Submission on the ALRC review of Judicial Impartiality (2021)

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This submission is in response to the Australian Law Reform Commission's review of Judicial Impartiality. Specifically, I am focusing my response on one question asked by the ALRC in their first consultation paper on this review (CP1).[1] Question 16 in that paper reads:

> 16 What should be done to increase diversity in the legal profession and to support lawyers from sections of the community that are traditionally underrepresented in judicial appointments to thrive in the profession?

My submission briefly discusses the types of diversity which I see to be important in the legal profession, the reasons for which that diversity is important, and outlines some ideas from which diversity could be encouraged and expanded at all levels of the profession. Proposal 14 in CP1 is closely related to question 16, reading:

> 14 The Australian Government should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community.

Accordingly, my response will, at times, touch upon the issues explored in this question and advocate for measures which relate more to it than question 16.

This submission is primarily concerned with racial and gender diversity. That is not to say, however, that sexual, religious, geographic, and other forms of diversity are not important. The reasons for which racial and gender diversity are important apply as readily to other forms of diversity. I focused on these two forms because they are relatively well documented and discussed, and because their proper representation in the judiciary has the most potential to alleviate perceived and actual bias,

[1] Australian Law Reform Commission*, Judicial Impartiality: Consultation Paper* (CP 1, 2021)

boost public confidence in the legal system and result in measurably better outcomes for marginalised members of Australian society.

It is important to discuss why diversity is important in the legal profession. A deeper understanding of the value of diversity will help lead to solutions which focus on meaningful outcomes. To my mind, there are three main arguments for diversity in the profession and, more specifically, in the judiciary. Firstly, that Australia is a representative democracy, and the people should be represented, in all their variety, in the courts. Secondly, that judges from a variety of backgrounds will bring a variety of approaches to the law. Thirdly, that Australia, as a responsible international legal actor, should act in accordance with the Sustainable Development Goals (specifically, goal 5 [women] and goal 16 [justice]) by creating and maintaining a diverse, strong and equitable judiciary and legal profession. I will explore these arguments in more detail.

The Commonwealth judiciary makes up the third branch of government under the constitution and, while it is not elected like the legislature and (parts of) the executive, it should still represent the people of Australia. The Australian government should be composed, at all levels, of Australians. Australians are culturally, racially and otherwise diverse. Half of Australians are women. The Commonwealth courts should be composed similarly if the people of Australia are to feel that they are being governed by their peers in their best interests rather than being ruled by a homogenised class of oppressors.[2] Further, seeing diverse people in positions of power, both in the judiciary and the profession, provides role models and drive to young diverse people.

It is equally important that groups feel that there is a voice for their unique needs in the courts, even though we expect the highest standards of impartiality from judges. Judges from diverse backgrounds will bring a breadth of understanding, knowledge, and experience to the courts without necessarily creating decisions which do not reflect a proper application of the law.[3] Courts not only interpret law, but also create law, and law makers should draw from the full diversity of experience in Australia when considering the correct formulation.

The Sustainable Development Goals are 17 aspirations developed by the international community in order to improve the conditions of the humanity across the world.[4] Australia was one of the member

[2] See, generally, Michael McHugh, 'Women Justices for the High Court' (Speech, Western Australia Law Society, 27 October 2004).
[3] See, e.g., Erika Rackley and Charlie Webb, 'Three Models of Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 283, 285.
[4] *Transforming our World: the 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015).

states who initially agreed to the goals and is ethically obliged to continue attempting to deliver the goals. Particularly relevant to this submission are goals 5 and 16, relating to gender equality and empowerment, and peaceful and inclusive societies with access to justice for all and effective, inclusive and accountable institutions, respectively. Target 5.5 is to "ensure women's full and active participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life". Target 16.7 is to "ensure responsive, inclusive, participatory and representative decision making at all levels". Importantly, each target indicates that diverse peoples should not only be able to participate in public decision-making (such as the judiciary) but also that they should actually participate. Australia will never be able to meet these targets without a significant increase in judicial diversity.

So, having established that diversity is vital in the judiciary, how can it be improved? This submission will go on to suggest a number of potential solutions which may help increase diversity in both the judiciary and the profession more broadly. Additionally, proposal 14 from CP1, if adopted, would help to deliver many of these solutions.

Likely the most important reform is a change in the philosophical and theoretical approaches taken to diversity in the legal profession. The most insidious, dangerous and difficult belief held by select members of the profession, judiciary and public more broadly is that a lack of diversity is somehow the result of a fair and measured system which promotes white men because they are the best candidate. Malleson argues that, rather than asking under-represented populations to justify their inclusion, we should ask over-represented populations to justify their over-inclusion.[5] Specifically here, we should shift the discourse from a discussion regarding why female, indigenous, or otherwise racially ethnic candidates should be selected over their white male colleagues to one about what justifies so significantly over-representing white males in the judiciary. Equally, it would be helpful for white men to more broadly recognise that the entrenched, patriarchal, racist systems of Australian society contribute significantly to their success both by removing barriers and offering supports. Barriers removed include better family financial status, more access to institutions, lower likelihood of domestic and carer responsibilities, and less exposure to violence and discrimination. Supports offered include overt and implicit bias, language nativity, easy access to mentors, and social systems designed for the white male. An uncomfortable truth which successful white males must grapple with

[5] Kate Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing Over-Representation in the Judiciary' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 259.

for the profession to start flourishing in diversity is that, if all members of our society were given the same advantages that white men are, the latter would certainly not dominate in so many arenas.

Another important theoretical adjustment which lends itself to greater diversity in the judiciary especially, is the concept of merit as a plateau. Nearly all Australians would agree, I think, that judges should be appointed on merit. That a candidate for a judicial role should be a meritorious person with experience, advanced legal skills, balanced temperament, intellect, excellent critical thinking abilities, and impeccable judgement. An issue in advancing the diversity of the judiciary is that, despite possessing many desirable traits and clearly being a strong candidate, diverse candidates will often be unable to exceed their white male peers in experience ('merit') due to the factors outlined above. An alternative is to define merit as a plateau, a bar which must be overcome but, once overcome, becomes irrelevant. Under such a definition, Australians can still be sure that the judges appointed are excellent legal professionals possessing all the requisite traits to interpret and make the law, but diversity can also take a front seat in judicial appointments. Proposal 14 is necessarily connected to this suggestion. The public can never be fully confident that their government is appointing the correct candidates to the judiciary if they do not understand why a candidate was appointed, why another one was not, and the traits for which the government is selecting. This is key to both an increase in judicial diversity and the maintenance of public confidence in the judiciary more broadly.

Another suggestion, which integrates well with the previous one, is that the government and major private legal operators could commence a long-term strategy to encourage diversity in the judiciary and profession more broadly. They could commit publicly to increasing diversity and indicate that diverse candidates would be specifically sought out for positions without committing to a timeframe. This could lead to more young, diverse professionals setting their sights on the bench or senior roles and achieving the experience required for those positions. This, in turn, may enable diverse appointments on raw merit rather than any perceived or actual positive discrimination. Equally, such a strategy may attract entry level diverse professionals who would otherwise enter other fields on the basis that the profession is dedicated to diversity. Such a strategy, if fully committed to, would also have the ancillary impact of increasing confidence in the judiciary and legal system more broadly among diverse populations on the basis that the system would no longer be run by people who are intrinsically alien to them. Arguably, this system may alienate white, male candidates and result in fewer high-quality candidates from that demographic. That is a relatively small price to pay in exchange for a rich and varied field of skilled professionals.

The suggestions hereafter are smaller, more practicable, and more likely to have a short-term impact if implemented. Each of them contributes in some way to creating a 'pipeline' for diverse legal

professionals in order to help them enter and penetrate more deeply into the profession without necessarily addressing the underlying systemic issues which prevent broader participation from diverse populations. Such a pipeline is helpful, and should not be disparaged, but it can never fully replace addressing those underlying issues.

Scholarships should be offered at all levels of education for diverse candidates. The relatively weak financial position from which many diverse candidates enter education presents a serious barrier to the academic focus required to ultimately participate fully and successfully in the legal field. Students in secondary school should be offered scholarships to take legally oriented subjects, or simply due to their diverse backgrounds. Diverse students at university should equally be offered scholarships to study law. The scholarships would have the added bonus of attracting greater numbers of students who hope to acquire the scholarships but would otherwise have pursued other fields.

Diverse candidates at all levels (university, profession, judiciary) should be encouraged and supported with paid time to recruit and mentor other diverse candidates. Diverse university students should be in high schools recruiting the best and brightest of diverse students, and then they should be establishing serious mentoring relationships with them to support them in at university. The same should be true of professionals recruiting into universities and mentoring early career professionals. Where possible, diverse judicial officers should be encouraged to do the same. The judiciary may benefit from more formal arrangements, such as a requirement that a certain number of associate and tipstaff positions be given to diverse candidates so long as the candidate is sufficiently skilled. This would also align with recent pushes to ensure that judicial staff are treated as employees of the court rather than the individual judge to help prevent misbehaviour and abuse. Such recruitment and mentoring would help bring diverse people into the profession and help them achieve the penetration required for high-level positions such as judicial ones.

Finally, recognition of diverse students, professionals, and judicial officers should be given more publicly. For example, media and branding departments in universities, departments, firms, and courts should actively promote imagery of diverse candidates in order to change public perceptions of what kind of person is a ‘law student’, ‘lawyer’ or ‘judge’. This must be done respectfully, with informed consent and in a way which does not abuse diverse populations.

I hope that these suggestions can offer some ideas for how the profession and judiciary might come to represent the diverse Australian population it serves. Thank you for your consideration.