30/06/2021

By email: *impartiality@alrc.gov.au*

Dear Justice Derrington,
Our names are Irene Park and Prue McLardie-Hore, and we are grateful for the opportunity to make a submission in response to the Australian Law Reform Commission's (*'ALRC'*) Judicial Impartiality Consultation Paper (*'the Consultation Paper'*).[1]

We have been fortunate to have completed Clinical Placement at the ALRC as part of Monash University's Clinical Placement program. During this experience, we have aided the ALRC in its work on the Judicial Impartiality Inquiry, including the publication of the Consultation Paper on Judicial Bias.

Given our exposure to the ALRC's current inquiries, our engagement in an undergraduate law degree and our experience and interest in areas of securing access to justice, fairness, and equality before the law, we respectfully make the following suggestions, with a particular focus on Proposal 18 and Question 21 of the Discussion Paper.

Recommendation 1: Publication of a Judicial Diversity and Inclusion Strategy

1. Consistent with the ALRC's discussion in the Judicial Impartiality Background Paper, we strongly endorse the establishment and subsequent publication of an Australian Judicial Diversity and Inclusion Strategy, akin to the United Kingdom's (UK's) Judicial Diversity and Inclusion Strategy.[2] Although the similarities between the UK and Australian Judiciary should not be overstated, the UK's strategy is a particularly attractive cross-jurisdictional model to observe, as Australian legislative history and processes is rooted in UK law.[3]
   - 1.1. We believe adoption of this strategy should extend not only to the Federal Judiciary, but to Australian judges in general, as the importance of diversity and inclusionary practice is not exclusive to the Federal Courts, but critical to the judiciary as a whole, and thus deserves to be implemented holistically.
   - 1.2. At present, there is a paucity of information available on court websites regarding diversity, and there is an absence of comment with respect to the judiciary's outlook on furthering diversity and inclusion in future years.
   - 1.3. We believe the first step in addressing this apparent deficiency in diversity is by reviewing the current diversity profile of the judiciary. This should be presented in a holistic and complete set of judiciary diversity data included in the Strategy.
   - 1.4. Our proposal is similar to Proposal 15 of the Consultation Paper, which suggests the Attorney-General of Australia should report annual data on the diversity of the federal judiciary, including, as a minimum, data on ethnicity, gender, age, and professional background.[4] Such proposal is also consistent with the UK's Strategy, which proposes diversity statistics could include reference to gender diversity, cultural diversity, and ethnic diversity.[5]

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[1] Australian Law Reform Commission, Judicial Impartiality: Consultation Paper (CP 1, 2021). (*ALRC Consultation Paper*).
[2] United Kingdom Courts and Tribunals Judiciary, *Judicial Diversity and Inclusion Strategy 2020-2025* (2020), <https://www.judiciary.uk/wp-content/uploads/2020/11/Judicial-Diversity-and-Inclsuion-Strategy-2020-2025.pdf>. (*UK's Judicial Diversity and Inclusion Strategy).*
[3] See, e.g., Patrick Parkinson, 'Tradition and Change in Australian Law' (2001) 26(2) *Alternative Law Journal* 104, 104-5.
[4] *ALRC Consultation Paper* (n 1) 27.
[5] *UK's Judicial Diversity and Inclusion Strategy* (n2) 8-9.

1.5. We also wish to briefly highlight our support for the inclusion of data regarding 'value driven diversity'- diversity that is not as easily identifiable nor quantifiable as gender or cultural diversity, such as diversity in thought and opinion. Whilst it is outside the scope of our current discussion to speak at length on this emerging area of literature, we think it astute that consideration of judges 'value diversity' is included in data collection. In addition to the benefits of diversification in regards to gender, culture and professional background, the academic consensus forwarding the need to increase judicial diversity is based on acknowledging that more diverse experiences and perspectives allow judges as a whole to make better informed decisions.[6]

1.6. Not addressed by other schemes, however, we also support the inclusion of statistics that reflect whether judges identify as Aboriginal and/or Torres Strait Islander. We believe it is appropriate to reflect First Nations status in the judiciary as Indigenous Australian's experience a unique intersection of racism, colonialism, dispossession, and procedural concerns such as over-policing,[7] and over-representation in the criminal justice system.[8] These factors, inter alia, have contributed to First Nations communities having a lower-level of trust in the judiciary compared to their non-Indigenous counterparts.[9] Representation, cultural awareness and sensitivity, however, leads to increased trust in the judiciary by First Nation communities.[10] Marchetti and Daly's cite the Victorian Koori Courts as but one example of where culturally appropriate judicial settings engender greater trust between Indigenous communities and judicial officers.[11]

1.7. The publication of judicial diversity statistics would also lend itself to acknowledging the current gaps in the judiciary's composition, and serve as a means to assess and measure progress in this regard.

1.8. Thus, the publication of such a Strategy would serve many functions. A transparent and public document highlighting the judiciary's commitment to diversity is not only necessary for accountability of the judiciary meeting their strategy objectives, but so too in increasing community confidence in the operation of the judiciary.

1.9. Through a wholistic approach, understanding and appreciation of diversity, we believe public awareness of the judiciary's acknowledgement and commitment to inclusionary practices will bolster public confidence in the judicial system, particularly those communities who have a low level of trust in the judicial system. This is because commitment to diversity aligns with the universally valued importance of inclusion, acceptance and respect, and these values, in turn, relate to public perception and acceptance of such institutions.[12]

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[6] See, e.g., Somendra Narayan, Jatinder Sidhu and Henk Volberda, 'From Attention to Action: The Influence of Cognitive and Ideological Diversity in Top Management Teams on Business Model Innovation' (2020) *Journal of Management Studies* 1.

[7] See, e.g., Emma Bastable and Vicki Sentas, 'Overpolicing Indigenous Youth: The Suspect Target Management Plan' (2016) 25(3) *Human Rights Defender* 16, 17.

[8] See, e.g., Australian Bureau of Statistics, *Prisoners in Australia* (2019) < https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginal-and-torres-strait-islander-prisoners>.

[9] Elena Marchetti and Kathleen Daly, 'Indigenous Courts and Justice Practices in Australia' (2004) 27(7) *Trend & Issues in Crime and Criminal Justice* 81, 86.

[10] Ibid, 83.

[11] Ibid.

[12] See, e.g., Clare Hocking, 'Occupational Justice as Social Justice: The Moral Claim for Inclusion' (2017) 24(1) *Journal of Occupational Science* 29.

1.10. At an organisational level, we hope the publication of diversity statistics will not simply serve as a mere visual representation of proof the judiciary is aware of diversity. Rather, our eventual hope through such a publication, is that it will ensure the judiciary is sensitive to intersectionality and value-driven diversity. We believe that this can only begin by first including diversity in the judiciary's dialogue and policies.

1.11. We believe, similarly to the United Kingdom's approach, that the development of such a strategy should be judge-led, and conducted in consultation with the Attorney General's department, as suggested by the ALRC's recommendation 15, as the Attorney General's department is well positioned to appropriately manage, conduct, and report statistics regarding judicial diversity.[13]

Recommendation 2: Active, Transparent Appointment Process Encouraging Diversification of the Federal Judiciary

2. The second recommendation we put forward regards the active, transparent encouragement of appointing diverse applicants in the Federal Judiciary.

2.1. There is currently no application process available to judicial officers, underscoring a lack of transparency in the judicial selection process as a whole, with federal judicial appointments process operating on an ad-hoc basis.[14]

2.2. We believe reform similar to that of the former Attorney-General Robert McClelland's in 2007, should be instituted to uphold diverse, merit-based appointments and promote equitable consideration of all qualified candidates.[15]

2.3. The ideal appointments procedures should include not only mandatory publication of vacancies and the establishment of an advisory panel, but also thorough selection criteria made accessible to the public on the Attorney-General's Department website.

2.4. In addition to the selection criteria that was proposed in the McClelland reforms,[16] we therefore support additional targeted attributes such as gender, residential location, professional experience, and cultural background being included in the judicial appointment process.[17]

2.5. Such model is consistent with the United Kingdom's Strategy, and such sentiment has also been supported in the Australian context, with the Australian Institute of Judicial Administration, proposed criteria for judicial appointment highlighting the importance of candidates' awareness of, and respect for, the diverse communities.[18] Such comment is also consistent with the express aims of the ALRC's Final Report 'Equality Before the Law'.[19]

2.6. To that end, we support the active seeking, encouragement, and promotion of applicants from diverse backgrounds in all upcoming judiciary roles. We wish

[13] *ALRC Consultation Paper* (n1) 27; *UK's Judicial Diversity and Inclusion Strategy* (n2) 4-7.

[14] See, e.g., Andrew Lynch, 'Diversity without a Judicial Appointments Commission' in Graham Gee and Erika Rackley (ed) *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 101-17.

[15] See generally *Attorney-General Robert McClelland,* 'Judicial Appointments Forum' (Speech, Bar Association of Queensland Annual Conference, 17 February 2008), <https://nswbar.asn.au/circulars/agspeech_180208.pdf>.

[16] For the complete list of criteria, see annexure 1 from Law Council of Australia, *The Process of Judicial Appointments* (Policy Statement, September 2008), 3, <https://www.lawcouncil.asn.au/publicassets/e66b7bd7-e1d6-e611-80d2-005056be66b1/0809-Policy-Statement-Judicial-Appointments.pdf>.

[17] Attorney-General's Department, Australian Government, *Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary through a Transparent Process* (April 2010) 1,1, <https://docplayer.net/15485104-Judicial-appointments-ensuring-a-strong-independent-and-diverse-judiciary-through-a-transparent-process.html>.

[18] Australian Law Reform Commission, *Equality Before the Law* (Final Report No 69, 1994).

[19] Australian Institute of Judicial Administration, *Suggested Criteria for Judicial Appointment* (2015) 4.

to stress, however, that our support for encouraging diverse candidates does not currently extend to introducing set goals or quotas for the judiciary to meet, as empirical research suggests candidates who retain positions due to quotas are less satisfied than if they were successful on merit alone.[20] If tangible diversification is able to occur without the need for quotas, we see this as preferable, although we concede there is a space for quotas if such change is stifled by current practice and culture.

2.7. We hope, however, by including diversity as but one factor to include in judicial appointment criteria, we would encourage a process in which judicial selection committees turn their mind to the importance of diversity, and the importance of having a judiciary reflective of the community it serves.

<u>Recommendation 3: Streamlined Judicial Training</u>

3. In response to proposal 18, we recommend that all education courses suggested by the ALRC be streamlined and promoted as a joint effort by institutions such as the NJCA, the AIJA, and state colleges.

3.1. As highlighted by the ALRC, the science on ways to navigate implicit bias is young – there is a large gap in concrete strategies available for application in judicial decision-making contexts. As such, by ensuring courses are streamlined, updates to training, resources, feedback, and suggestions can be aggregated and serve as shared information that can hopefully reach a greater number of participants.

3.2. It is also recommended training includes not only the provision of information on implicit bias, how it operates, and general mitigation strategies, but that it also includes the subsequent opportunity for participants to engage in active critical thinking from participants to create and tailor their own strategies to how they can navigate implicit bias in their working lives.[21] This is in response to the criticisms of current judicial education programs being overly-reliant on simple information delivery.[22]

3.3. Examples include experiential learning techniques, group exercises, and group review.[23] This will provide participants with not just the tools to navigate these influences, but the opportunity to acquire and hone the requisite skills with their colleagues. By allowing participants the chance to consider how implicit bias operates for them and to review each other's strategies, it will kick start the beginning of an informal communication channel between colleagues on this very topic. In that regard, participants can reach out and access much more easily after the conclusion of training and when the time comes for them to consider these issues in court.

3.4. Additionally, we also suggest including an assessment of a specific bias, being egocentric bias. This is a heuristic common amongst all people, including judges, where one believes that they have the ability to control their own biases.

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[20] See, e.g., Albena Neschen and Sabine Hugelschafer, 'Gender Bias in Performance Evaluation: The Impact of Gender Quotas' (2021) 85(1) Journal of Economic Psychology 1.

[21] National Center for State Courts, 'Strategies to Reduce the Influence of Implicit Bias' (2021) 1, < https://cdn.ymaws.com/www.napaba.org/resource/resmgr/2015_NAPABA_Con/CLE_/400s/404_NAPABA2015CLE.pdf> ('*Implicit Bias Influence Reduction*').

[22] See Gabrielle Appleby et al., 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 299, 333 '*Contemporary Challenges: Empirical Interruption*').

[23] Ibid 7.

This is because studies in response to the IAT have shown that overconfidence and belief in one's own objectivity can actually subvert it.[24]

3.5. In conjunction with the ALRC's proposed cultural competency training, this will support the judiciary's deeper understanding of and sensitivity to the different influences at work when hearing and deciding cases. And it will provide them with not just the tools to navigate these influences, but the opportunity to acquire and hone the requisite skills.

Recommendation 4: Reduction of Judiciary Overburdening

4. We view that reducing overburdening of judicial officers will mitigate the impact of implicit social bias in judicial decision-making.

4.1. Implicit bias operates with little to no conscious thought. It presents a way in which people can automatically form decisions and conserve cognitive resources at the expense of inadvertently generalising.[25]

4.2. Reducing the cognitive load required from judicial officers will mean that decision-makers will have more time to process and critically analyse all the information presented to them.[26] Allowing decision-makers the time to properly engage with high effort processing will reduce their need to rely on the type of intuitive thought-processing which can result from implicit social biases.

4.3. Accordingly, we suggest a review of the areas in which judges are likely to be overburdened, with specific emphasis on areas of the law with which marginalised or under-represented people frequently engage, and a consequent modification of procedures to provide more time for judicial decision making.[27]

4.4. To that end, reducing judicial caseload will not only provide adequate time for decision-making, but it will insulate against stress, which is a known trigger to implicit bias.[28]

4.5. It is therefore recommended that there be a review and subsequent improvement of case flow management in federal courts to increase work efficiency, which will reduce stress, workload, and potential delays. Currently, Federal courts currently circulate an efficiency toolkit and a self-assessment checklist.[29] The toolkit is predominantly explanatory with very general suggestions.

4.6. In addition to what is currently in place, it is suggested that there should be a concrete commitment to creating better case flow management. The level of sophistication can vary - from investing more in modern technologies to create case flow management information systems to simply upgrading current practices, such as transferring more administrative responsibilities from judges to court staff.[30]

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[24] https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1096&context=ijlse Jennifer L. Howell & Kate A. Ratliff, Not Your Average Bigot: The Better-Than-Average Effect and Defensive Responding to Implicit Association Test Feedback, 56 BRIT. J. SOC. PSYCHOL. 125, 127 (2017).

[25] See, The National Centre for State Courts, 'Helping Courts Address Implicit Bias: Addressing Implicit Bias in the Courts' (2015), 8-9; Shawn C Marsh, 'The Lens of Implicit Bias', (2009) 16 *Juvenile and Family Justice Today* 16, 17.

[26] Sharn C Marsh, 'The Lens of Implicit Bias' (2009) 16 *Juvenile and Family Justice Today*, 16, <https://www.ncjfcj.org/wp-content/uploads/2012/09/The-Lens-of-Implicit-Bias_0.pdf>.

[27] See, eg, Chris Guthrie, Jeffrey J Racklinski, and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) *Cornell Law Review* 1, 35-6.

[28] See, eg, Gabrielle Appleby et al., 'Contemporary Challenges: Empirical Interruption' (n 22); Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An Overview of Findings' (2008) 18(1) *Journal of Judicial Administration* 5.

[29] See Pacific Judicial Strengthening Initiative, 'Efficiency Toolkit (2018) <https://www.fedcourt.gov.au/pjsi/resources/toolkits/efficiency/Online-Version-Efficiency-Toolkit.pdf>.

[30] See, eg, Legal Vice Presidency The World Bank, 'Caseflow Management: Key Principles and the Systems to Support Them' (Justice & Development Working Paper Series, 2013) <

4.7. Lastly, it is recommended revisiting Court productivity metrics, which emphasises figures relating to backlog and case clearance.[31] The pressure to increase these numbers not only increase judicial stress, but it impairs the integrity of a proper and fair consideration of individual cases and the quality of justice administration.[32]

4.8. Whilst there are other figures published in the Commission's annual report, such as file integrity and court satisfaction, we believe that there is room to re-evaluate the calculation of 'effectiveness' and 'efficiency' to provide a more holistic view of court excellence that goes beyond case clearance.

4.9. The necessity to balance judicial caseloads is a long-standing problem. Specific recommendations concerning how to best relieve the overburdening of courts whilst addressing the problem of costs or delay fall outside the scope of our submission. Notwithstanding, at the expense of oversimplification, we propose that, where possible, organisational changes should be made to allow judges the time and ability to make deliberative and well-reasoned decisions instead of decisions that are more prone to being made on intuition.

It is our hope that this submission can be used to inform meaningful collaboration and reform in this area of the judiciary.

We thank you once again for the opportunity to provide comment on this inquiry. We look forward to reading the Commission's Final Report.

Warm regards,
Irene Park and Prue McLardie-Hore.

https://documents1.worldbank.org/curated/en/368901468325193887/pdf/811210NWP0Case0Box0379828B00PUBLIC0.pdf
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[31] Specifically, the Productivity Commission's 'key performance indicators' as published annually in its annual Report < https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/courts/rogs-2020-partc-7-courts-interpretative-material.pdf>.

[32] Gabrielle Appleby et al., 'Contemporary Challenges: Empirical Interruption' (n 22) 342.