

'Benchmarking' a Supreme Court and Federal Court Judge in Australia

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Abstract

In this article, we reflect upon the backgrounds and career trajectories of judicial officers currently presiding over the Federal Court and Supreme Courts, which are some of the highest courts, in Australia. We gathered information through publicly available websites in Australia providing official biographical information, and drew on academic efforts to fill in more details about the judiciary. While patchy, the picture today in the Australian judiciary is of a relatively uniform educational and career background – for both male and female judges. Our analysis shows that judges are predominantly recruited from a long career at the private Bar. However, given continued professional barriers to women succeeding in the Australian legal profession which we describe, we argue that it is time to take seriously the stated goals of modern judicial appointment to widen the pool and consider merit that is not solely defined by a benchmark male career.

Key words

Judges; diversity; gender; barristers; solicitors

Resumen

Planteamos una reflexión sobre los orígenes y las trayectorias de las autoridades judiciales que presiden el Tribunal Federal y los Tribunales Supremos, algunas de las instancias judiciales más altas de Australia. Recopilamos información publicada en webs australianas que proporcionan biografías oficiales, y completamos el retrato judicial mediante recursos académicos. Aunque borroso, el retrato actual del mundo judicial australiano muestra un origen educativo y profesional similar para jueces y juezas. Nuestro análisis muestra que jueces y juezas provienen generalmente de una larga carrera profesional en la abogacía. Sin embargo, debido a los constantes

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obstáculos –los cuales describimos– que deben enfrentar las mujeres para triunfar en la profesión jurídica, argumentamos que ha llegado el momento de abordar seriamente los objetivos establecidos de la designación judicial, para ampliar el grupo y tomar en consideración méritos que no están definidos únicamente por la trayectoria legal masculina.

Palabras clave

Jueces; juezas; diversidad; género; abogados; abogadas

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1. Introduction

In this article, we reflect upon the backgrounds and career trajectories of judicial officers presiding over the Federal Court and Supreme Courts, which are two of the highest courts in Australia.¹ We searched and examined publicly available information about the judges. We looked for patterns in personal identity factors that might be apparent or declared (such as sexuality, sex, ethnicity and education), careers prior to their elevation to the bench, and careers when in a decision-making role (i.e. promotion through the judiciary or tribunals to their current superior court role). In short, we found that there were relatively few general trend distinctions as between male and female senior judges, and a long career as a barrister was the norm. From the available material, we were unable to identify trends in other aspects of judicial personal identity. Part 2 of this article briefly summarises our findings in the context of other available empirical studies about judicial backgrounds. While patchy, the overall likely picture today and over time in the Australian senior judiciary is of a relatively educationally and ethnically homogenous group.

One of our findings, as long observed by scholars and even those within the judiciary, is the dearth of information about our most senior judges. In Australia, there are no official collections over time about demographics – what might be called 'workforce diversity data'.² In Part 3, we explain the lack of information about the judiciary and how it impacts on our study, and we recommend that there be an official capture of data about judicial diversity.

In Part 4, we engage with the scholarship concerning the case for judicial diversity (primarily sex and ethnicity), as well as common assumptions about the factors that contribute to diversity (see also Sexton and Mayer 1982, Macdonald 1995), to explain why knowing about judicial backgrounds matters. Where this is an agreed objective, one solution that has been long proposed is a wider selection pool recognising the relevant competencies of 'other' legal professionals than the long-time silk at the Bar (Cooney 1993). 'Silk' in this context refers to a barrister who has been awarded the title of Queen's Counsel (QC) or Senior Counsel (SC). Such appointments are made by the legal profession on the basis of various criteria which refer to the merit and seniority of a barrister. However, these are relatively non-transparent processes that have themselves been subject to critique (Rogers 2010). Similarly, Margaret Thornton (2007, p. 294) has challenged the concept of 'merit' as an ill-defined concept that is heavily weighted towards the male candidate. She has sketched this 'benchmark male' as the 'normative agent of legality' (Thornton 2007). Feenan (2008) has observed that he also tends to have the other identity attributes of privilege in English/Australian society (white, heterosexual, educated in prestigious places). Those conforming to this norm are more frequently appointed to senior ranks of the profession and the judiciary. Or, as sitting justice of the New South Wales (NSW) Supreme Court, Justice Ruth McColl (2014, p. 5), described (albeit purportedly speaking of earlier times) a process of appointing:

¹ Our snapshot is of the superior courts as at August 2017. We are aware that a number of judicial appointments have been made to these courts since that time that will not be reflected on our data or the conclusions drawn from it. These appointments may change the diversity profile. For instance, the first Indigenous justice of the District Court in Queensland, Judge Nathan Jarro, was appointed in 2018. As described further in Part 3, there are two separate hierarchies of courts in Australia: the federal and then state or territory regimes. We examine the highest federal court and also the highest court in the three largest States in Australia: New South Wales, Victoria and Queensland. The highest court in the Australian system is the High Court which may hear appeals from all other courts. We do not examine this Court in any detail except to acknowledge the ratios of male and female judges presiding.

² This is a relatively rare, and usually voluntary industry practice, in Australia. Nevertheless, the Workplace Gender Equality Act 2012 (Cth) has established a federal agency to collect self-reported diversity data and company systems of large organisations with more than 100 staff. As Australia is home to a number of very large law firms, they must report on their diversity profile, at least as to sex of their workers.

those who exhibited the same qualities as themselves with the unsurprising result that the people appointed (...) tended to be those that had a traditional practice and profile: (that is to say) male, silk and all round decent chap.

In Part 5, we give an overview of the available information and literature concerning the Australian legal profession that produces judicial candidates. In Australia, the legal profession is divided by regulation or practice between solicitors and barristers.³ Solicitors are legally and ethically entitled to engage in the practise of law in any context, including advocacy in the courts. Barristers, by their own design in their conduct rules, are ethically limited to a small range of activities including advocacy in court and legal advising. In the senior courts we consider, the solicitor will usually be in a contractual relationship with the client (a party in the case) and the solicitor will enter into a contractual arrangement with the barrister (will 'brief' the barrister) to advocate for the client in court. In this typical arrangement, the barrister and solicitor acting for the client/party will both be in court acting in different capacities. We briefly examine what we know about the backgrounds of lawyers in both of these branches in Australia as crucial for understanding the bottlenecks in the career progression which might ultimately limit the flow of certain lawyers to the bench.

In Part 6 we return to our findings to examine in more detail the differences between courts and trends in particular career histories prior to appointment at the bench. Our analysis shows that judges are predominantly recruited from a long career at the private Bar. We also note the relative infrequency of a justice having served a previous term on another decision-making body, particularly a tribunal or as a magistrate. The publicly available information allowed us to identify the sex of the judge⁴ and while we traced the judges' professional backgrounds based on sex we could discern no significantly gendered patterns. However, we note that there appears to be a strong correlation between concepts of merit for appointment and length of time at the Bar. For the reasons discussed in later Parts, this might be less attainable for women and impact upon numbers of available candidates.

As we identify in our study, senior judges often possess many of the benchmark personal and career qualities of the traditional male judge. However, despite the possession of certain typical qualities, Thornton (1996, p. 208) contends that women struggle to slough off their gendered embodiment: 'The contradictions between the neutrality of adjudication, the ever-present image of "the judge" as male, and the absence of authority emanating from female corporeality crystallise in the woman judge' (see also Graycar 2008). Women judges therefore remain noticeable and, as our study indicates, a higher proportional representation of judges from the solicitors' branch, or from non-traditional career paths, means they could be fixed with this career tag on the bench. Somewhat conversely, the lack of information about judicial identity factors may make invisible the dearth of senior judges who are not white, heterosexual, able-bodied or from a high socio-economic background. We argue that it is time to take seriously the stated goals of modern judicial appointment to widen the pool and consider merit that is not solely defined by seniority at the private bar, and the structural barriers for many 'others' this seems to impose. This discussion about judicial appointment should start by collecting and scrutinising the data about the reality of diversity in this arm of government.

³ Lawyers are regulated at a state level and there is therefore some variance around the country about how they are regulated and practice. In some states, there is a fused profession whereby all lawyers are admitted as 'barristers and solicitors' and then specialise in their practice. In other jurisdictions, lawyers are admitted as either a barrister or a solicitor.

⁴ This is of course in so far as a name or other biographical details indicated this. We are not aware of any judicial officers that identify as intersex. However, as we discuss in more depth in this Part, an identity may not be visible unless declared and made less visible by the weight of assumed 'normal' identities in society and particularly among the judiciary (see for instance the discussion by Moran, 2006).

2. Summary of findings about senior Australian Judges

As dictated by the Commonwealth of Australia Constitution and state constitutions, the Australian judiciary is hierarchical (see Figure 1 below). Our consideration of the judiciary concentrates on its apex – the several superior courts of record in Australia: the Supreme Courts and Courts of Appeal in NSW, Queensland and Victoria and the Federal Court.

FIGURE 1

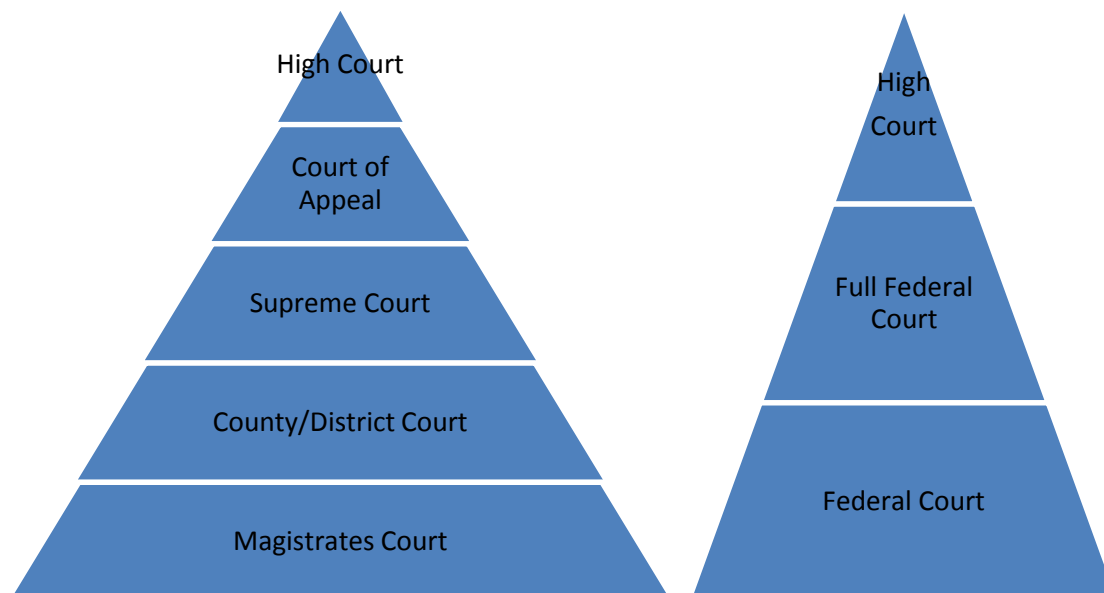


Figure 1. Hierarchy of federal and state courts in Australia.

There has been a gradual increase in the number of women in the Australian senior judiciary. In an early study in 1978, Michael Sexton and Laurence Maher (1982, pp. 4-5) looked at the Supreme Courts of Victoria and NSW where there were two female judges out of 22 and four out of 34 judges respectively. They observed that most had practised exclusively as barristers and for (on average) 25 years; 90% had attended a private school and many came from legal families. In 1993, there were only 6% of women on the bench (Cooney 1993, p 22). In 2006, Kathy Mack and Sharyn Roach Anleu (2013) found that of 308 judges across district/county court, state supreme and Commonwealth courts, 25% were women. The studies of Enid Campbell and H.P. Lee (2013) in 1999 and then 2011, show a dramatic increase in women in the apex courts in that period – from around 13% to 25%. Table 1 lists the figures for senior courts in Australia we consider.

TABLE 1

State/Territory/ Federal	Judges total	Judges female	Percentage of female
High Court	7	3	43%
Federal Court	49	11	22.4%
Supreme Court	56	12	21.4%
NSW			
Supreme Court	45	11	24.4%
Victoria			
Supreme Court	27	8	29.6%
Queensland			

Table 1. Australia Judiciary by Gender (August 2017).

In the six years since the Campbell and Lee study, there were generally backward steps as the proportional numbers of women dropped. We continue to experience many 'female firsts' as leaders of these courts, more than 50 years after the first

woman was appointed to a senior court (Douglas *et al.* 2015, p. 4). For example, the recently appointed High Court Chief Justice, Susan Kiefel, is the first woman in this position.

Former Justice Anthony Whealy also described his observations of change in the NSW Supreme Court; he saw a 'broader church' in 2010 than in the recent past:

we've got women, Jews, Catholics, atheists, Anglicans, homosexuals (...). I don't see the sort of stuffiness that was possibly in the court 20 years ago. Traditionally the Supreme Court has been a very Anglican institution. If you looked at the lists of judges 15 years ago they were all ex-Knox boys (...). Now there are eight who went to Riverview [a Catholic boys' school]. (Cited in Snow *et al.* 2010)

He pointed to the Jewish, public school educated Chief Justice (as he was then) Ron Spigelman and women on the Court of Appeal.⁵ There is no doubt that there is some diversity on senior courts but the rate of change seems slow. Today, there is at least one women on the Australian High Court identifying as within a same sex relationship (Justice Virginia Bell). Mack and Roach Anleu's (2008, 2013) earlier studies report that there is limited ethnic diversity in the higher courts,⁶ and over half (59.3%) identified as Christian, 5% as Jewish and 33.1% as not-religious which is roughly similar to the general population.⁷ The Asian Australian Lawyers Association's report in 2015 finds only 0.8% of the judiciary were of Asian descent (where around 10% of Australia's population are of Asian descent). There are no men or women identifying as Indigenous or of Chinese Australian currently presiding over senior Australian courts. It is particularly disheartening to see that there are currently no Indigenous judges at the Supreme or Federal Courts in Australia because there is no representative of its first nations peoples in this judicial arm of government (we discuss justifications for diversity further in Part 3). This may be explained to some extent by the fact that Indigenous students are significantly underrepresented at Australian law schools. In 2000 there were just 118 Indigenous law graduates reported across Australia (Douglas 2001, p. 488). Attracting and retaining Indigenous law students was identified as a continuing issue in 2014 and many law schools offer alternative entry and support programs to address this (Devonshire 2014). This may impact upon the low numbers and proportional representation of Indigenous lawyers across the country. While there have been a few Indigenous appointments to the magistrates' courts and to the District or County Courts, until attraction and retention issues at the undergraduate level and within the legal profession are addressed, potential judicial candidates will remain few.

Mack and Roach Anleu (2010, p 371) report that women judges are only notably diverse from male judges in 'relation to balancing work and family pressures'. While beyond the scope of our discussion here, it is important to note that gendered roles may still distinguish men and women in the judiciary in terms of their experience of judging and perhaps their judgments (see Hunter 2008). Our study does not allow us to make similar findings relating to the impact of a gendered society as, for example, we cannot tell whether women judges were more likely to have taken a career break or worked while taking primary responsibility for the care of children (however, see Thornton and Roberts 2017).

While we sought to identify other aspects of judicial background or identity in our study, we found few. There are a few we identified as not born in Australia such as Justices Darryl Ranguah (born in South Africa), Susan Kenny (born in England) and Debra Mortimer (born and educated in New Zealand). Justice Anthe Philippides, of the Queensland Supreme Court, was the first woman of Greek origin to be appointed

⁵ Justice Spigelman is now sitting on the New South Wales Court of Appeal. The women of the Court of Appeal are currently Justices Ruth McColl, Julie Ward and Carolyn Simpson. There are, however, three times more men sitting on this elite court (nine).

⁶ They found that all except around 18% of judges identified as Australian or English heritage.

⁷ 52% of the population identify as Christian and around 30% identified as non-religious (Australian Bureau of Statistics 2016).

to an Australian superior court. Many swearing in speeches refer to spouses and children. There were some references to growing up in working-class families or regional settings. It may be that a range of background experiences and personal identities are made invisible in official biographies and were not declared by the judges. We therefore cannot assume a lack of diversity from these omissions. In the remainder of the article we concentrate on career trajectories and gendered effects where there is more available information.

2.1. Education and career

We found some difference as between jurisdictions and along sex lines in terms of high schooling. Women were most likely to have attended an independent school and there was a much higher percentage of (male) judges in NSW attending a state school (probably around 45%) than in other states.⁸ Mack and Roach Anleu's (2010, 2013) research similarly found a high proportional representation of those who attended independent schools: 35.2% of the judges they surveyed attended an independent/private school and 30.3% attended a Catholic school.⁹ These are considerably higher numbers of those attending independent schools in general in Australia. According to the Australian Bureau of Statistics (2017), 14% of the population were educated in independent schools and 20% in Catholic schools.

We also note that most judges we considered attended prestigious universities in Australia¹⁰ for their undergraduate law studies, and often studied at Oxford, Cambridge or Harvard at postgraduate level. The above findings may replicate findings about the judiciary in England and Wales, where students from less privileged socio-economic backgrounds were found to be far less likely to enter elite professions (Milburn 2009, Zimdars 2010, Ashley and Empson 2016). Blackwell (2012) describes an even less diverse judiciary in England and Wales with close educational and even familial connections enjoyed by senior judges, particularly for the few female judges (Goldthorpe 2000).

Once qualified, Mack's and Roach Anleu's (2010, p. 378) studies of legal careers found that women were on average a few years younger when appointed and had fewer years in professional legal practice than male judges. While our information is incomplete, our observations are similar for the superior courts studied. We note, though, that Queensland seems to be an outlier where judges are more likely to have taken longer to reach senior barrister status and the bench than in other states. There was also a wider gap between male and female judges as to time until promotion to QC and to the bench in that state.

The most significant finding on the public records is that senior judges come from the ranks of senior barristers, having spent most of their career at the private bar. Thus, the Australian senior bench is mostly drawn from a very small pool of Australian lawyers. Barristers only account for around 8% of the legal profession, and those having practised for many years or having received the accreditation of QC/SC comprise a much smaller group again (around 16% of all barristers). As described in

⁸ We have not provided exact numbers or percentages as there are many judges for whom we cannot locate their schooling details, including a number of female judges not participating in any academic collection of biographies. We do not assume education at any particular school. Nevertheless, of those we have identified we discern the reported minor trends.

⁹ A total of 65.5% in an independent, non-government run or public, school.

¹⁰ This refers to universities in the 'Group of Eight' being University of Melbourne, Monash University, University of Sydney, UNSW, University of Queensland, University of Western Australia, University of Adelaide and Australian National University. It is conceded that many universities offering law schools have only been established long after many of the older judges had entered the profession. It is possible given the proliferation of law schools in recent decades that we will see more diversity in tertiary education of judges.

Part 5, women make up only around 10% of the SC/QCs across the country which is only around 1.5% of the barristers.¹¹

There is an increased selection from the other professional branch. Solicitor appointments to the state superior courts appears to have begun as a trend with the appointment of Bernard Teague in Victoria in 1987 (Lamb *et al.* 2015, p. 106).¹² Yet, while appointments of solicitors have continued, there have been few senior judges from this branch to date. In each court we examined, we found there are 2-4 male and female judges respectively who have practised only as solicitors.

There are a number of judges in NSW who had previously served on the District Court and it is relatively common for the Federal Court to appoint from a state Supreme Court. However, there were few judges with careers as decision-makers on tribunals or in lower courts. Sometimes a senior solicitor had been appointed first to a lower court and then a more senior court. Numerically, there were no gendered patterns here, but there were proportionately more female judges who served on or presided over a tribunal (often it was the Anti-Discrimination Tribunal) before being appointed to the senior bench. Women judges therefore do not have generally different careers to male judges coming to the bench. However, as we explore further in Part 5, it may be more difficult for women (and others who don't reflect Thornton's concept of the 'benchmark male') to acquire this benchmark career in order to be eligible for judicial selection.

3. Finding out about the background of Australia's judges – difficulties and implications for forming a picture of the courts

In 1977, the Chief Justice of the High Court (Barwick 1977; see discussion in Opeskin 2013) called for official collation of statistical information about the Australian judiciary – to no avail. From this time until today there has been no official collection of data about Australian judges as to their socio-economic status, ethnicity or other indicators of affiliation or identity (Goldsmith 2000, Campbell and Lee 2013). The Supreme Courts and Federal Courts provide brief biographies of sitting judges on their websites. In this study, we only considered publicly available information about the Australian judiciary currently sitting in superior courts as at August 2017 which relies on these official stories. This information (probably) identifies the sex of the judge (by name or photograph), and usually the career trajectory and their secondary and tertiary education. We have supplemented these official biographies with information drawn from swearing-in speeches and media reports where they are available, as well as academic collections. There is no attempt by the senior courts to collate statistics about their judges which makes even identifying those currently presiding in the court sometimes difficult.¹³ There is no central online repository for swearing in speeches and we could not find them for all judges.

There are only a handful of academic studies which collect demographic or career background information about judges, and the picture is patchy. Mack and Roach Anleu (2008, 2010) conducted the first large-scale empirical project focused on judges and magistrates in Australia in 2006, producing invaluable, anonymised information about over 300 decision-makers' backgrounds and experiences. What they describe is a relatively non-diverse judiciary in terms of heterosexuality and Anglo or European ethnicity and also career trajectory, although there is no clear indication of social class in the data. Campbell and Lee's surveys of public information (Campbell and Lee 2013) as to gender balance and prior career of judges in the superior courts, like our study, identify the court but rely on incomplete information

¹¹ This figure is based on the available statistics from the Bar Associations of NSW, Victoria and Queensland. It does not reflect the barristers practising in other places in Australia.

¹² There has been the odd earlier judicial appointment from the solicitors' branch prior to this date.

¹³ On each court, there is a list of current judges but in some cases they will not be sitting as they are seconded to another place such as a law reform body or tribunal. We have counted all judges listed except those that are 'Associate Judges'.

provided by the judges or those around them to produce raw figures on a number of demographic indicators. Heather Roberts (2014) has long studied the swearing in speeches (as autobiography of the judge and biographies by others known to them) of senior judges. The swearing in ceremony provides another opportunity for better understanding a judge's life story as well as what Roberts (2014, p. 150) describes as a 'performance of juridical ideals.' Leslie Moran (2011, 274) notes that the biographies share a tone of 'eulogy' (while the judge is nascent and alive!) which is at once tender and perhaps irreverent but also full of praise for the individual. They attest to the judge's 'professional pedigree' and show them as an 'exemplary individual' who 'embodies the virtues of the judicial institution'. Nevertheless, Roberts' qualitative approach, which pays attention to the tone and language of these speeches, observes a range of gendered attributions and expectations of male and female judges (Roberts 2014). These stories sometimes provide information about a judge's family (including whether and to whom they are married) and ethnic heritage, not provided in other official biographies.

There is otherwise a real scarcity of more lengthy treatments in judicial biography in Australia. Tanya Josev (2017, p. 843) remarks that only 15 of the 53 High Court justices in Australia have been subjected to an extended biography. She notes that where this occurred it may be more attributable to their profile or endeavours outside the law as politicians or champions of a particular social cause (see also Macintyre 2011). We found that this seems to be a continuing trend – indeed there is less official, publicly available information about those more recently coming to the bench. This may be because judges are increasingly less willing to share their backgrounds and other information including date of birth and schooling. Self-promotion through sharing one's curriculum vitae, may be seen as unfitting to the 'prevailing legal culture of discretion' (Josev 2017, p. 845). Campbell and Lee (2013, p. 37) hypothesise that judges would find general questionnaires about these matters 'intrusive, and perhaps even impertinent'. Mary Gaudron, Australia's first female High Court judge, said she had a 'horror' of providing assistance to her own biography (cited by Atkinson 2017). In general, there may be an individual reticence to speak about oneself, or to be defined by one's background. Self-promotion could be perceived to be at odds with an expectation of dispassion. Nevertheless, we acknowledge the significant contribution to our knowledge through the efforts of Kim Rubenstein in collecting biographical information or oral histories of nearly 500 Australian women lawyers and judges.¹⁴

Official biographies may also be increasingly seen as unnecessary for the institutions themselves to provide.¹⁵ Such information could be viewed as invasive or irrelevant. It may be seen as inappropriate where it implies the importance of membership of a privileged social status. Sociological studies have long identified shared, homogenous communities as creating and maintaining powerful positions unavailable to those who do not process appropriate *habitus*. Scholars such as Hilary Sommerlad (see e.g. 2011, 2016) have applied this analysis in a sustained way to the legal context as having a distinctly gendered effect including in judicial selection. As Jenkins (2002, p. 11) puts it, the theory drawn from the work of Pierre Bourdieu,¹⁶ posits that 'privilege becomes translated into "merit" in the eyes of those who dominate the field'. This results in privileged access to these professions without overtly relying on discriminatory factors. Perhaps scholarly critique and judicial education on unconscious bias,¹⁷ have influenced those coming to the bench and they may wish to

¹⁴ These are available from the Australian Women Lawyers as Active Citizens database at <http://www.womenaustralia.info/lawyers/a-z.html>

¹⁵ Compare perhaps to the increasing use of social media by certain judges such as Lex Lasry's use of Twitter or postings by Supreme Courts themselves (see Blackman and Williams 2016).

¹⁶ Bourdieu (1977) considered tertiary education and its corresponding relationship to reproduction of the dominant class in elite professions.

¹⁷ For those in previous judicial positions, they may have been exposed to judicial training and Bench Books which identify the impact of cognitive and cultural biases and blindness.

present themselves as washed of their cultural inscriptions.¹⁸ There has long been debate about the merits of diversity as described below and the legitimacy of policy aimed at redressing imbalances including affirmative action. Judicial officers and official biographers may want to avoid any visibility of difference so as not to attract negative comment. Many have observed that complaints of bias can arise associated with identification of difference where being the 'norm' is invisible and unassailable (Moran 2006, Douglas and Bartlett 2016).¹⁹

Perhaps for a range of reasons, our findings are constrained by the lack of data as to the various identities and experiences of the judges. We cannot say anything about the diverse structural or cultural factors that may collide to impede women of low socio-economic status or non-Anglo heritage from rising to a position so as to be appointed to the senior judiciary. In our study, we found some judges more elusive than others as to background and even career milestones. Those appointed directly from the solicitors' branch were the most difficult to document. They have typically pursued careers within large law firms that are notoriously secretive (Flood 2013). Unlike barristers, there is no individual self-promotion on firm websites; only at partner level might there be any information about the person.²⁰ Even very senior solicitors within law firms are not personally identified in cases they have conducted (as is the barrister) in the reporting of cases in Australia.

Given the dearth of information about the backgrounds of sitting judges in Australia, we cannot draw any clear findings about this or seek to attribute characteristics from omission. Our primary focus is the sex of the judge and their career trajectory. There is plenty to say about this, as it remains a source of inequality as described below. Nevertheless, even in relation to gender there are significant limitations we acknowledge at the outset. Many talented women choose to take appointments in the Tribunals, Magistry and County or District Courts (see Hunter *et al.* 2016). The figures show a larger and growing female representation in these branches (Mack and Roach Anleu 2013, Opeskin 2013). These talented women leaving for another decision-making role may narrow the pool of available lawyers for senior judicial office we describe. Furthermore, our study does not include the 'feminised' family law realm in the judicial context, as we have not considered judges of the Family Court or Federal Circuit Court.²¹ We concede that there is a higher proportion of female judges in these courts²² and it is possible their background careers may look very different to the ones we have studied (see Campbell and Lee 2013, p 39). Thus our claims about the benchmark legal professional career are constrained by these limitations.

¹⁸ Still, this does not remove the utility of a project to collate diversity information undertaken here, but we do not take the next step to argue that these judicial backgrounds necessarily define judicial decision making. We do not argue that it has no effect, but rather do not engage with the substantial and sophisticated discussions in theory and attempts to empirically test the impact of judicial background. For a summary of some of this research, see Coontz (2000). For original discussions and also summaries of the scholarly debates, see also Hunter (2008), Kenney (2008).

¹⁹ This may arise also in relation to an open declaration about a personal belief such as being a feminist. In our interviews with female judges in Australia in an earlier study, we observed a caution to identify publicly with feminism for fear of being tagged as lacking judicial impartiality (Douglas and Bartlett 2016).

²⁰ While this may be a changing phenomenon with the use of platforms like LinkedIn commonly used by solicitors, it did not assist us to collect information about the demographic we studied.

²¹ Thornton (1996) has long observed that there are designated 'feminine areas' of law which are thereby occupied by more women than men, or proportionally many more women than in other areas of legal practice. She notes, as does Rhode (1994, p. 59) of the United States profession, that these fields are consequently generally less prestigious and less remunerated. In respect of the Bar, from which Australia has traditionally drawn most of its judiciary, Rosemary Hunter and Helen McKelvie (1998, p. 93) found that Victorian women barristers in the 1990s were 'pigeon-holed' in their careers and 'over-represented in family law, and significantly under-represented in commercial law, common law and personal injury'. Given that the majority of the judges we consider here were working in the legal profession around this time (early 1990s) or earlier, unfortunately, these findings may hold true for their careers.

²² In the Family Court in 2017 female judges comprised 40.7% of the judiciary (11 out of 27) [Family Court of Australia 2018]. There are 41.5% of female Circuit Court judges (27 out of 65 across the country) [Federal Circuit Court of Australia 2018].

4. The diversity debate and questions about merit in judicial selection

Australian academics studying the profession, as in England and Wales (Blackwell 2012), have found a relatively non-diverse senior judiciary according to a range of standard indicators.²³ It is necessary at this point to place this within the debate about why we care about judicial diversity.

There is a range of arguments that have been postulated for promoting greater judicial diversity (Douglas and Bartlett 2016). For instance, feminist academics (see Malleson 2006) have run a democratic argument that a representative judiciary lends credibility and greater comfort to the public the judge presides over.²⁴ At times, some administrations have drawn on like justifications when appointing many women, and women with diverse socio-economic backgrounds, to radically address imbalances in numbers in the judiciary (see discussions in Cooney 1993, O'Donnell 2008). Those opposed to such an agenda tend to place diversity in a dichotomous relationship to merit – often unsurprisingly uttered by members of the bar or judiciary itself. For instance, former High Court judge, Sir Harry Gibbs, delivered a speech in which he criticised the appointment of a number of women to the Queensland Supreme Court in 2000 (cited by Hunter 2004, p. 146; see also Gibbs 1987). While vague about the specific lack of skill or knowledge, Gibbs referred to the 'poor' reception 'from the Bench, the Bar Association and the media' (cited by O'Donnell 2008, p 118). He also objected to the appointment of a number of female judges, and the first woman Director of the Public Prosecutions, in the mid-1990s by the executive because he thought it was wrongheaded to deliberately correct what was a very low representation of women at the time. He said, 'Judges should not be seen to be representatives of particular groups; they are there to do justice to all manner of people' (cited by Hamilton 1999, p 10). This argument begs the question of why a judge appointed from other than the senior bar would *not* do justice 'to all people'. O'Donnell observes that Gibbs' comments were framed as a concern about a lack of 'merit' of chosen candidates largely because they had been selected at least in part to increase judicial diversity. In Australia, this form of argument persists. A Federal Senate Committee in 2009 (Senate Standing Committee on Legal and Constitutional Affairs 2009, p. 20) continued to raise this dichotomy between merit and promoting diversity.

Appointment processes for senior judges are relatively similar in most states for Supreme Court positions with the Executive²⁵ making the appointment after a consultation process with the judiciary and legal profession. The Commonwealth Constitution provides that Justices of the High Court and of other federal courts 'shall be appointed by the Governor-General in Council' (Commonwealth Constitution s 72). In practice, the Attorney-General (the senior law officer and a federal parliamentarian) makes recommendations to the Cabinet (senior politicians forming

²³ Education and ethnic origin are points of data that have been used to identify diversity in England and Wales (Milburn 2009). Of course, high-schooling does not necessarily provide a good insight into the socio-economic status of the child and there are other sorts of experience or identity that might make someone feel like an outsider. In England and Wales, the Legal Services Board, following its report, *Qualified Lawyers Transfer Scheme: Map of England and Wales Solicitor Day One Outcomes against a Barrister of England and Wales on completion of Pupillage* (2011), has required a range of diversity statistics to be captured by regulators in the legal profession. This data assists to identify and find solutions to the inequities in the professions and to indicate what might be causes of a dearth of diverse candidates for judicial selection (Webley *et al.* 2016). There are critiques of this initiative that have identified a failure to comply with the reporting requirements in some branches like at the Bar (Vaughan 2017).

²⁴ There are many other justifications such as an ethical justification of a commitment to equality, and arguments contending that adding women or diverse 'others' improves judicial capabilities. There is a large literature debating whether women lawyers or judge 'differently' and the effect of diversity to group decisions (which might be relevant where judicial decisions are made collectively by a panel of judges as in appellate contexts) [see eg Hunter 2008]. Our previous work has contended that female judges have seen the impact of their presence in the court in a range of positive ways including changing the general culture of the court (Douglas and Bartlett 2016). This article cannot engage with the rich literature concerning the substantive impacts of increasing judicial diversity.

²⁵ This refers to the politicians forming the government of the day.

government), and the Attorney-General then advises the Governor-General (the Queen's representative). Traditionally, the selection of possible candidates was a closed, 'secret soundings' approach among these senior parliamentarians and the senior judiciary. This persists in some states and in federal court appointments although, in recent years most states have introduced a process of advertising and calls for nominations. As Justice McColl (2014, p 8) argues, a process which allows for candidates to put themselves forward at the very least means that when women do apply they cannot be ignored in the initial identification phase. This could lead to an opening up of those being considered for judicial appointment where the professional bodies and executive may have failed to identify that candidate. It would be a basis on which lawyers outside the Bar or the large law firm could be considered, where they may not have been otherwise known.

While getting women or those with non-traditional backgrounds or established links onto the selection list is useful, it may not be sufficient to diversify the bench. Exact data on diversity in Australian politics is scarce. However, it is at least clearly a male-dominated realm²⁶ as is the senior legal profession and judiciary as we described in this article. Thus, there are further questions that could be posed about the appropriate composition of those selecting judges. The criteria for selection is also contentious. Exactly what is meant by 'merit' is often unspoken. Merit is a term that continues to be imbued with great authority and many powerful groups involved in judicial appointment (governments, judges, law societies and academics) grapple over the right to declare it. Feminist academics have sought to enter the debate, and to problematize the claim to 'know merit when they see it' of many, by identifying both useful and suspect criteria (Malleon 2006). For instance, most would agree that qualification and knowledge needed to fulfil the role are appropriate measures to evaluate a candidate. Experience might indicate requisite knowledge or aptitude for the job, but how long and where this is gained is an arguable point for judges. As explored in the final Part, there has been a largely unspoken assumption that long experience as a barrister is a necessary criterion. However, there is no empirical evidence for this proposition in terms of whether this makes a better judge. Each jurisdiction has for some time prescribed minimum qualifications for judicial office – aspirants must have been an Australian lawyer for at least 5-10 years.²⁷ These are far lesser experience expectations than of those currently appointing judges, or the profession commenting on certain appointments (described above). Nevertheless, in many Australian states there is a recognition in selection processes of a range of knowledge and experience as relevant to the judicial role. For instance, the Victorian courts adopt the approach of the Judicial Studies Board of England and Wales applying a Framework of Judicial Abilities and Qualities (Judicial College of Victoria 2008). In most states, there is at least recognition of the goal of increasing diversity. For instance, in assessing merit the NSW Justice Department states that 'all legal experience, including that outside mainstream practice' will be considered.²⁸ According to these criteria, there appear to be no judicial outliers of either sex in our study whether they spent their career at the Bar, in a large law firm, predominantly in academia or corporate legal practice. Still, there appears to be slow progress towards a widened pool of selection to date.

While increasing the diversity of the judiciary is now generally recognised as a good objective, many academics have pointed to the professional assimilation that occurs during professional education and working lives in shared professional communities (Silius 2003, Rackley 2008, Hale 2005). Mack and Roach Anleu's (2010, p 385)

²⁶ There were 40 women in the House of Representatives in the federal parliament in July 2016 which represents less than 30%.

²⁷ Supreme Court Act 1970 (NSW) s 26(2)(a) (7 yrs); Constitution Act 1975 (Vic) s 75B (5 yrs); Constitution of Queensland 2001 (Qld) s 59 (5 yrs). It is ten years minimum in Northern Territory and South Australia: Supreme Court Act (NT) s 32(1); Supreme Court Act 1935 (SA) s 9; and eight years in WA: Supreme Court Act 1935 (WA) s 8.

²⁸ The website also cites the same broad qualities for a judicial officer as in Victoria (Department of Justice 2018).

responses from their surveys of judges indicates that this is an applicable thesis in the Australian context. Sommerlad (2013) and Reg Graycar and Jenny Morgan (2002) are similarly critical of the idea that simply adding more women is the cure for a perceived lack of diversity. They point to this strategy as legitimising the current order and suggest that the impact of a women is likely to be 'strictly constrained' because judges are 'already socialised in the rules of the profession' (Sommerlad 2013, p. 372). In many ways, female judges come to be seen as 'honorary men' as Mary Gaudron (1997) has described herself and other senior judges. Their sex is only one part of any judge's subjectivity and experience. Indeed, as Moran argues, there are likely to be many more personal identities that go undeclared and are made particularly invisible by common assumptions about what a 'normal' judge will be (Moran 2006). However, this is not to imply that unstated judicial beliefs or identities will be automatically erased by this process of assimilation.

We also note the critique that has been offered by non-white scholars who have pointed to the harms caused by a focus only on increasing numbers of women on the bench. Tuanh Nguyen and Reynah Tang argue that the focus on gender might act to make other identities less visible such as 'the extent to which the two aspects [woman and Asian Australian] can intersect' to make an 'opaque – and perhaps impenetrable – glass coated bamboo ceiling' (Nguyen and Tang 2017, p. 93). Nguyen and Tang go on to argue that a focus on gender as diversity acts as 'something of a traffic jam for diversity in law, with cultural and other aspects of diversity being held up, until gender equality has been cleared' (Nguyen and Tang 2017, p. 93). They refer to a range of strategies employed by the profession in the name of diversity which only address gender inequity.²⁹ We acknowledge the dangers of a single approach to considering diversity and attempt to integrate this into the discussion where possible. At the very least, we hope to contribute to the calls for the collection of more data to better inform discussions about judicial diversity and selection.

We now turn to consider the legal profession. The legal profession feeds into the judiciary (as Australian judges must have formal legal qualifications) and inequities at that level has implications for the appointment of judicial officers.

5. What we know about the Australian legal profession – understanding candidates for judicial selection

Most local law societies now capture a range of information about their members, including age and sex, and report this in their Annual Reports. The Law Society of New South Wales (2017a), the Law Council of Australia (2009, 2014) and some public media³⁰ also periodically publish national profiles of parts of the profession. As at October 2016, there were 71,509 practising solicitors in Australia. The largest proportion of solicitors practise in New South Wales (42.2%), followed by Victoria (25.4%) and Queensland (15.3%) [Law Society of NSW 2017a, p. i]. There are approximately 6,600 barristers.³¹ Thus the majority of the legal profession work in the solicitors' branch. These figures may not account for those working in and around the law such as government lawyers or in-house counsel who are not required to

²⁹ We note that while this is demonstrably true, there are examples of efforts made to promote Indigenous lawyers in similar ways to women such as the Indigenous Equal Opportunity Briefing Policy (Law Institute of Victoria and Victorian Bar Council, n.d.) and Subsidised Chambers Policy (Victorian Bar Council 2012) adopted by the Victorian Bar Council.

³⁰ There are biannual surveys conducted of partnership in large law firms by the *Australian Financial Review* and *The Australian* newspapers.

³¹ This is a figure produced by our searchers of public available Bar Society websites and where statistics are produced by the professional bodies. These are somewhat unreliable as barristers work in multiple jurisdictions and may be certified but inactive. We have tried to account these issues so as not to artificially inflate the figures.

have practising certificates in many states,³² or those in academia or policy roles. Those at the Bar account for only around 8% of the profession.

As we found for the judiciary, obtaining current statistics about other demographics or identity indicators for the legal profession is hard to come by. There is a dearth of large-scale surveys about diversity in the profession except as to sex or practice of practitioner. Since 2014, law societies have at least collected data about the number of solicitors identifying as Aboriginal or Torres Strait Islander and by gender and age. The latest national data for Indigenous lawyers is dismal, with only 621 or 1.2% of the lawyers identifying as Indigenous where they represent around 3.3% of the Australian population (Law Society of NSW 2017a, ii). In Queensland, there are only five barristers in private practice identifying as Indigenous (Bar Association of Queensland 2017, p. 17). The Asian Australian Lawyers Association reported that in 2015, 3.1% of law firm partners and 1.6% of barristers (and only seven SCs) are Asian-Australian compared to the population where 10% have an Asian background (Asian Australian Lawyers Association 2015).³³ The Law Society of New South Wales (which represents the largest Australian jurisdiction) reports that about 25% of the solicitors were born overseas and of these 42% were born in an Asian country (Law Society of NSW 2017b, p. i). These patchy statistics indicate that the ethnic diversity and particularly seniority of the profession is lagging behind the multi-cultural population of the country. Given the lack of other contemporaneous data about diversity, we will now concentrate on what we know from the scholarship about women in the law and the barriers they face.

5.1. Women in the legal profession

By 1987, the numbers of women law students rapidly expanded to nearly half at several law schools, and around 17% of practising lawyers. Nevertheless, growth was very slow in the Australian legal profession until the late 1970s, with fewer than one in five law graduates being women (Mathews 1982, p. 636, Roach Anleu and Mack 2017, p 1). Thornton (1996) describes the barriers experienced once women were officially let into the profession as working in a very chilly environment and where jobs were nearly impossible to come by and gendered attributions stunted careers.

For more than 30 years, there have been more female law graduates than male in Australia.³⁴ Australia can now boast parity of the sexes in the solicitors' branch (Law Society of NSW 2017a). However, there remains an intractable disparity between men and women in rates of retention and seniority across the profession. In Australia, like other common law countries, the legal profession has always been segmented and stratified (Heinz and Laumann 1982). Women are in the lower ranks as they are more likely to be employed rather than employers. Different kinds of work are differentially evaluated and women lawyers tend to occupy the lower end sectors. Two early studies (Hetherington 1981, Dixon and Davies 1985) show that women lawyers have occupational profiles different from those of men, and recent statistics from professional bodies indicate that this persists. For instance, we continue to see gender stereotypes push women into areas of law thought best suited for them as they predominate family law and tend not to be in criminal advocacy (Law Society of NSW 2017a, p. i).

³² This is no longer true in Victoria and NSW under the Legal Profession Uniform Law Application Act 2014 (NSW) and Legal Profession Uniform Law Application Act 2014 (Vic) since the end of 2015.

³³ The Asian Australian Lawyers Association reports that William Ah Ket was the first practising lawyer in Australia of Chinese background. He was the son of Chinese migrants admitted to practice in Victoria in 1903 and quickly went to the Bar practising until his death in 1936 (Asian Australian Lawyers Association 2017).

³⁴ In 1994 the Equality Before the Law report noted that there were 50% women law graduates (Australian Law Reform Commission 1994, para 2.24). In 2012, it was reported that 63% of law graduates in Australia were women, and tended to outperform male students academically (Guthrie 2012; see also Nelson 2015, Martin 2015).

Women have for some time worked in the community sector and government in much larger proportional numbers than private practice. The Commonwealth Attorney-General's Department Annual Report 2015-16 reports that 67.1% of its employees are women.³⁵ However, these have traditionally been more poorly paid and less prestigious roles.³⁶ Women are also increasingly working in the exponentially expanding 'corporate' sector often as in-house counsel roles in companies (Law Society of NSW 2017a, p. 5). This may be by choice as these roles offer a better lifestyle in terms of fewer hours in the office and less of a homosocial atmosphere (Thornton and Bagust 2007). However, as in other areas of law, corporate practice may also be subject to structural and cognitive biases which create barriers to women's careers, as Eli Wald's (2010) study in the United States indicates. Women are still the minority on corporate boards or as senior corporate figures, which may set a less than receptive corporate culture for diversity in hiring and decision making. Still, if corporate lawyering becomes a female dominated sector – offering opportunities to break the glass ceiling for the many rather than the few – we may see more female judges with this career background. At present, our study found that those few recruited to the senior bench from the solicitor's branch are typically drawn from the corporate large law firms now wielding unprecedented power in the profession.

At the moment, most women working in the corporate sector are significantly more likely to be younger and more junior than the men. The most recent figures report growth of women in the solicitors' branch in 2016, but women comprised the majority (60%) of solicitors admitted to practice for five years or less (Law Society of NSW 2017a, p. 2). Despite decades of sex parity at the beginning of Australian legal careers, women are only around 17-18% of equity partners and less than approximately 25% of salaried partners in large law firms.³⁷ We see a sharp drop-off in numbers of women in the solicitors' branch from the age of 45, such that there are very few proportionally to men when we reach those in their 50s or 60s (Law Society of NSW 2017a, p ii). Women working in larger law firms are still reporting their experiences of bias and discrimination such as being subject to the 'mommy track' where they are conceived of as a less 'committed' worker and thereby less likely to receive prestigious and high billing work (Law Council of Australia 2014; see also Hagan 1990). For all of these reasons, women do not have pay equity in the solicitors' branch.

The picture at the Australian Bar for women is worse. Historically elite and still specialised, women have always been underrepresented in every respect at the Bar (Hunter and McKelvie 1998, Law Council of Australia 2009). They now occupy around 20-30% of the total barristers but around 7% (in Queensland) to 11.6% (in Victoria)³⁸ of the SC/QCs around the country. Statistics from the Australian Women Lawyers' *Gender Appearance Survey* (2006) and the Law Council of Australia's *Beyond the Statistical Gap: 2009 Court Appearance Survey* (2009) reflect this sexed difference in seniority where more junior women appear for significantly less time

³⁵ There is no report on the number of women in legal roles or their SES seniority (Commonwealth Attorney-General's Department 2016a).

³⁶ Nevertheless, our study found that both male and female judges occupied the most senior and visible government positions such as Solicitor-General or Crown Prosecutor.

³⁷ Equality in the Workplace Agency provides publicly searchable data on each of the reporting companies as required under the enabling Act. These approximate figures come from our searches of large law firms on the database.

³⁸ In NSW in 2018, there were 543 female barristers out of 23,750 (around 23%). There are 41 female SC/QC out of 376 SC/QCs at the NSW Bar (around 11%) [New South Wales Bar Association, n.d.]. In 2017, there were 596 women of 2,056 barristers in Victoria (29%). There are 32 out of 276 QC/SCs (11.6%). Only 1.6% of all barristers were female barrister (whereas male senior barrister comprised 11.9%) [Victorian Bar Council 2017]. In Queensland, McMurdo (2015, p. 3) reported that women represent 19.7% of the private Bar in Queensland and 34.2% of the employed Bar, and 9.2% of SCs in 2015. There are currently 11 women out of 159 QC/SCs (7%).

and in less superior courts.³⁹ The Commonwealth Attorney-General's Department Legal Services Expenditure Report for 2015-16 indicated that women were briefed in only 28% of matters and for around 26% of the expenditure, and that this has been an ongoing trend for the last three years.⁴⁰ This is perhaps a more encouraging report than from the NSW Bar, where on average in 2014, the reported 'gross annual fees for men were \$226,213 higher than that of women across the whole of the New South Wales Bar' (New South Wales Equitable Briefing Working Group 2015, p. 7). This suggests a difficult environment at the Bar for women who are trapped in a cycle of receiving fewer and less well remunerated briefs which may account for a significant attrition before they reach seniority. These financial factors will also presumably disproportionately impact those with fewer social or familial supports or contacts within the profession such that the pool of senior barristers may be less diverse in other ways.

Another Law Council of Australia (2014 p. 73) report indicates that there has been little change over recent years in the experience of female barristers of unconscious bias in receiving briefs, and even overt sex discrimination or harassment. It may manifest as open discrimination but is also often described as a product of 'hegemonic masculinity' (Hunter 2003b, p. 104) where the best advocate is assumed to have masculine qualities (such as a booming voice). Women are assumed to be unsuited to advocacy and prevailing gendered roles make the full-time requirements of the Bar inaccessible for women with family responsibilities (see, e.g., Sommerlad 2002, Rhode 2003). In these ways, a famously collegiate profession might foster a junior barrister or exclude them as is indicated in the dismal briefing results, and failure to reach SC/QC status, for women (see, e.g., Davies 1996, Bolton and Muzio 2007).

Gender inequality within the legal profession continues across the Western world (e.g. Epstein 1981, Reichman and Sterling 2004, Thornton 2007). Yet, the contention of a 'trickle-up' effect is still pervasive as Malleon (2006) describes in England and Wales. There is major growth in the junior ranks of the solicitors' profession and a slight growth of junior women in the barristers' branch, but a seemingly unbreakable barrier to parity in seniority in both branches. The female judges we examine in our study are overwhelmingly those who have been long at the Bar suggesting they are the rare exception to have withstood or avoided the barriers of culture and its financial dangers. If judges are exclusively taken from the senior Bar (QCs/SCs or those long at the Bar), which Campbell and Lee (2013, p. 37) confirm has always been overwhelmingly the case, there is, and may remain, a very small pool of women to choose from.

6. Consideration of our findings – Career Trajectories

6.1. Queensland

In Queensland, there were eight female and 19 male judges as at August 2017, representing 29.6% women on the bench. One of these women is the current Chief Justice, Catherine Holmes. All except the two solicitor-only appointments (a man and a woman), went straight to the Bar from legal qualification spending on average more than twenty years there, and taking silk.⁴¹ Thus, most of the women at the Queensland Supreme Court spent the majority of their careers at the Bar, taking

³⁹ For instance, in the New South Wales Supreme Court only 9.9% of appearances before the Court of Appeal were by women, but 27.8% of appearances before a Master were by women. In the Federal Court only 5.8% of appearances by Senior Counsel were by women. The average length of hearing for men Senior Counsel was 119.7 hours, compared to 2.7 hours for women Senior Counsel. In the Federal Court the average length of hearing for male counsel appearing as Junior to Senior Counsel was 223.6 hours, whereas for women Junior Counsel in the same role it was 1.4 hours.

⁴⁰ In 2014-15, women received 1,131 hours and men 2,921 hours; women received around \$15.65 million of \$60.9 million (26%) [Commonwealth Attorney-General's Department 2016b]. McMurdo (2015, p. 3) noted that this fluctuates in recent years as it was higher in 2012 than 2013.

⁴¹ Some of the judges may have practised at the Bar working for government, while the majority worked for private clients.

between 13-15 years to take silk which is slightly less time than for the average man (around 17 years). While more women than men were appointed without taking silk, all had spent significantly more than the statutory minimum of five years in legal practice [Constitution of Queensland 2001 (Qld) s 59]. Only a couple of judges have pursued government lawyer careers before going to the Bar.⁴² Of the male justices, several had been President of the Bar Association.⁴³

In this Court too, it is relatively rare for a judge to have previously presided over a tribunal or sat on a lower court. Nevertheless, while the numbers are small, many more female judges have done so (five out of eight).⁴⁴ For instance, Justice Roslyn Atkinson sat on the Social Security Appeals Tribunal and was a member and the President of the Anti-Discrimination Tribunal before her appointment to the Supreme Court. Justice Ann Lyons, worked as a solicitor, academic and a member of various tribunals and finally President of the Guardianship and Administration Tribunal for six years prior to her appointment to the Supreme Court. Despite their evident experience as decision-makers⁴⁵ and administrators, both of these appointments were heavily critiqued as lacking in merit.

6.2. New South Wales

As of August 2017, there were 12 women and 44 men on the NSW Supreme Court (21.4% women). There were few barristers appointed without attaining silk and only one female QC (Justice Helen Wilson) appointed to the bench within a year of attaining silk. The typical background for male and female careers prior to appointment was a long uninterrupted time at the bar. There were four male judges⁴⁶ and two female judges (Justices Julie Ward and Monika Schmidt) who practised as solicitors upon appointment to the bench. Justice Ward was the first solicitor appointed to the NSW Supreme Court in 2008.⁴⁷ Compared to the Queensland bench, there were many more male judges in NSW who had a substantial career in the solicitor's branch before being called to the Bar⁴⁸ and a number of judges with significant academic careers such as Justices John Basten and Mark Leeming. There were many more judges who had practised in government law (at the Bar and as solicitors) than in most other states.⁴⁹

Several female judges had a long career as a government solicitor before going to the Bar, such as Justice Megan Latham who worked as a Crown Prosecutor and the first female Crown Advocate in 1996 before being appointed to the District Court in 1998 and then the Supreme Court in 2005. Justice Natalie Adams, who was appointed

⁴² These are Justice James Henry, President Walter Sofronoff and Chief Justice Catherine Holmes.

⁴³ These include Justices Fraser, Daubney, Martin and Gotterson. The only female justice to serve in such a role, as Vice President of the Bar Association, is Justice Susan Brown.

⁴⁴ Justice Helen Bowskill was a District Court judge for three years prior to her appointment on the Supreme Court; Justice Jean Dalton was a Member of the Land Court and the ATSI Land Tribunal and President of the Anti-Discrimination Tribunal for three years prior to her appointment on the Supreme Court; and Justice Debra Mullins was a part time member of the Queensland Building Tribunal. Justices Roslyn Atkinson and Ann Lyons are described in the text. There are male judges who have similar profiles: Justice David Boddice was a member of the Anti-Discrimination Tribunal for three years and the Chair of the Nursing Tribunal for two years before appointment to the Supreme Court; President Walter Sofronoff was the President of the Anti-Discrimination Tribunal for four years before becoming Solicitor General for nine years until his appointment as President of the Court of Appeal. Justice David Thomas was drawn from large law firm practice and appointed as a Supreme Court judge to preside over the Queensland Civil and Administrative Tribunal. After four years in this role he was appointed to the Australian Appeal Tribunal. Thus, his skills appear to be recognised as an administrator for the Tribunal sector in particular.

⁴⁵ Upon Justice Lyons' swearing in, the then Chief Justice of the Supreme Court, Paul de Jersey, commented on such expertise (De Jersey 2006).

⁴⁶ Justices Price, Black, Barrett and Ball.

⁴⁷ Her Honour's appointment does not appear to have been greeted with public concern. She had over 25 years' experience as a solicitor and was the youngest ever partner of Mallesons.

⁴⁸ Sixteen males and four women with over four and up to sixteen years in practice as a solicitor.

⁴⁹ For instance, Justices Adams, Hulme, Button, and Payne. Lee and Campbell's study also found that there were many involved in academia but only a small handful across the country in 2011 who had been principally in this occupation. They list both retired Justices Paul Finn and Julie Dodds-Streton (who nevertheless was at the Bar prior to appointment).

in 2016 to the Supreme Court, followed a similar career in 2000s, and Justice Helen Wilson worked as a solicitor at the Director of Public Prosecutions for seven years and then as a Crown prosecutor for 15 years. While this career trajectory can be observed as a proportion of female judges than male judges, there were numerically more male judges with such careers on the current bench.

What is most distinctive in NSW as compared to other state courts we considered was the frequency of those having occupied other decision-making appointments prior to sitting on the Supreme Court, although most were judges of the District Court rather than sitting on a more inferior decision making body such as a tribunal or as a Magistrate.⁵⁰ This career path was not particularly common for the sitting female judges; the three who held other decision making positions prior to appointment to the Supreme Court were on the Industrial Relations Commission or District Court.⁵¹

6.3. Victoria

In Victoria as at August 2017, there were 11 female and 34 male judges on the Supreme Court (24.4% female). The current Chief Justice is a woman and was appointed from the solicitor's branch, Chief Justice Anne Ferguson.⁵² She had been practising for around 25 years, five years as a partner, before being appointed to the Supreme Court. Chief Justice Ferguson was the first woman solicitor, of only three female solicitors (all currently sitting), ever to be appointed to the Supreme Court. The typical career for both men and women in this jurisdiction is, as usual, working almost entirely at the private bar prior to elevation to the bench. As in most states, there are similar numbers of male and female judges appointed from the solicitor's branch, but in percentage terms, there is a higher proportion of female judges from this branch (4.5% of men compared to 25% of women appointed from solicitor's branch).⁵³

Similar to NSW there are a number of judges with academic careers including Justices Mark Weinberg and Joseph Santamaria. Justice Pamela Tate also had a career teaching philosophy before coming to the bar; forging a very successful barristerial career before being appointed as Solicitor-General.⁵⁴ Justice Karin Emerton initially pursued an academic career, obtaining a PhD from the Sorbonne.⁵⁵ While, there are relatively few careers spent in government law on the Victorian Supreme Court, a couple of judges practised in community legal centres which we did not see in the judicial profiles in other states and Federal Court.⁵⁶ As in Queensland, relatively few judges have held other decision-making positions before their appointment to the Supreme Court.⁵⁷

⁵⁰ Eight judges had previously served in other decision-making capacities: Justices McClellan, Emmett, Johnson, Price, Rein, Hulme, Garling and Wright. Only Justices Price and Wright had served as tribunal members and/or as a Magistrate.

⁵¹ Justices Beazley, Schmidt and Wilson.

⁵² Chief Justice Ferguson was preceded by another woman, Chief Justice Marilyn Warren. Chief Justice Ferguson spent a few years at the Victorian Supreme Court and Court of Appeal prior to being appointed as the Chief.

⁵³ There are currently two male judges from the solicitors' branch (Justices Kyrou and Croft) and three female judges from the solicitors' branch (Chief Justice Ferguson, Justices Cameron and Zammit).

⁵⁴ Justice Tate was appointed directly to the Court of Appeal in 2010. Hers is a similar career path to the President of the Court of Appeal in Queensland (Walter Sofronoff P) and Justice Stephen McLeish of Victoria, both serving as Solicitor-Generals before the bench.

⁵⁵ Sourced from https://en.wikipedia.org/wiki/Karin_Emerton

⁵⁶ Justice Kevin Bell's career before the bench was in the community legal sector and Justice Peter Vickery spent some of his early career in this sector. It is noted that Justice Bell of the High Court worked at Redfern Legal Centre in NSW before going to the private Bar.

⁵⁷ Five exceptions include: Justice Mark Weinberg who was a Federal Court judge for ten years; Justice Betty King (recently retired from the Supreme Court) who was a crown prosecutor then a County Court judge for five years; Justice Anthony Cavanough who was a part-time hearing Commissioner for the Human Rights and Equal Opportunity Commission for three years; and Justice Maree Kennedy who served on the County Court.

6.4. Federal Court

As at August 2017, there were 11 women and 38 men on the Federal Court (22.4% women). The typical career again seems to be spent almost entirely at the private Bar prior to appointment to the Court. As in the state courts considered, there are even but proportionally higher (27% compared to 7.8%) numbers of female to male judges appointed from the solicitor's branch.⁵⁸ There are two female judges who, while at the Bar for significant periods prior to their elevation to the bench (respectively, 15 and 20 years), had not taken silk at time of their appointment.⁵⁹ Justices Susan Kenny and Annabelle Bennett were appointed to the bench very shortly after being made QCs.

There were a number of judges with careers in academia⁶⁰ and several whose careers were spent in the government sector.⁶¹ Justice Berna Collier had a rather unique career in private practice (apart from her long career as a senior academic) working in corporate law and then as the Director of the Australian Prudential Regulation Authority and a Commissioner for the Australian Securities and Investments Commission. A large percentage of Federal Court judges (around 18%) had served in other decision-making roles prior to their appointment to the Federal Court, particularly on a state Supreme Court.⁶²

6.5. Key findings considered

In 2013, Campbell and Lee (2013) noted that when their consideration was narrowed to the Court of Appeal in the larger states of Australia, 87% of judges had been silks at the Bar and there was just one former solicitor. On most Supreme Courts, men were more likely to have been at the private Bar for the majority if not the entirety of their career prior to their elevation. While the numbers are small, a significant number of women had similar careers having spent most or all of their career at the Bar ultimately appointed as SC/QC. Justice Edelman, now on the High Court, is the only male judge not having been appointed to SC/QC. In contrast, a handful of female barristers had not taken silk before being appointed to the bench or were appointed in the same year as taking silk, but all had been in practice for many years. Given the discussion in Part 5, this is a significant finding as there is such a small group of lawyers in this category.

Yet for those women who did not quite fit this benchmark male career we have traced, there was sometimes public concern raised, and we could not find examples of concerns raised about similar male careers. For instance, Justice Atkinson's appointment caused negative comment from high places in the profession (Hamilton 1999, Hunter 2004). The Queensland Bar Association objected to her appointment, implying that seeking to achieve a 'so-called representative judiciary' and appointing on 'merit' were inherently inconsistent (cited by Hamilton 1999, p. 10). Yet, she

⁵⁸ There were three male judges appointed from the solicitors' branch (Justices Greenwood, Murphy, Thomas) and three female judges from this branch (Justices Collier, Farrell and Markovic). There are similarly high numbers of Federal Court judges, mostly male (13 of 15), that had significant (over four years) early careers in the solicitors' branch before moving to the Bar: Justices Siopis, Richards, McKerracher, Rares, Foster, Barker, Lee, Griffiths, Yates, Nicholas, Burley, Murphy, White, Jagot and Charlesworth.

⁵⁹ Justices Jayne Jagot and Natalie Charlesworth.

⁶⁰ Five male judges (Justices Tracey, Barker, Griffiths, Kerr, Murphy) and one female judge (Justice Collier) had a significant career (three or more years) in academia before their appointment.

⁶¹ Justices Robertson, Wigney, Ross, Kerr and Bromwich.

⁶² These judges include: The now Chief Justice Allsop (formerly on the Federal Court and then President of the NSW Supreme Court); Justices Dowsett, Kenny, Davies and Besanko who moved from the Supreme Court to the Federal Court; Justice Barker who moved from the Supreme Court to the Administrative Appeals Tribunal in Western Australia and then to the Federal Court; Justice Ross who moved from the Supreme Court to the Victorian Civil and Administrative Appeals Tribunal and then to the Federal Court and who is now the President Fair Work Tribunal; Justice Pagone who moved from the Supreme Court to the Federal Court and then served as the Administrative Appeals Tribunal President; Justice Rangiah who served as member of the Queensland Anti-Discrimination Tribunal and Civil and Administrative Tribunal; Justice Mansfield who served as the President of Australian Competition Tribunal and member of AAT.

brought, like most judicial officers, exemplary academic credentials, 11 years at the Bar and having presided over a tribunal. Barbara Hamilton (1999, p 12) observes of these critics, that merit to which they refer is defined, almost comically, within the most traditionally conservative terms as 'of an experienced advocate of senior rank'. This was applied to Justice Atkinson by the then Bar Association President Bob Gotterson (now a Supreme Court judge) in the following terms: she has 'demonstrated her ability in her relatively short career as a lawyer, but not for the time and at the level necessary to demonstrate a capacity to perform the function as justice of the Supreme Court' (cited by Hamilton 1999, p 12). When we consider other currently sitting judges on the Queensland Supreme Court it is true that that female judges have less time as barrister on average. However, this does not necessarily equate to lack of merit. There are other career experiences that help to develop judicial qualities as discussed below. When only 7% of the QCs/SCs are female in Queensland, representing less than 1% of the legal profession, the evaluative criteria can only be satisfied by a very small pool of people indeed. As described above, this is unlikely to change dramatically in the near future across Australia as major impediments to women's longevity and success at the Bar persist. As a matter of substantive equality then, with so few women available now and for the foreseeable future, this narrow criterion of 'merit' seems suspect.

While the profiles we considered indicate that there is no strongly gendered career trajectory coming through the solicitors' branch, there has often been a perception of women appointed to high judicial office being 'queue jumpers' (Hunter 2003a) – because they have not spent enough time at the Bar. We also observed the appointment of solicitors to the judiciary in low but relatively equal numbers for men and women. Yet, given that women on the apex courts are stuck at around 25% of judges, a couple of appointments from the solicitors' branch for women is proportionally greater and thereby more noticeable. However, we also found that those selected from this branch tend to have been in legal practice for decades. Thus criticism of appointments from this branch indicates that solicitors' experience and training counts for less. The traditional evaluative reason provided is that barristers bring with them experience in trial conditions. However, many have argued that advocacy skills may not assist a judge and there is no reason why a solicitor cannot show such experience as a litigator (Resnick 1988, Commonwealth Attorney-General's Department 1994). Indeed, appointments to the Court of Appeal require other skills that do not relate to trial advocacy. The current judges we considered had almost all come from a litigation background. For instance, the recent appointment of Chief Justice Ferguson appears to have been well received by the media and the profession with many reports commenting on her more than 30 years' experience in litigation (e.g. Walsh 2017).

Still, it is noticeable that when statements are made about appointments from the 'other' branch, there are more emphatic attempts to justify the merits of the appointment. This is often the case concerning female appointments, but similar explanatory statements have been deemed necessary upon the appointment of some male solicitors. In one case, the appointment of another outsider – an academic Marcia Neave – to the Victorian Supreme Court was criticised (Bolt 2006, Thornton 2007, p. 393, Hunter 2013, pp. 400-401). This may indicate a general tendency to discount candidates without advocacy or practice experience, and there are relatively few judges on the courts we considered who had academic careers or who had not otherwise been at the Bar for a significant period. There were also very few sitting judges with a substantial part of their legal career in less prestigious branches of the profession, such as community legal centres. There were many more government lawyers, but typically they occupied very visible and senior positions. No judge who was previously a solicitor spent their entire pre-judicial career in a small law firm. For both barrister and solicitor sectors, we could see no distinct patterns of sex difference.

7. Conclusion – an argument for more data and for opening the judicial pool of candidates

Ten years after the criticised appointment of Justice Atkinson in Queensland, Justice Lyons' appointment in 2006 to the Queensland Supreme Court, was similarly criticised, this time by the then Vice President of the Bar Association (O'Donnell 2008, p. 118). The local newspaper reported: 'There is uproar in legal circles (...) Justice Lyons' qualifications are perceived as unsatisfactory and her appointment is seen as gender-based discrimination' (cited by O'Donnell 2008, p. 118). The appointment was again characterised as failing to choose the 'best person' because it was motivated by a desire to achieve diversity. Such a characterisation was seemingly made because it was an appointment of someone from an 'inferior' decision-making body, without seniority at the Bar. Sommerlad (2013b, p. 361) notes that there is a perception of separation between the tribunal and lower level judiciary and more senior office in England and Wales. Given the evidence that many talented female lawyers are recruited into the tribunal sector, our study of senior court appointments might indicate that many may experience what Hunter has described in England and Wales as 'sticky floors' when it comes to promotion through the judiciary (Hunter 2015, p. 93).

Nevertheless, as described above, there is an increasing body of academic scholarship, and even judicial acceptance, that non-adversarial skills may also be useful for a judge. The tribunal worker, with different experiences such as dealing with non-represented parties, flexible rules of evidence, and especially for those who are presiding, managerial experience, seem ideal. Many years ago, Solomon (1995) argued that professionals such as solicitors, academics and government lawyers possess useful skills for judicial work that have been historically undervalued. Elizabeth Handsley and Andrew Lynch (2015, p. 213) point to the increasing acceptance that skills other than advocacy are needed for most judicial positions, even those at the apex of our courts, such as 'certain interpersonal skills and a temperament and capacity for professional cooperation'. Having worked in another decision-making capacity would seem to be a relevant indicator of merit for a judge. However, our analysis shows that selection of Supreme and Federal Court judges from the ranks of sitting members or officers in other courts and tribunals is a relatively rare career trajectory in Australia.

It is also uncommon that an appointment from a career other than the Bar is publicly proposed in conjunction with an explicit acknowledgment of the need to look elsewhere to assist development of a diverse judiciary or even to draw on additional talents than offered by someone with a career at the Bar. Former Attorney General, Nicola Roxon (2012), provides a rare example, speaking about the appointment of Justice Kathleen Farrell, a solicitor:

In the history of the Federal Court, the appointment of a solicitor is a rare event. I have made no secret of my view that improving professional, cultural and gender diversity of courts across the country can only strengthen and deepen the role, and the respect in which the court is held. Of course, these appointments must also be of the highest professional and legal caliber, and your appointment, easily, meets all of those standards.

Indeed, there are some 'worrying signs' (McColl 2014, p. 10) of backwards progress at times as the falling proportional numbers of women judges in some courts indicate. During a 2013 Federal Government election campaign debate, Senator George Brandis (later Attorney-General) stated that 'all judicial appointments under the Coalition will be based on meritocratic principles' (Priest 2013). This signalled a return to the more traditional approach to judicial selection, abandoning a process of advertising and nomination adopted in 2008 for Federal Courts. A report by the Judicial Conference of Australia (2015) indicates that selection protocols often change with a change in government at a federal and state level. This might impact upon

judicial diversity. Our snapshot provided few indicators of this, but the effects might take time to be observable except in rare occasions.⁶³

Our study indicates that there is more to do to make the judiciary truly diverse. There is not gender parity while those male and female judges we studied have similar career backgrounds. We simply do not know much more about them, or the other candidates not promoted to the bench. It may be that the intersection of identities such as being female and non-white poses a range of additional barriers that have been undocumented. In a country where nearly half the population was either born overseas or has a parent who was born overseas (Australian Bureau of Statistics 2016), it is worth knowing how representative the judiciary is of the community. Thus, we argue that keeping an eye on the make-up of the legal profession and the judiciary is important. Collecting data about diversity along a range of indicators will assist us to know where we are and what might need to be done. Exactly what questions about their background or personal identity need to be asked, and how public this information would be, is a topic for discussion at another point.

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⁶³ As described above, appointments by government of a number of female judges in Victoria and Queensland a few decades ago immediately addressed what was seen as unacceptably low numbers. It might also be that there is little effect in processes calling for self-nomination because, as Hunter (2015, p. 98) points out, the neo-liberal focus on individual choice to apply does not address 'systemic structural and cultural barriers' which occur at the level of legal practice and in selecting judges. Indeed, it might be that where there have been many gains particularly in appointment women to the bench, there may be a perception that the work has been done (Kanter 1983, Hunter 2005).

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