in any publicly available source. The gender of non-sessional tribunal members can be surmised from their names, which are published, but that is about it.

In the United Kingdom, part of the Judicial Diversity and Inclusion Strategy for increasing diversity includes annual reporting of de-identified statistics about diversity in the personal characteristics of judges, tribunal judges, non-legal members of tribunals and magistrates. Publishing that data is designed to provide transparent reporting on whether, and how well, the aim of greater diversity in appointments is being achieved. Recognising that data cannot be reported if it is not collected, the strategy required that, by March 2021, all judicial officeholders were to be encouraged to self-classify against a wide range of diversity characteristics.

A strategy of this kind — to collect and publish data about diversity in the personal and professional characteristics of tribunal members — could easily be adopted in Australian tribunals. For the avoidance of doubt, I am not suggesting that tribunal members should be compelled to provide information about their personal characteristics or that such information be published in any way which identifies particular individuals. But it would not be difficult to invite members to provide that information and then to publish it in a de-identified form.

The voluntary collection, and de-identified publication, of this data would be a useful first step in measuring the extent of diversity in the membership of Australian tribunals. Ultimately, it would be a way of celebrating the achievement of real diversity in tribunal membership.

Conclusion

Tribunals have been at the forefront of innovation in administrative decision-making and dispute resolution in this country for almost half a century. The diversity in their membership has always distinguished tribunals from courts. Despite outstanding achievements in relation to gender diversity, much work remains to be done in achieving greater diversity in the personal characteristics of tribunal members. And the importance of diversity in the professional qualifications and backgrounds of tribunal members, by the appointment of specialist non-legal members, should not be overlooked or rejected. There is more work to be done in pursuing these important objectives and readily achievable means by which to do so.