CONTEMPORARY CHALLENGES FACING THE AUSTRALIAN JUDICIARY: AN EMPIRICAL INTERRUPTION

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The structures that regulate and support the Australian judiciary reflect and serve the traditional judicial values of independence, impartiality and the rule of law. Yet modern society places emphasis on an additional range of values that are expected of government and public institutions. These contemporary values include diversity, transparency, accountability and efficiency. Reforms to introduce regulatory and support structures that prioritise and facilitate these values in the judicial arm has proved challenging and, sometimes, contentious. This article reports on a survey of Australian judicial officers (n = 142) from across different jurisdictions. Participants were asked what they considered to be the most pressing challenges that face the various levels of the Australian judiciary, and whether the current regulatory and support environment achieves international best practice. The responses provide a nuanced picture of the state of the modern Australian judiciary as it appears to those within it. The study facilitates an understanding of the degree to which judicial officers are satisfied with the current legal and regulatory framework and, where they are dissatisfied, the nature of their disquiet. While not seeking to offer complete resolutions to the many issues canvassed, the data and analysis presented in this article serve as an interruption to regulatory and academic studies of the Australian judiciary, with the potential to illuminate and re-orientate the reform conversation in light of the judicial perspective on these various issues.

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I Introduction

Judges are more open to public scrutiny than ever before. Their work is generally conducted in open court, sometimes with proceedings broadcasted or digitally streamed. Their decisions, conduct and attitudes are widely reported and critiqued. In the words of Professor John Williams, 'exponential commentary and criticism is the new reality'.[1] In the United States, websites rank and comment on judicial performance.[2] Similarly, in New Zealand, a ranking of judges claims to be 'the "go to" resource for lawyers and the broader public'.[3] Some courts have adopted a proactive approach, hiring media officers to assist in the communication of their work, occasionally making public comment and permitting media interviews with judicial officers.[4] A few judges and courts have taken the plunge into social media.[5] Researchers are also gaining increasing access to judicial officers in order to

[1] John M Williams, 'Of "Fragile Bastions", "Political Judges" and "Robust Debates": Judges and Their Critics' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 210, 210.

[2] See, eg, *The Robing Room: Where Judges Are Judged* (Web Page) <http://www.therobingroom.com/md/Default.aspx?state=MD>, archived at <https://perma.cc/DZY4-QHKS>.

[3] Vince Siemer, '2014 New Zealand Judge Survey Results Are Out', *Kiwis First: Legal News From New Zealand* (Blog Post, 4 July 2014) <http://www.kiwisfirst.com/2014-new-zealand-judge-survey-results/>, archived at <https://perma.cc/KD5V-4FG5>. Judges are reportedly ranked by intelligence, fairness, legal knowledge and personal character.

[4] For a discussion of early developments in this vein, see Elizabeth Handsley, 'Can Public Sector Approaches to Accountability Be Applied to the Judiciary?' (2001) 18(1) *Law in Context* 62, 94–5.

[5] For example, in 2013, it was reported that the Supreme Court of Victoria would refashion its website as a 'multi-media hub with video on demand, summaries of judgments and capacity for the community to leave comments on news from the court', including what the then Chief Justice said was a 'plan that a retired judge might write a regular blog for the court website to create greater community understanding around controversial issues': Chris Merritt, 'Retired Judge to Blog for Supreme Court', *The Australian* (online, 22 October 2013) <https://www.theaustralian.com.au/business/legal-affairs/retired-judge-to-blog-for-supreme-court/news-story/0d5989ec224937dc782ed3872e074dac>. While that blog no longer appears on the Supreme Court's website, former Justice Lex Lasry is one example of a judicial member of that Court who tweets, including during his time in office: @Lasry08 (Lex Lasry) (Twitter) <https://twitter.com/lasry08>, archived at <https://perma.cc/638A-6TB9>. See generally Alysia Blackham and George Williams, 'Social Media and Court Communication' [2015] (3) *Public Law* 403; Alysia Blackham and George Williams, 'Social Media and the Judiciary: A Challenge to Judicial Independence?' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 223.

learn more about the judicial role.[6] The Judicial Conference of Australia, a professional association for judicial officers, has taken on the role of defending the judiciary from comment that is perceived to be inaccurate or unfair, or responding to proposals for reform.[7] In some jurisdictions, judges have appeared and given evidence before parliamentary committees.[8] Yet, despite this increased activity in the public realm, there is much about the judicial experience of judging and the court system that is not well understood.

Judicial officers rarely speak candidly about being a judge or about the strengths and shortcomings of the judicial system.[9] Instead, on the occasions that those in senior positions in the judiciary do give speeches or interviews, they tend to offer reflections upon matters of high principle, frequently from the vantage point of legal history.[10] Yet, the experiences and views of judges on the judicial system, and judicial support and regulation are matters of real concern: understanding how judicial officers experience challenges in their role can assist in crafting appropriate reform, as well as indicating where greater research and regulatory efforts are most desirable.

Academic and regulatory debates in Australia over judicial reform are presently insufficiently tested against judicial experience and perspective. To date, judicial perspectives are predominantly gained through the public statements of current or former judges, confidential consultations between the government and the heads of jurisdiction, or limited empirical work. In this latter respect, the most important work is that undertaken by Professors Sharyn Roach Anleu and Kathy Mack, who have conducted extensive

[6] See, eg, Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An Overview of Findings' (2008) 18(1) *Journal of Judicial Administration* 5 ('The National Survey of Australian Judges'); Heather Douglas and Francesca Bartlett, 'Practice and Persuasion: Women, Feminism and Judicial Diversity' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 76.

[7] See, eg, 'Inaccurate Reporting of Judge's Sentencing Reasons', *Judicial Conference of Australia* (Blog Post, 29 November 2017) <http://www.jca.asn.au/inaccurate-reporting-of-judges-sentencing-reasons-30-november-2017/>, archived at <https://perma.cc/ASR6-A4QD>.

[8] See, eg, 'Senior Judges Give Evidence on Increased Court and Tribunal Fees', *UK Parliament* (Web Page, 25 January 2006) <https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-20151/courts-tribunals-fees-charges-fourth-evidence-15-16>, archived at <https://perma.cc/3NQG-AK79>.

[9] For two notable exceptions, see Justice Michael Kirby, 'What is it Really Like to be a Justice of the High Court of Australia?: A Conversation between Law Students and Justice Kirby' (1997) 19(4) *Sydney Law Review* 514; Justice Susan Kiefel, 'On Being a Judge' (Public Lecture, The Chinese University of Hong Kong, 15 January 2013).

[10] See, eg, Chief Justice Robert French, 'The Rule of Law as a Many Coloured Dream Coat' (Annual Lecture, Singapore Academy of Law, 18 September 2013).

empirical research on the Australian judiciary, including two magistrate experience surveys (2002 and 2007) and a judicial experience survey (2007).[11]

This article reports on quantitative and qualitative survey research carried out by the authors — which follows in the path forged by Roach Anleu and Mack in the Australian judicial sphere — but seeks to complement it in two key ways. The first is by shifting the focus of the empirical questions to regulatory challenges, and the second by seeking to understand the judicial perspective a decade after Roach Anleu and Mack undertook their multi-jurisdictional survey,[12] and in the wake of some significant developments affecting the judiciary.[13] These include the controversy that attended the appointment of Chief Justice Tim Carmody in Queensland,[14] experimentation with reform of the process for making appointments to the federal judiciary,[15] and the adoption of judicial complaints mechanisms in a number of

[11] See Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave Macmillan, 2017); Sharyn Roach Anleu and Kathy Mack, 'Managing Work and Family in the Judiciary: Metaphors and Strategies' (2016) 18(2) *Flinders Law Journal* 213; Sharyn Roach Anleu and Kathy Mack, 'Judicial Performance and Experiences of Judicial Work: Findings from Socio-Legal Research' (2014) 4(5) *Oñati Socio-Legal Series* 1041 ('Judicial Performance'); Anne Wallace, Kathy Mack and Sharyn Roach Anleu, 'Work Allocation in Australian Courts: Court Staff and the Judiciary' (2014) 36(4) *Sydney Law Review* 669 ('Work Allocation'); Sharyn Roach Anleu and Kathy Mack, 'Job Satisfaction in the Judiciary' (2013) 28(5) *Work, Employment and Society* 683; Kathy Mack and Sharyn Roach Anleu, 'In-Court Judicial Behaviours, Gender and Legitimacy' (2012) 21(3) *Griffith Law Review* 728 ('In-Court Judicial Behaviours'); Mack and Roach Anleu, 'The National Survey of Australian Judges' (n 6); Kathy Mack and Sharyn Roach Anleu, 'The Security of Tenure of Australian Magistrates' (2006) 30(2) *Melbourne University Law Review* 370 ('The Security of Tenure').

[12] Mack and Roach Anleu, 'The National Survey of Australian Judges' (n 6).

[13] This is not just an Australian concern. The Judicial Attitudes Survey conducted in England and Wales, Scotland and Northern Ireland provides a remarkable snapshot of the judiciary from the inside. Conducted for the first time in 2014, the survey is now providing longitudinal data about judicial working conditions. For the findings made in England and Wales, see Cheryl Thomas, UCL Judicial Institute, *2014 UK Judicial Attitude Survey: Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals* (Report, 4 February 2015); for the findings made in Scotland, see Cheryl Thomas, UCL Judicial Institute, *2014 Judicial Attitude Survey: Findings Covering Salaried Judges in Scotland* (Report, 20 November 2014).

[14] See Rebecca Ananian-Welsh, Gabrielle Appleby and Andrew Lynch, *The Tim Carmody Affair: Australia's Greatest Judicial Crisis* (NewSouth Publishing, 2016).

[15] See, eg, Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–13' (2015) 37(2) *Sydney Law Review* 187.

jurisdictions.[16] These, as well as other less discernible influences (such as technological innovation or familiarity with developments in comparable foreign jurisdictions) may plausibly have affected the way Australian judicial officers understand and experience their role.

Our intention in this article is to use the data to disrupt the current scholarly and regulatory debate in relation to key aspects of judicial support and regulation. In doing so, we will explore how this data calls for a reorientation of these debates, or where it demonstrates the need for further research to be undertaken. We do not purport to proffer full and concrete solutions to the regulatory challenges that we consider; rather, we highlight the need for reassessment, further study and research.

The article begins in Part II with a description of the methodology employed in the survey, and offers some general comments about its efficacy and limitations. Part III outlines in brief the demographics of the survey participants. The article then moves on to consider the substantive data, organised into three broad themes: appointment (Part IV); the working life of the judge (Part V); and complaints, discipline, tenure and removal (Part VI). In each area, some contextual background is provided before the data are presented, and a thematic discussion and analysis then follows. Part VII concludes by highlighting the key themes that emerge and suggesting some further research directions signaled by the empirical disruption offered by the data.

II Methodology

In 2016, we conducted a survey to investigate the views of Australian judges across different federal, state and territory jurisdictions regarding the regulatory and working challenges they face. The survey, in which a total of 142 judicial officers participated, was conducted on the following bases:

- completion of the survey was voluntary;
- all data were collected anonymously and, while a small amount of demographic information was requested to assist with analysis, this portion of the survey was optional;
- the survey was administered online, although a Word version was available on request which participants could complete and return by post or email;

[16] See Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 30.

- the research team sought the approval of Heads of Jurisdiction[17] to survey the judicial officers of their court and the survey was not distributed to the judicial officers of any court where prior approval had not been obtained; and
- at the conclusion of the project, Heads of Jurisdiction who granted approval for the judicial officers of their court to participate were provided with a short summary of the results, which could be distributed to judges in their court at the Head of Jurisdiction's discretion.

The questions corresponded with the life cycle of judges by looking at appointment issues, challenges throughout the working life of a judge (such as education, ethical support, workload, remuneration, and staffing and support), and matters relating to discipline and removal. The survey was divided into three sections. The first section (Part A) asked participants the extent to which they believed that 13 listed challenges confront the judiciary in their jurisdiction. The second section (Parts B, C and D) took its design from a 2015 report of the United Kingdom's Bingham Centre for the Rule of Law, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice' ('Bingham Report').[18] That report details 'best practice' in the areas of judicial appointment, tenure, discipline and removal across all Commonwealth countries, including the Australian federal, state and territory court systems. In the second section of the survey, participants were asked the extent to which they agreed that the current arrangements in their jurisdiction satisfied the Bingham Report's descriptions of best practice. In this section of the survey, as in the first, each question presented the judicial officer with a Likert scale,[19] from which the respondent could select a response (strongly agree,

[17] Heads of Jurisdiction approached were: the Federal Court of Australia; the Family Court of Australia; the Federal Circuit Court of Australia; the Supreme Courts of all six states and the Northern Territory; the District Courts of New South Wales, Queensland, South Australia and Western Australia; the County Court of Victoria; the Local Courts of New South Wales and the Northern Territory; and the Magistrates Courts of Victoria, Queensland, South Australia, Tasmania and Western Australia.

[18] Jan van Zyl Smit, 'The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice' (Research Report, Bingham Centre for the Rule of Law and British Institute of International and Comparative Law, 2015).

[19] A Likert scale measures an individual's response through the use of a questionnaire with a point scale system.

agree, neutral, disagree, strongly disagree), and participants were given an opportunity to explain or comment on their responses to each question.[20]

The third section of the survey asked participants to provide specific demographic information. This included information about gender, length of judicial service, jurisdiction (New South Wales, Victoria, Tasmania, Western Australia, South Australia, Queensland, Northern Territory or Federal),[21] and court level (Magistrates Court ('Magistrates')/Local Court ('Local'); District Court ('District')/County Court ('County')/the Federal Circuit Court of Australia ('Federal Circuit'); or Supreme Court ('Supreme')/the Federal Court of Australia ('Federal')/the Family Court of Australia ('Family')).[22] In Parts IV–VI of this article, when quoting from the open responses of participants, we generally stipulate these demographic data to provide the context of the comment. However, this information is omitted where there is a real risk that it would identify the respondent.

In some courts, the Head of Jurisdiction granted us permission to email each judicial officer individually (sometimes using a list of contact details provided by the Head of Jurisdiction) with a letter of invitation, information on the survey, and an embedded link to the online survey. In other courts, the Head of Jurisdiction offered or agreed to distribute the survey internally on our behalf. Heads of Jurisdiction and individual judicial officers to whom the survey had previously been sent were contacted with a reminder and notice of when the online survey portal would close. Only three of 142 respondents submitted their responses via a hardcopy of the survey, having requested a Word version.

The only court that expressly declined to participate was the Federal Circuit Court of Australia, although no response to the request for approval to contact judicial officers was received from the Heads of Jurisdiction of the Supreme Court of Victoria, the District Court of South Australia, the Magistrates Court of Queensland and the Local Court of the Northern

[20] A number of these comments are reproduced in this paper. Where necessary, they have been lightly edited in order to remove any typographical errors.

[21] The only jurisdiction not included in the survey was the Australian Capital Territory ('ACT'). When the survey was administered in March 2016, there were just 11 judicial officers serving in that jurisdiction. It was felt by the research team that members of a group with such low numbers might have legitimate concerns about the extent to which their anonymity could be preserved upon publication of the data. The two jurisdictions with the lowest numbers of judicial officers included in the survey had almost double the number of the ACT (being Tasmania and the Northern Territory, with 19 and 20 judicial officers respectively).

[22] The High Court of Australia was not included in the survey on the basis of reasoning similar to that listed above regarding the ACT: see above n 21.

Territory. Our assumption that judicial officers in those courts were not sent the survey is supported by the demographic data collected.

III Demographic Snapshot

The values of independence and impartiality have been a critical influence — and indeed an important constraint — upon the development of mechanisms for the regulation and accountability of the judicial arm of government. They are also of personal importance across the ranks of the judiciary, regardless of individual characteristics or the level and jurisdiction within which the judicial officer presides. However, those latter considerations may assume a more variable significance in respect of efforts to regulate the judiciary in order to promote other values, such as diversity or efficiency. Accordingly, the survey administered by the authors sought some basic demographic data from participants in order to explore associations between those data and the responses provided. Participants were asked about their gender, length of service, jurisdiction and court level.

Tests were conducted to determine whether there was a statistically significant relationship between pairs of discrete variables using the chi-squared test. These revealed a number of associations with gender. Female respondents were significantly more likely than males to provide responses indicating that 'quality of appointment', 'diversity', 'use of part-time judges' and the 'adequacy of disciplinary and removal processes' were challenges facing the judiciary. Court level also revealed some interesting associations. Respondents from superior and lower courts were significantly more likely than those from intermediate courts to flag 'workload' as a challenge. Lower court judicial officers were also significantly more likely to see 'judicial pensions and remuneration' as a challenge, and were less satisfied with the 'ethical support' available to them.

Although 142 individuals responded to the survey, some chose not to answer all questions (in the presentation of the data below, the number of responses for each question is indicated). The demographic questions were answered by 130 respondents, of whom 58% were men and 42% were women. Given that women presently comprise only 37% of the Australian judiciary,[23] this reflects a proportionately higher response from female judicial officers than male judicial officers. The profile of the respondents by length of judicial

[23] 'Judicial Gender Statistics', *Australian Institute of Judicial Administration* (Web Page, 7 March 2018) <https://aija.org.au/wp-content/uploads/2018/03/JudgesMagistrates.pdf>, archived at <https://perma.cc/33YG-754A> ('Judicial Gender Statistics').

service, jurisdiction and court level is broken down in Figures 1–3 below. When compared to the judiciary overall,[24] these reveal that our respondents were more likely to be from superior and intermediate courts than would be expected of the general population of judicial officers. However, the jurisdictional affiliation of the respondents to the survey roughly conforms to the geographical spread of the Australian judiciary.[25]

Figure 1: Length of Judicial Service

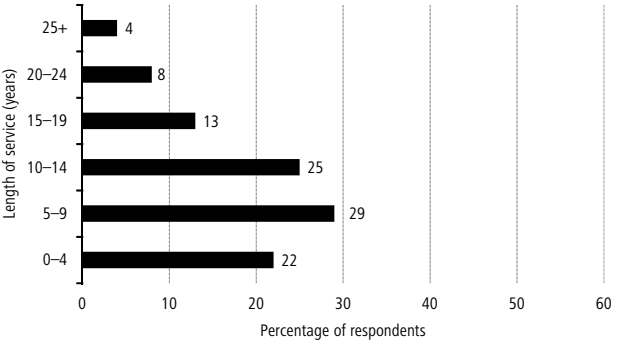
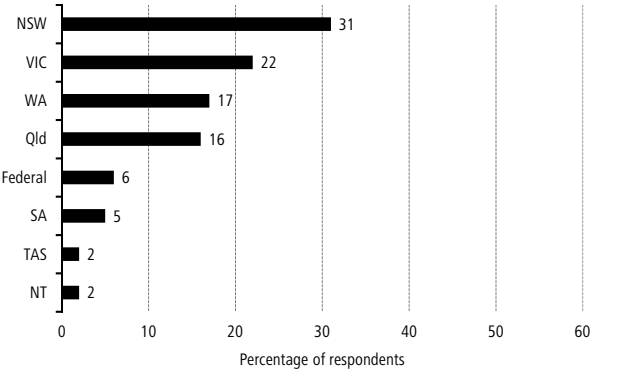


Figure 2: Jurisdictional Affiliation[26]

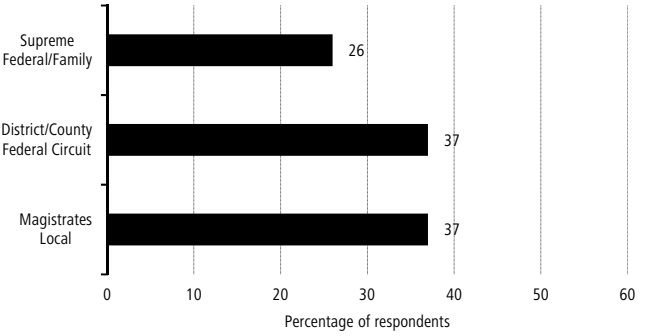


[24] See Brian Opeskin, 'The State of the Judicature: A Statistical Profile of Australian Courts and Judges' (2013) 35(3) *Sydney Law Review* 489 ('The State of the Judicature').

[25] Ibid 507.

[26] ACT is not included in this graph since it was not invited to participate in the survey: see above n 21.

Figure 3: Level of Court Hierarchy



IV Judicial Appointment

A *Context*

The process of judicial appointment in Australia has largely retained its traditional form. That is, it remains the gift of the executive, exercised with 'unfettered discretion'[27] by the relevant Attorney-General recommending judicial candidates to Cabinet, with appointment formally made by the Governor, the Governor-General or the Administrator of the jurisdiction. In several jurisdictions, changes have been introduced with the intention of enhancing the process and transparency. For instance, in 2008, the federal Attorney-General Robert McClelland introduced reforms to the process of appointment of judicial officers in the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court (since renamed the Federal Circuit Court).[28] This initiative included setting out criteria against which judicial candidates were to be evaluated, setting up a public process calling for expressions of interest and convening an advisory panel to assess candidates.[29] The professed aim of these changes was to seek 'to increase the diversity of the federal judiciary' with respect to gender, residential location, professional background and experience, and cultural background.[30]

[27] Handsley and Lynch (n 15) 188.

[28] For a comprehensive discussion of these reforms, see Handsley and Lynch (n 15).

[29] Attorney-General's Department, *Australian Government, Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary through a Transparent Process* (Report, September 2012) 1–2 ('*Judicial Appointments*').

[30] Ibid 1.

Appointments to the High Court were exempt from these reforms, except for the Attorney-General's stated intention to consult more broadly about potential candidates for that body than is required under s 5 of the *High Court of Australia Act 1979* (Cth).[31] Although McClelland's reforms operated for a number of years, they 'slipped from the departmental website' after the election of the conservative government in September 2013,[32] and no longer reflect federal practice.[33]

Reform has also been instigated at the state and territory level and, while this has been varied, it has proven thus far to be more enduring in those jurisdictions where it has been undertaken.[34] For example, in 2005 in Victoria, Attorney-General Rob Hulls indicated he was seeking to 'secure both the best and the brightest *and* a judiciary that reflects the community it serves'.[35] He introduced a broader consultation process, the identification and use of specific criteria and advertising for expressions of interest.[36] The system remains in place today, with potential candidates able to apply online for judicial office.[37]

The changes described above have been publicly justified by a desire to enhance diversity.[38] This responds to the relative homogeneity of the judiciary, especially in superior courts across Australia.[39] Taking gender as one example of the various dimensions of diversity, as of March 2018, the percentage of female judicial officers in Australian courts was 37%.[40] The highest percentage

[31] Ibid 3.

[32] Handsley and Lynch (n 15) 188.

[33] Ibid.

[34] For a recent survey that includes all these jurisdictions, see Judicial Conference of Australia, *Judicial Appointments: A Comparative Study* (Report, April 2015). Since that report was produced, Queensland has introduced a protocol for judicial appointments in the wake of the Carmody affair: Department of Justice and Attorney-General (Qld), 'Protocol for Judicial Appointments in Queensland', (Web Document) <http://www.courts.qld.gov.au/__data/assets/pdf_file/0011/472439/ja-pub-protocol-for-judicial-appointments-in-queensland.pdf>, archived at <https://perma.cc/2VWN-JUHV>.

[35] Rob Hulls, 'We Have Thrown Open the Process for Judicial Appointment, Previously Subject to Secrecy and Whim' (2005) 134 (Spring) *Victorian Bar News* 11, 11 (emphasis in original).

[36] Ibid.

[37] See Victorian State Government, 'Judicial Appointments', *Justice and Regulation* (Web Page, 23 July 2018) <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>, archived at <https://perma.cc/5J2F-EWKF>.

[38] *Judicial Appointments* (n 29) 1. See also Handsley and Lynch (n 15) 189–90; Hulls (n 35) 11–12.

[39] See Opeskin, 'The State of the Judicature' (n 24) 511.

[40] This calculation is based on the figures contained in Judicial Gender Statistics (n 23).

can be found in the Australian Capital Territory at 50%; the highest percentage for a superior court is in the High Court at 43%.[41] However, the average percentage of women judges serving in other superior courts is 26%.[42] In some superior courts, the percentage of women is markedly low. In the Western Australian Supreme Court, women make up only 15% of the bench, and in the New South Wales Supreme Court (including the Court of Appeal), the percentage of female judges is 23%.[43] There is still a considerable way to go before women in the judiciary reflect their prevalence among law graduates or in the general population.

Judicial diversity obviously extends beyond gender to include many other attributes and experiences, including ethnic background, professional experience, education, socio-economic background, and sexuality. Although there are some data on other background characteristics of the Australian judiciary, this has traditionally been very limited.[44] Lee and Campbell acknowledged that it may be 'impossible to assemble relevant and reliable data' on such questions 'without seeking answers from individual judges to questionnaires which many judges would most probably regard as intrusive, and perhaps even impertinent'.[45] While reliable statistics are hard to come by, it remains fair to assume that many Australian judges conform to the 'judicial norm' described by English jurist Sir Terence Etherton. He described the English judiciary as dominated by 'the life experience of middle-class, white, heterosexual men, whose entire pre-judicial career has been as barristers in private practice'.[46]

While most judicial appointments are received with professional approbation and public indifference, from time to time an Australian judicial appointment is greeted with considerable controversy. This has generally been due to concerns that political considerations have been influential in the selection of particular candidates, or whether the candidate in question has the appropriate character and experience for the office. The appointment of

41 Ibid.

42 Ibid.

43 Ibid.

44 Kathy Mack and Sharyn Roach Anleu have obtained some data on these attributes in their national survey: Mack and Roach Anleu, 'The National Survey of Australian Judges' (n 6) 10–14.

45 HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 36–7.

46 Sir Terence Etherton, 'Liberty, the Archetype and Diversity: A Philosophy of Judging' [2010] (October) *Public Law* 727, 746.

Murphy J to the High Court and, more recently in 2014, of Carmody CJ to the Supreme Court of Queensland, are notable examples.[47] The appointment and tenure of Carmody CJ was particularly notable in that we saw current and former members of the Queensland judiciary speak out about his appointment.[48]

While rare, there have been a number of occasions where current and former members of the judiciary have entered the debate about appointments. For instance, in 2015, the Australasian Institute of Judicial Administration released a set of 'Suggested Criteria for Judicial Appointment', which it sent to all Attorneys-General and Shadow Attorneys-General.[49] Individual judges have also expressed their views. Stephen Gageler, before he was appointed to the High Court, wrote on judicial appointments, noting particularly that merit alone would be unlikely to be a sufficient criteria and that '[c]onsiderations of geography, gender and ethnicity all can, and should, legitimately weigh in the balance'.[50] He articulated his own ideal judicial appointments process:

> I would have one method for identifying the pool of potential judicial candidates and another for choosing amongst them. Both stages would be transparent. The first stage would be solely concerned with identifying persons having what I have described as the essential judicial attributes. At the second stage, I would be happy to see the broader considerations to which I have referred openly brought to the fore and debated.[51]

Nonetheless, we have limited understanding of the wider judiciary's views on the current system and possible reform of the appointments system. It is against this background of traditional practice, modest reform, recent controversy and limited understanding of the judicial perspective that we sought judicial views of the existing appointments processes across Australia.

[47] Gabrielle Appleby and Suzanne Le Mire, 'The Australian Judiciary: Resistant to Reform?' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 35, 38–9.

[48] See, eg, Joshua Robertson, 'Tim Carmody Hits Back at Criticism from Retiring Queensland Supreme Court Judge', *The Guardian* (online, 27 March 2015) <https://www.theguardian.com/australia-news/2015/mar/27/tim-carmody-hits-back-at-criticism-from-retiring-queensland-supreme-court-judge>, archived at <https://perma.cc/7DAH-4V46>.

[49] Australian Institute of Judicial Administration, *Suggested Criteria for Judicial Appointments* (Web Page, 2015) 3 <http://aija.org.au/wp-content/uploads/2017/10/Suggested-Criteria-for-Judicial-Appointments-AIJA-2015.pdf>, archived at <https://perma.cc/FP77-EUH2>.

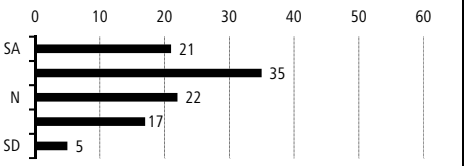
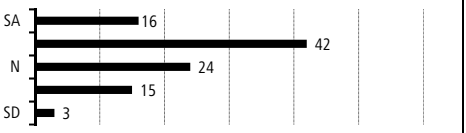
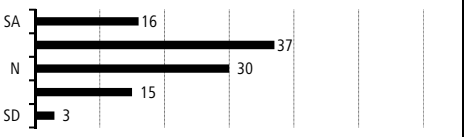
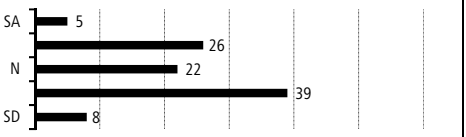
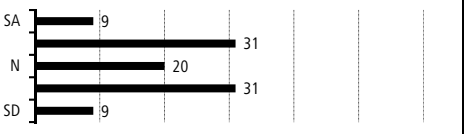
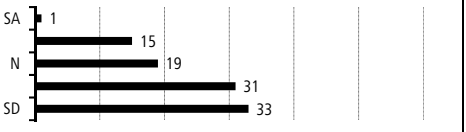
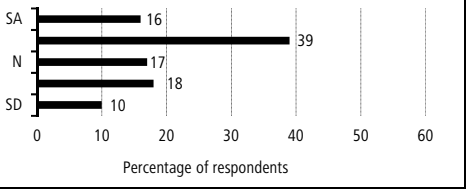
[50] Stephen Gageler, 'Judicial Appointment' (2008) 30(1) *Sydney Law Review* 157, 158.

[51] Ibid 159.

B *Survey Data*

Figure 4 illustrates the responses to questions, asking first to what extent the respondent agreed that various aspects of the judicial appointments system were a challenge facing the judiciary in their jurisdiction (Qs 1a, 1b and 1c), and then to more specific propositions based upon the Bingham Report's discussion of this topic across its survey of Commonwealth countries (Qs 2–5). The graphs show the percentage of respondents to that question who answered strongly agree ('SA'), agree ('A'), neutral ('N'), disagree ('D') or strongly disagree ('SD'). Discussion on each follows Figure 4.

Figure 4: Appointments Process

Q1a	Integrity of appointments process is a challenge	
Q1b	Quality of appointments is a challenge	
Q1c	Judicial diversity is a challenge	
Q2	Appointment arangements satisfy Bingham best practice	
Q3	Executive should retain sole responsibility for appointments	
Q4	Legislature should have some responsibility for appointments	
Q5	Independent commission should have responsibility for appointments	

1 *Integrity of Appointments Process*

The responses to the proposition that the 'integrity of appointments process' is a challenge showed that judicial officers remain concerned about current appointments processes. Of the 142 respondents, 56% agreed or strongly agreed with the proposition, 22% were neutral and only 22% disagreed or strongly disagreed with it. A number of participants expressed satisfaction with the integrity of the current appointment process:

> Canvas, interview, recommend, appoint; all good.[52]

> ***

> In my experience judicial appointees possess outstanding integrity.[53]

Those who agreed integrity of appointments presented a challenge gave a variety of reasons. For some, it was about the potential for politics to creep inappropriately into the process:

> In all jurisdictions I observe appointments being made, some of which do not appear to be addressing the needs of a particular court, rather the appointment of people who are simply mates of the current attorney, or who are appointed as a political favour designed to repay past obligations, or to open up that person's previous position for future advantage. Even if only 25% of appointment[s] are made in this way, the reputation and efficiency of the court concerned is severely compromised.[54]

Indeed, for a number of respondents from Queensland, the Carmody appointment was front of mind:

> The premier's determination to appoint a partisan, under-qualified Chief Justice, with the boast that the appointee had the full support of the editor of the Courier Mail shortly after a recent change in editor was gravely worrying.[55]

Several judicial officers explained their negative views of the integrity of appointments by referring to a lack of transparency and consistency:

> Appointments are still entirely in the gift of the AG [Attorney-General], and are shrouded in mystery. The process changes from government to government

[52] Respondent (Male, 5–9 years' service, NSW, District/County/Federal Circuit, March 2016).

[53] Respondent (Male, 10–14 years' service, NSW, Magistrates/Local, March 2016).

[54] Respondent (Female, 25+ years' service, NSW, District/County/Federal Circuit, March 2016).

[55] Respondent (Demographic data omitted, March 2016).

> and Attorney to Attorney, leaving governments and appointees alike subject to criticism for lack of transparency, favouritism, bias and 'stacking'.[56]

Articulating the complexity of *reforming* the judicial appointments system, one respondent said:

> The more that arguments are advanced for any criteria for appointment outside of apparent independence and merit (based on intellect, personality and experience) the greater the challenge — those who would have diversity or 'representative' appointments bring the soft corruption of those who would appoint political favourites with them, because appointment can be justified on grounds other than merit. Look at the recent Queensland fiasco [referring presumably to the appointment of Chief Justice Carmody].[57]

2 *Quality of Appointments*

The responses to the proposition that 'quality of appointments' was a challenge showed that judicial officers are also concerned about the quality of appointments resulting from the current processes (Figure 4). Of the 142 respondents, 58% agreed or strongly agreed with the proposition, 24% were neutral and only 18% disagreed or strongly disagreed with it.

These responses revealed a correlation with gender, with female respondents more critical of the quality of appointments. Some 71% of female respondents agreed or strongly agreed that the quality of appointments was a challenge, compared to only 47% of male respondents. Male respondents were more likely to be neutral (29%) or disagree or strongly disagree (24%) than female respondents (14.5% and 14.5% respectively).

One respondent focused on qualities that they thought were currently overlooked:

> Courtroom experience is underrated as a prerequisite. Trial courts have big reserve lists and it is important to have judges who can hit the ground running. There should also be more court of appeal appointments from experienced trial lawyers rather than those practising primarily in the rather artificial environs of the court of appeal. We get far too many trials overturned on overly technical bases, or sentences trifled with due to a lack of trial experience in court of appeal judges. It is a flaw in our system, where practitioners specialise, that

[56] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[57] Respondent (Male, 0–4 years' service, Qld, Supreme/Federal/Family, March 2016).

> appeal judges often sit on cases in areas of law where they are entirely inexperienced leading to overly technical and stilted decision making.[58]

Two respondents were interested in the extent to which judicial roles appealed to potential candidates, particularly in light of the different benefits that apply at different jurisdictional levels:

> I think most appointments are, by and large, sound. However there are clearly some excellent candidates who are not appointed. It has to be accepted that some of these may have declined for reasons best known to them. It cannot be said that the bench is for everyone. It is better if those qualified who hold that view vis-à-vis themselves decline appointment. Nevertheless it would be worth studying what discourages some apparently eminently qualified practitioners from accepting appointment.[59]
>
> ***
>
> While well paid, the absence of medical retirement, the poor leave entitlements and restrictions around superannuation contributions make [an appointment to a lower court] less attractive than other jurisdictions.[60]

Another respondent expressed concern as to the consequences of appointment of variable quality candidates:

> We have had a number of appointees who are not skilled to perform their role in this jurisdiction which creates a corresponding burden on colleagues.[61]

3 *Judicial Diversity*

Responses to the proposition that 'judicial diversity' was a challenge again showed that judicial officers are concerned about the diversity of appointments resulting from the current process (Figure 4). Of the 142 respondents, 53% agreed or strongly agreed with the proposition, 30% were neutral and only 18% disagreed or strongly disagreed with it.

The responses to this question also revealed a correlation with gender, with female judges again emerging as more concerned about diversity. Female respondents were more likely than male respondents to indicate that diversity was a challenge: 71% of female respondents agreed or strongly agreed with the

[58] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[59] Respondent (Female, 10–14 years' service, NSW, Supreme/Federal/Family, March 2016).

[60] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

[61] Respondent (Female, 10–14 years' service, Federal, Supreme/Federal/Family, March 2016).

proposition, while only 47% of male judicial officers did so. At the other end of the scale, 5% of male respondents strongly disagreed that diversity posed a challenge, compared with no female judicial officers.

Some participants who agreed that diversity was a challenge cited ongoing barriers to appointing diverse candidates:

> People advising and making appointments tend to like and recommend people who are similar to themselves. Insufficient regard is had in all jurisdictions to the appointment of qualified, experienced people, but with a non-standard background, or even gender![62]

Others noted that diversity was not simply a gender issue:

> Gender diversity is far from the only problem. Diversity in terms of socio-economic background and racial and ethnic diversity also need attention. The effect that longevity in the legal profession (and rising into its senior ranks) seems to have [is] an increasing conservatism of outlook, work practices, attitudes to activities outside the law, attitudes to family responsibilities generally need to be addressed. These things cannot really be addressed without addressing diversity in the legal profession generally — that is, the pool of quality and experienced candidates coming through.[63]

Several of those who did not view diversity as a challenge expressed doubts about the value of diversity itself, indicating they were unconvinced by the arguments that have been made in favour of it:

> I do not agree with diversity for its own sake. Judges make individual decisions, rather than collective decisions. What is more important is balance possessed by each judge, not balance across the court.[64]
>
> ***
>
> The intelligent experienced judicial officer is better equipped to implement Parliament's social agenda than an inexperienced officer from a 'diverse' social background.[65]
>
> ***

[62] Respondent (Female, 25+ years' service, NSW, District/County/Federal Circuit, March 2016).

[63] Respondent (Female, 0–4 years' service, Federal, Supreme/Federal/Family, March 2016).

[64] Respondent (Male, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

[65] Respondent (Male, 0–4 years' service, Vic, District/County/Federal Circuit, March 2016).

> There is no doubt that governments both say that they are appointing on diversity grounds and are doing so. Diversity is not merit. Who asks if their surgeon or engineer comes from a diverse background? Or is law no longer a learned profession?[66]

4 *Compliance with Best-Practice Appointment*

The next question with respect to appointments explored what a best-practice version of an executive-only appointment model might look like. It suggested that such a model should be buttressed by a number of safeguards in order to be 'reliable and legitimate'. The question was prefaced by the following passage from the Bingham Report:

> Executive-only appointment systems … require a combination of legal safeguards and settled political conventions in order to be a reliable and legitimate means of appointing judges. The precise mix may differ between jurisdictions, but should include at least transparency regarding the criteria for appointment and the procedures followed, a requirement of consultation with senior judges and possibly also opposition politicians, and ideally the existence of an independent body to provide oversight and deal with complaints.[67]

Respondents were then asked to indicate the extent to which they agreed that the current arrangements for appointing judicial officers in their jurisdiction satisfied the Bingham Report's description of minimal 'best practice'. Some 47% of judicial officers disagreed or strongly disagreed that their jurisdiction complied with the Bingham Report's description of best practice; 22% were neutral and 31% agreed or strongly agreed that their jurisdiction met best practice.

Several respondents took issue with the Bingham Report's description of best practice:

> I do not accept that that report describes best practice. While there is scope for improving transparency in appointments, all these measures proved in practice to be a waste. Applicants for judicial office writing essays is ridiculous. The bureaucratic process leads to long delays in appointments.[68]

***

[66] Respondent (Male, 0–4 years' service, Qld, Supreme/Federal/Family, March 2016).

[67] van Zyl Smit (n 18) 24.

[68] Respondent (Male, 0–4 years' service, NSW, Supreme/Federal/Family, March 2016).

> I do not agree with the proposition that the quoted passage is appropriately regarded as '… a minimal best practice.' It is not. I strongly do not agree with the proposition that opposition politicians should be consulted, nor that an independent body should provide some undefined 'oversight'.[69]
>
> ***
>
> I mostly agree, but I am not sure about the independent body to provide oversight. That could turn easily into a second-guessing of appointments, by a group of people who themselves have been appointed. As I said, I think the best modifier of extremities in the appointment process is a strong and respectful working relationship between the Chief Justice of the jurisdiction, and the executive and Attorney of the day. Too much 'oversight' can lead to compromise appointments and actually be a dampener on diversity.[70]

5 *Alternative Modes of Appointment*

The possibility of adding an additional process incorporating a judicial commission or some form of legislative responsibility was explored in the next three questions of the survey. The Bingham Report stated that just 18.7% of Commonwealth jurisdictions appoint all judicial officers using an 'executive-only' model (though a greater percentage employ this method for their highest courts and/or the position of Chief Justice).[71] In other Commonwealth jurisdictions, there is 'some decision-making responsibility given to the legislature, or a judicial appointments commission'.[72] Respondents were initially asked to indicate the extent to which they agreed that it is appropriate that the executive retain sole decision-making responsibility for appointing judicial officers.

The responses to this question showed a remarkable degree of symmetry, with 40% agreeing or strongly agreeing that the executive should retain sole decision-making power, while 40% disagreed or strongly disagreed, 20% indicated neutrality (Figure 4).

Comments from those who disagreed with the retention of unadorned executive discretion over judicial appointments focused on the potential for 'manipulation' of the process,[73] and a concern that the 'motivation to appoint

[69] Respondent (Male, 5–9 years' service, NSW, Supreme/Federal/Family, March 2016).

[70] Respondent (Female, 0–4 years' service, Federal, Supreme/Federal/Family, March 2016).

[71] van Zyl Smit (n 18) 16.

[72] Ibid 25.

[73] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

a person who will act independently without fear or favour is decreased in this method'.[74]

While there was no statistically significant association between gender and response for the question, there was some indication that female respondents were more likely than males to disagree with the executive holding sole decision-making power: 49% of females disagreed or strongly disagreed, compared with 32% of males. It is possible that this reflects the greater concerns about diversity exhibited by female respondents, which some comments referenced. Several female judicial officers who disagreed saw the shift away from an 'executive-only' model as providing an opportunity to enhance diversity:

> An independent judicial appointments body is vital if gender balance and diversity are to be achieved at all levels of the judiciary.[75]

The remaining two questions on appointments processes tested the acceptability of two possible additions to the executive-only model. First, judicial officers were asked about whether involving the legislature would be appropriate or desirable. Second, participants were consulted about the addition of a judicial appointments commission (Figure 4). Judicial officers did not find legislative involvement appealing: 64% of respondents disagreed or strongly disagreed that this would be appropriate or desirable, while only 17% agreed or strongly agreed.

Not unexpectedly, several comments reflected a fear that such a process would increase the likelihood that politics would intrude:

> [It] [p]oliticises the process. Governments of the day (the executive) are elected to make decisions such as appointments. The balance is struck by the democratic process of changing governments and therefore changing appointment decision-makers from time to time.[76]

Others couched this concern more expressly in terms of a diminishment of the separation of powers:

> Umm. Separation of powers?[77]

***

[74] Respondent (Demographic data omitted, March 2016).

[75] Respondent (Demographic data omitted, March 2016).

[76] Respondent (Female, 15–19 years' service, Vic, Magistrates/Local, March 2016).

[77] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

> This sounds risky. It might work if the Bingham safeguards existed but it is not institutionally desirable in terms of separation of powers — could lead to populism and elected judges by default.[78]

Respondents were also asked whether it is appropriate or desirable that an independent judicial appointments commission be established and conferred with some decision-making responsibility (including the preparation of a shortlist of candidates from which the government must appoint) in the process for appointing judicial officers. There was a majority view of 55% that a judicial commission would be desirable, with 29% disagreeing.

Few comments were made to elaborate these responses. Those who agreed and commented saw a judicial commission as a significant step towards a more appropriate appointments process:

> This provides a greater likelihood of a fair, transparent selection and vetting process. It will enable candidates who don't 'look like' their predecessors to be considered, and give greater confidence in the independence from the government of the day from the selection and vetting process.[79]

Several who disagreed expressed concern about the likely composition and effect of such a body:

> An independent judicial appointments commission would be reflective of the elite of the profession making judgements based upon their own particular worldviews. They are not elected therefore they are not reflective of any particular base. It would be similar to allowing the Bar Councils to make appointments. Same old boy bent.[80]

C *Discussion*

The 'integrity of appointments process', 'quality of appointments' and 'judicial appointments' were all identified by 50% or more respondents as current challenges in their jurisdiction. This flies in the face of the easy trope that judges themselves are, of course, satisfied with the appointments system; after all, they were appointed under it.

This level of concern may reflect the high profile controversy that ensued from the elevation of Tim Carmody to the position of Chief Justice of

[78] Respondent (Female, 25+ years' service, Qld, Supreme/Federal/Family, March 2016).

[79] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[80] Respondent (Female, 15–19 years' service, Vic, Magistrates/Local, March 2016).

Queensland (which was recent at the time the survey was put into the field).[81] But even so, the survey results offer a clear affirmation that the topic of judicial appointments remains a fertile area for debate and further research. This is despite the fairly sustained academic and judicial commentary that the issue of appointment processes has received over the last few decades.[82] While some jurisdictions have taken steps to increase the transparency and rigour of the appointment process,[83] these remain the exception and there does not appear to be much political appetite in Australia for further or more widespread reform. Indeed, in the case of the Commonwealth, the enhanced consultation processes implemented in 2008 does not appear to have been used since the change of government in 2013.[84] This lack of political will stands in contrast to what this survey reveals about judicial interest in reform. With the data indicating that a majority of judicial officers (55%) were in favour of the creation of an independent commission, it seems that this issue is far from exhausted.

The survey also reveals a significant correlation between those judges concerned about the issue of integrity, quality and diversity of appointments, and gender. This provides us with a reminder of the importance of reflecting on the ways different judicial officers experience their role and that, as other academic work has found, women in general experience the judicial life differently.[85] It suggests that the current appointments process, with all its focus on increasing representativeness of the judiciary, still remains of acute concern to the group which is supposed to have benefited from that focus. It also suggests that progress to a more diverse judiciary might be advanced with greater understanding of the challenges and experiences of women judicial officers themselves.

The responses in relation to the reform of the appointments process also provide a salutary reminder of how complex reform can be in this area, the myriad factors that need to be considered, and the potential unintended negative consequences of a particular reform, such as an independent commission.

[81] See generally Robertson (n 48).

[82] See, eg, Gageler (n 50).

[83] See, eg, Hulls (n 35) 11–12.

[84] See above nn 28–33.

[85] See, eg, Mack and Roach Anleu, 'In-Court Judicial Behaviours' (n 11); Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013); Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013).

Finally, the data generate a note of caution about relying too heavily on judicial perceptions and ideas in relation to judicial regulation and reform. While they might provide an illuminating and important perspective, they should be supplemented with other evidence. For instance, the suggestion by one respondent that an independent appointments body might increase diversity has been questioned in other jurisdictions via longitudinal study.[86] The experience in England and Wales suggests that a reform of this type may not produce the dramatic change for which this particular respondent is hoping. Since the inception of the Judicial Appointments Commission in England and Wales in 2006, the 'diversity deficit' in England and Wales has proved to be stubbornly persistent, with only modest advances in the percentage of women, and minimal change in the numbers of judicial officers identifying as 'Black, Asian [or] Minority Ethnic'.[87] Significantly, the upper echelons of the English court structure have been especially impervious to any broadening in the diversity of the bench.[88] These results have led one commentator to argue that this should be addressed by returning power to the executive.[89]

V Judicial Working Life

A *Context*

Once appointed, there are a myriad dimensions to a judge's working life. These undoubtedly differ depending on the particular court to which they have been appointed, and also any occupancy of a special position within that institution. So much is obviously true of any attempt to compare different work environments in a particular profession. Accordingly, it is important to refer to the demographic information accompanying survey responses on this broad topic so as to appreciate these differences between jurisdiction and seniority.

[86] See Graham Gee and Erika Rackley, 'Diversity and the JAC's First Ten Years' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 1.

[87] Ibid 3, 7.

[88] Ibid 6.

[89] Graham Gee, 'Rethinking the Lord Chancellor's Role in Judicial Appointments' (2017) 20(1) *Legal Ethics* 4.

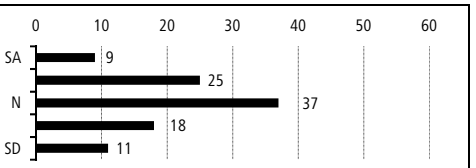
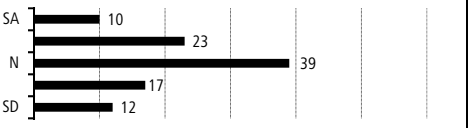
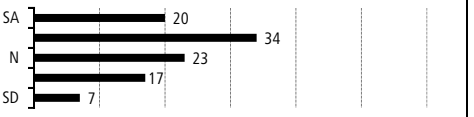
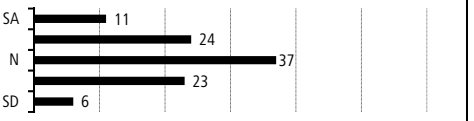
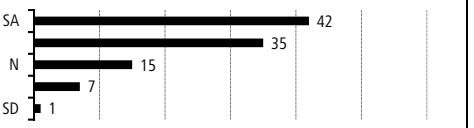
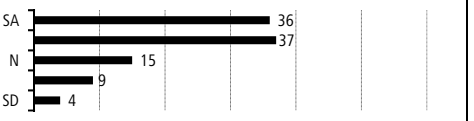
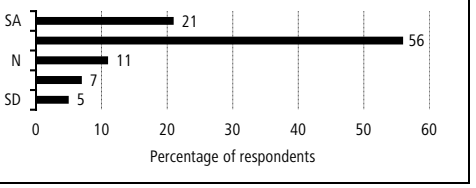
In this section, we consider the judicial working life in six respects:

- the impact of judges in an acting (or 'temporary') capacity;
- the impact of part-time judges;
- the education and ethical support provided to judges;
- the judicial workload, staffing and support;
- judicial remuneration and pensions; and
- retirement age.

B *Survey Data*

The responses to the relevant survey questions are illustrated in Figure 5.

Figure 5: Judicial Working Life

Q1d	Use of acting judges is a challenge	
Q1e	Use of part-time judges is a challenge	
Q1f	Education of judicial officers is a challenge	
Q1g	Ethical support is a challenge	
Q1h	Workload is a challenge	
Q1j	Staffing and support services are challenges	
Q1i	Judicial remuneration and pensions are challenges	
Q8	Age limits are appropriate for acting judicial officers	
Q7	Capacity checks are appropriate for judicial officers	

1 *Acting Judges*

A reliance on acting judges to perform the work of the courts can arouse strong opinions, particularly in relation to the perceived threat that their appointment may pose to the principle of judicial independence. In the 2006 High Court case of *Forge v Australian Securities and Investments Commission*, Kirby J, when considering whether New South Wales legislative provisions allowing the appointment of acting judges to the New South Wales Supreme Court were constitutional, asserted in his dissenting opinion that the 'time has come … to draw a line and to forbid the practice', at least so far as he appreciated its operation in the particular context of that case.[90] At the same time, such appointments can assist the courts — and hence serve the public interest — in significant ways. They may allow for the appropriate management of conflicts of interest, strengthen a bench that is depleted due to temporary illness or unavailability, or provide a cost effective way to manage short-term workload pressures.

In Australia, while all states and territories provide for some form of acting appointment (they are prohibited in federal courts pursuant to s 72 of the *Constitution*),[91] the regulatory arrangements are highly varied and there is often little transparency around the use of acting judges. There are variances horizontally (across the states and territories) and vertically (between courts within a jurisdiction). Victoria is the only jurisdiction with a consistent approach to regulation, applying the same clear legislative rules for all acting positions across all court levels with respect to appointment, eligibility, terms of office, renewal, mandatory retirement age, salary and entitlements, outside work, and security of tenure. This Australia-wide variability reveals that there is little principled consideration underpinning the different arrangements relating to the appointment, conditions, remuneration and termination of acting judges.[92] It is against this backdrop that we sought judicial views on their use.

[90] (2006) 228 CLR 45, 94 [125]. Kirby J acknowledged that it was not the Court's role 'to pronounce on the "general desirability" of the appointment of acting judges' and that, although the plaintiff's challenge had 'potential significance for State courts other than the Supreme Court, it was ultimately focussed on the validity of appointments of acting judges in the Supreme Court of New South Wales': at 117 [181].

[91] See generally *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

[92] See also Gabrielle Appleby et al, *Temporary Judicial Officers in Australia: A Report Commissioned by the Judicial Conference of Australia* (May 2017) 2.

The responses to the proposition that the use of acting judges was a challenge showed that judicial opinions were mixed. Of the 142 respondents, 34% agreed or strongly agreed that this is a challenge, 37% indicated neutrality and 29% either disagreed or strongly disagreed.

These responses, together with the associated comments, support the proposition that arguments can be marshalled both in favour and against the use of acting judges, but that some disquiet exists among the judicial officers surveyed about the appropriateness of the current approach.

Two demographic variables were correlated with different responses: gender and level of court. Female respondents were slightly more likely to indicate that the use of acting judges was a challenge. By court level, respondents from superior courts (Supreme/Federal/Family, n = 34) were more likely to not see the use of acting judges as a challenge when compared with those respondents appointed to either the lower courts (Magistrates/Local, n = 48) or the intermediate courts (District/County/Federal Circuit, n = 48). However, care must be taken due to the fact that federal judges are not exposed to temporary judicial appointments, and their concomitant challenges due to the constitutional prohibition on such appointments.

Comments indicated that the predominant perceived advantage of using acting judges was that they provided assistance with the management of workload demands. Typical comments were:

> As the appointment of acting judicial officers are made from the ranks of recently retired judicial officers the usual concerns about tailoring outcomes to ensure political favour is maintained does not occur. Without acting judicial officers, the efficient operation of the court during times of illness and the provision of out of hours services would be compromised.[93]
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> ***
>
> Appointment of appropriate acting judicial officers may be an efficient way to deal with case backlogs.[94]

[93] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

[94] Respondent (Male, 10–14 years' service, NSW, District/County/Federal Circuit, March 2016).

For another respondent, the opportunity to 'try before you buy' was appealing:

> Trialling proposed new appointees for, say, three months is similarly not objectionable. Both the Court and appointees should have the opportunity for an obligation free fixed term trial.[95]

A number of negative responses focused on the threat to independence that was seen as accompanying temporary appointments:

> Easily perceived as not independent and not part of the body of permanent judicial officers … also golf or surfing three to four days a week and one day work and to ensure full days salary string out the hearing of cases or get part heard to ensure more work.[96]
>
> ***
>
> It is of concern when Acting JO's [judicial officers] are used in substitute for permanent appointments. I am also concerned that acting appointments are subject to renewal at the instance of the AG and also the head of the court and this is a problem in terms of any potential impact upon independence of decision making.[97]
>
> ***
>
> They may feel constrained, because of lack of tenure, in acting entirely independently.[98]
>
> ***
>
> The state government has been making use of acting magistrates over the past five years, instead of appointing additional magistrates. That has enabled the AG to select retiring magistrates whose approach, particularly to sentencing is consistent with the government's law and order agenda. At a time when magistrates have been forced to retire on their 65th birthday, certain favoured retiring magistrates have been appointed as acting magistrates up to their 70th

[95] Respondent (Female, 25+ years' service, NSW, District/County/Federal Circuit, March 2016).

[96] Respondent (Demographic data not provided, March 2016).

[97] Respondent (Female, 15–19 years' service, Vic, Magistrates/Local, March 2016).

[98] Respondent (Male, 5–9 years' service, WA, Magistrates/Local, March 2016).

> birthday, whilst others who would like to continue working have not received such a commission.[99]

Others noted the impact of drawing on the banks of retired judges, for instance:

> There is some discussion, maybe even concern, about the number of retired appeal judges returning to the Court of Appeal. Given the small number of appeal judges, and the capacity of a small number of them to exercise a disproportionate influence on appellate decisions, there is concern about the lack of renewal usually provided for by retirement. This is compounded by the eight-year window post retirement for appointment as an acting judge.[100]

A few responses demonstrated empathy for the acting judges and indicated that drawing on acting judges could raise concerns about the degree to which such judges were being appropriately managed and supported:

> [It is] [o]k provided that they are given the same resources such as bench books, laptops etc to keep them up to date with the changes in the law.[101]
>
> ***
>
> [It is] unfair of the government to appoint acting Judges five or six times and then not appoint them to the position.[102]
>
> ***
>
> [It is] [s]ubject to continuity of work to keep up to date.[103]

2 *Part-Time Judges*

The survey also explored judicial perceptions of the use of part-time judges. The judicial role has, like most professions, traditionally been conceived of as a full-time one. The Council of Chief Justices wrote in 2017: 'Judicial office is a full-time occupation and the timely discharge of judicial duties must take priority over any non-judicial activity.'[104]

[99] Respondent (Female, 10–14 years' service, WA, Magistrates/Local, March 2016).

[100] Respondent (Female, 10–14 years, Vic, District/County/Federal Circuit, March 2016).

[101] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

[102] Respondent (Male, 5–9 years' service, WA, District/County/Federal Circuit, March 2016).

[103] Respondent (Male, 25+ years' service, NSW, Magistrates/Local, March 2016).

[104] Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (3rd ed, 2017) 29.

As the Chief Justices note, this view is arguably informed by the need to ensure the efficient administration of justice, and for judges to largely remove themselves from non-judicial commitments while holding office so as to avoid real and apprehended conflicts of interest,[105] as well as the danger of bringing themselves or the judicial institution into disrepute. The Law Council of Australia has expressed concerns that part-time appointments may be used by governments to avoid meeting their obligations to staff the judiciary adequately.[106] This seems to anticipate that government may establish part-time judicial positions, effectively imposing them on the courts, rather than such an appointment being at the election of those judges seeking flexible working conditions. Today, the need for flexible and part-time working arrangements is an important part of achieving greater diversity across all workplaces, and the judiciary is no different. However, the concerns about how part-time arrangements might affect the judiciary suggest that there is a need for some regulation of part-time appointments.[107] In 2009, the Senate's Legal and Constitutional Affairs References Committee concluded part-time working arrangements 'will be an issue of increasing importance in attracting and retaining many talented appointees' and recommended the development of a protocol to encourage such arrangements in a manner that did not compromise the independence of the judiciary.[108]

To date, part-time judges have been allowed only in lower courts across Australia, with New South Wales leading the charge in allowing part-time magistrates in 1999.[109] Only in Victoria are part-time appointments allowed across all levels of the judiciary.[110] Despite the allowance for part-time judicial appointments, there has been little appetite for actually making such appointments. In New South Wales, between the time that part-time magisterial appointments were permitted in 1999 and 2014, only 4 of the 121

[105] See, eg, *R v Lippé* [1991] 2 SCR 114.

[106] Law Council of Australia, Submission No 11 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 9.

[107] Brian Opeskin, 'The Supply of Judicial Labour: Optimising a Scarce Resource in Australia' (2017) 7(4) *Oñati Socio-Legal Series* 847, 858–60 ('The Supply of Judicial Labour').

[108] Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (Report, December 2009) 47 [4.69].

[109] See *Local Courts Amendment (Part-Time Magistrates) Act 1999* (NSW), which was the Act that provided for the office of Magistrate to be held on a part-time basis. Note that this Act was repealed by *Statute Law (Miscellaneous Provisions) Act 2001* (NSW) sch 4.

[110] See, eg, *Judicial Entitlements Act 2015* (Vic) s 3 (definition of 'part-time service arrangement') ('*Judicial Entitlements Act*').

appointments (3.3%) made were part-time.[111] This is consistent with the national figure recorded by Mack and Roach Anleu over a decade ago of only eight part-time Magistrates out of 242 (3.3%).[112]

It is against this backdrop that we sought judicial views on the use of part-time judicial officers in their respective jurisdictions (Figure 5). In the survey, the responses to the proposition that the use of part-time judicial officers was a challenge showed that judicial opinions were mixed. Of the 142 respondents, more than a third (39%) of respondents were neutral about the proposition, with approximately a third (32%) agreeing and less than a third (29%) disagreeing.

Only one demographic variable — gender — was associated with different responses. Female respondents were slightly more likely to indicate that the use of part-time judges was a challenge in their jurisdiction, with almost half of male respondents indicating that they were neutral on the proposition. That the challenge of part-time appointments is more keenly felt by female judicial officers is perhaps explained by the largely gendered foundation that underpins the need for greater workplace flexibility.[113]

Only a small number of comments articulated substantive concerns around part-time appointments:

> Fully tenured positions are critical to a robust and independent judiciary, as is stamina, focus and immersion in one's judicial task. I don't really see a role for part time judges.[114]

Most of the comments against part-time appointments focused on the difficulty it would create for the administration of the court:

> Difficulties in management. By way of example, dealing with matters that have to be adjourned. Also raises concerns about the ability to ensure (as far as practicable) independence through tenure.[115]

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111 Opeskin, 'The Supply of Judicial Labour' (n 107) 859.

112 Ibid.

113 See, eg, the strategies of the Commonwealth Workplace Gender Equality Agency on workplace flexibility: 'Strategic Approach to Flexibility', *Workplace Gender Equality Agency, Australian Government* (Web Page, 2018) <https://www.wgea.gov.au/lead/strategic-approach-flexibility>, archived at <https://perma.cc/X3WS-MWU7>.

114 Respondent (Female, 0–4 years' service, Federal, Supreme/Federal/Family, March 2016).

115 Respondent (Male, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

> This does not work as they never share the load of work claiming that they cannot hear lengthy cases due to not sitting full time.[116]
>
> ***
>
> While … flexibility is desirable for the judicial officer, managing listings and the allocation of cases becomes problematic. Fulfilling country commitments is also difficult when more and more judicial officers are seeking part time appointments.[117]

Other respondents supported the arguments in favour of part-time judicial appointments. For instance:

> Yes! This would result in more experienced and worthy judicial officers staying on longer, or happy to fill in once they have retired. A flexible work place is a quality work place.[118]
>
> ***
>
> Scope for part time judicial officers would make judicial appointment more available to persons with primary responsibility for the care of family. It would also avoid the early and unnecessary retirement of some individuals.[119]

3 *Judicial Education*

To qualify for appointment, a judge must be of standing in the legal profession for a specified number of years and, therefore, must have achieved minimum standards of education and experience.[120] However, once appointed, there were traditionally no continuing educational requirements. Today, a number of national and state institutions provide continuing judicial education: the National Judicial College of Australia,[121] the Australasian Institute of Judicial

[116] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

[117] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

[118] Respondent (Female, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

[119] Respondent (Male, 5–9 years' service, Qld, Supreme/Federal/Family, March 2016).

[120] For the qualifications required for the Victorian Supreme Court, see *Constitution Act 1975* (Vic) s 75B; *Supreme Court Act 1986* (Vic) s 104. For the qualifications required for the Victorian Magistrates' Court, see *Magistrates' Court Act 1989* (Vic) s 7.

[121] 'About NCJA', *National Judicial College of Australia* (Web Page) <https://njca.com.au/about-us/about-njca/>, archived at <https://perma.cc/KSQ8-5WQ2>.

Administration,[122] the Judicial Commission of NSW,[123] the Judicial College of Victoria[124] and the Judicial Conference of Australia.[125] There is now a National Curriculum for Professional Development for Australian Judicial Officers (developed by the National Judicial College in 2005 in consultation with the courts and other judicial education bodies).[126] In 2006, a national standard (albeit still voluntary) for judicial education of five days per year per judicial officer was prepared by the National Judicial College, and endorsed by the Council of Chief Justices of Australia, chief justices, chief magistrates, and other judicial representative and education bodies.[127] A 2010 review revealed that while only one jurisdiction had formally adopted the standard, 68% of judges met or exceeded the standard.[128]

It is against this backdrop that we sought judicial views on the education of judicial officers. In the survey, the responses to the proposition that the education of judicial officers was a challenge were overwhelmingly in agreement, with 54% of respondents agreeing or strongly agreeing with the proposition, 23% neutral and only 24% disagreeing or strongly disagreeing (Figure 5).

For some respondents, gains that have been made in recent years had meant judicial education was no longer a 'challenge', although it should be an ongoing commitment. One respondent indicated the question of judicial education 'no longer arouses passions, but was now "just part of the landscape"'.[129] Many of these comments came from those jurisdictions with established local judicial education institutions:

[122] 'About the Australian Institute of Judicial Administration (AIJA)', *The Australian Institute of Judicial Administration* (Web Page) <https://aija.org.au/about/>, archived at <https://perma.cc/A4CB-AAWL>.

[123] 'About Us', *Judicial Commission of New South Wales* (Web Page) <https://www.judcom.nsw.gov.au/about-the-commission/>, archived at <https://perma.cc/37NA-8G8X>.

[124] 'About Us', *Judicial College of Victoria* (Web Page) <http://www.judicialcollege.vic.edu.au/about-us>, archived at <https://perma.cc/V3FF-LGUZ>.

[125] 'About Us', *Judicial Conference of Australia* (Web Page) <https://www.jca.asn.au/about-us/>, archived at <https://perma.cc/FHH9-ULUU>.

[126] Christopher Roper, *A Curriculum for Professional Development for Australian Judicial Officers* (Report, January 2007). The history of the curriculum can be found in the report: at 61.

[127] Ibid 99–101.

[128] Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers* (Report, National Judicial College of Australia, December 2010) 9.

[129] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016.)

> I think there is a strong system of judicial education in Australia and a positive approach to undertaking programs.[130]
>
> ***
>
> This issue has improved dramatically since I was appointed in 1994 with the advent of the NCJA and a much greater recognition of the need for on-going education of judicial officers in all aspects of their role. When I was first appointed, the focus was on the law — fascinating papers on Mareva injunctions and the like, but now issues such as court room conduct, personal stress, and input from other disciplines (psychology, sociology, criminology etc) are part of most education programmes.[131]

However, a number of responses indicated that some judicial officers appreciated the importance of structured and organised ongoing judicial education, which they saw as lacking in some jurisdictions:

> I think education is done better in those jurisdictions with a Judicial College. I think in the other jurisdictions, education is more ad hoc. At leave time, it is often difficult to find conferences that are truly educational.[132]

Resourcing and time constraints were identified by a number of respondents as undermining judicial education:

> Very little time made available for continuing education.[133]
>
> ***
>
> Funding of education is inadequate.[134]
>
> ***
>
> Magistrates get the short straw being required to pay for their own textbooks to keep up to date. It's an absolute disgrace.[135]

Others doubted the adequacy of what was being provided, which may be attributable to the lack of funding:

[130] Respondent (Female, 15–19 years' service, Qld, District/County/Federal Circuit, March 2016).

[131] Respondent (Male, 20–24 years' service, Qld, District/County/Federal Circuit, March 2016).

[132] Respondent (Female, 0–4 years' service, Qld, District/County/Federal Circuit, March 2016).

[133] Respondent (Male, 5–9 years' service, WA, District/County/Federal Circuit, March 2016).

[134] Respondent (Male, 0–4 years' service, WA, District/County/Federal Circuit, March 2016).

[135] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

> Judicial Education, with respect to magistrates, is very poorly resourced. In recent years, the Chief Magistrate has increased the number of days per year to four days; however magistrates themselves, unlike other jurisdictions, are expected to fund education themselves with minimal contribution from the Department of the Attorney-General. Consequently, CLE [Continuing Legal Education] consists mainly of magistrates doing presentations for the group, or a judge delivering a paper on an issue, or organisations who deliver services to offenders, or other court users, who want face time with magistrates presenting their programme or service. This does not engender fresh ideas, or new approaches or innovation.[136]
>
> ***
>
> While there is a large investment in judicial education in NSW, I doubt the efficiency with which judicial education is delivered and the usefulness of much of what is delivered. The main problems are: (a) judges and magistrates are not well-trained in delivery of adult education and (b) the approach taken is largely 'one size fits all'. Thus, much of the effort is either ill-directed or of very limited use to the recipients. Like much CPD [Continuing Professional Development] in the legal profession generally.[137]

Finally, one respondent expressed his concern about the voluntary nature of current judicial education standards:

> The real problem has always been there, and that is, the small number of people who would most benefit from such programmes do not attend![138]

4 *Ethical Support for Judges*

The ethical standards of judicial officers have traditionally been perceived as a matter for individual judges to determine for themselves. The more contemporary approach has been to develop a set of standards that can guide judicial conduct, such as the *Guide to Judicial Conduct*, published for the Council of Chief Justices of Australia.[139] Beyond these standards, judges are left to consider ethical dilemmas with little formal institutional support. As the judiciary, and the legal profession from which it is drawn, becomes larger and (albeit slowly) more diverse — in terms of gender, race, ethnicity, religion,

[136] Respondent (Female, 10–14 years' service, WA, Magistrates/Local, March 2016).

[137] Respondent (Male, 20–24 years' service, NSW, Magistrates/Local, March 2016).

[138] Respondent (Male, 20–24 years' service, Qld, District/County/Federal Circuit, March 2016).

[139] *Guide to Judicial Conduct* (n 104).

sexuality, class, education, age and geographic region — it becomes less likely that there will be common understandings as to the way the judicial role should be performed.[140] This may extend to shared, implicit ethical values to difficult dilemmas. Questions thus arise as to whether this traditional approach remains adequate.

The question relating to ethical support asked judicial officers to indicate the extent to which 'ethical support' was a challenge in their jurisdiction. There was a fairly balanced response, with 35% agreeing or strongly agreeing, 37% neutral and 28% disagreeing or strongly disagreeing. Only one demographic factor was correlated with different responses, namely, the level of court. Respondents from lower courts (Magistrates, n = 48) or intermediate courts (District/County/Federal Circuit, n = 48) were more likely to see the lack of ethical support as a challenge when compared with respondents appointed to superior courts (Supreme/Federal/Family, n = 34).

Some comments described the 'traditional' model and indicated their high level of comfort with it:

> Ethical support is informal, via discussions with other judges and head of jurisdiction, who are always helpful.[141]

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> The collegiate nature of most judicial bodies is one of the great strengths.[142]

In addition to the informal support of colleagues and heads of jurisdiction, one respondent referred to the soft law ethical support for judges:

> The AIJA Guide on behalf of the Council of Chief Justices of Australia, is an invaluable resource in this area, and I would consult it at least once a month.[143]

Some respondents revealed concerns about the management of ethical support at the senior level within the judiciary. It appeared that this was dependent on the individual filling the role of head of jurisdiction. For example:

> I think it depends on your court. We have a Chief Judge who is very supportive and provides good counsel.[144]

[140] Mack and Roach Anleu, 'In-Court Judicial Behaviours' (n 11) 729.

[141] Respondent (Male, 10–14 years' service, Qld, District/County/Federal, March 2016).

[142] Respondent (Male, 0–4 years' service, Qld, Supreme/Federal/Family, March 2016).

[143] Respondent (Male, 20–24 years' service, Qld, District/County/Federal, March 2016), discussing *Guide to Judicial Conduct* (n 104).

One respondent noted possible consequences of a growing and more diverse judiciary on the traditional ethical advisory model. This respondent believed that growing diversity ought to be viewed as a positive development:

> This tends to come informally through colleagues, which works well — as it also does, for example, at the Bar, in my experience. But such practices depend on like minded people being able to confide in each other, which in turns means you need a sufficiently diverse and approachable judiciary for everyone to find their 'buddies'.[145]

Some respondents explained that they would like to see more formalised systems of ethical support in place. A number of respondents made comments to this effect, with suggestions for possible models:

> I think a more structured mentoring system would help in this area. As a relatively new judge, whilst my court is extremely collegiate, it is nevertheless quite isolating and others give the impression of being very self-sufficient.[146]
>
> ***
>
> Each court should designate a retired judge who is available to assist in this regard.[147]
>
> ***
>
> There needs to be a federated group of judicial commissions, with one secretariat to provide guidance and, if needed, investigation and recommendation for removal applying to all judges and magistrates. The standards need to be consistent Australia-wide.[148]

Evidencing why some judges may feel reluctant to seek ethical support and counsel from colleagues, one respondent commented:

> If you need ethical support you shouldn't be in the job.[149]

[144] Respondent (Female, 15–19 years' service, Qld, District/County/Federal, March 2016).

[145] Respondent (Female, 0–4 years' service, Federal, Supreme/Federal/Family, March 2016).

[146] Respondent (Female, 0–4 years' service, Qld, District Court/County/Federal, March 2016).

[147] Respondent (Male, 5–9 years' service, WA, District/County/Federal Circuit, March 2016).

[148] Respondent (Male, 10–14 years' service, Federal, Supreme/Federal/Family, March 2016).

[149] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

5 *Judicial Workload, Staffing and Support*

There is an increasing trend to measure the productivity of courts by reference to various metrics. Since 1995, the Productivity Commission's annual *Report on Government Services* has contained a chapter on the work of the courts.[150] This provides annual statistics on the budget and staffing of courts across the federation, as well as their annual caseloads, including cases lodged and finalised. It also contains an assessment of the 'key performance indicators', which includes judicial numbers (relative to population), backlogs and clearance of cases. These indicators have been subject to robust criticism by academics and members of the judiciary.[151] Indeed, in relation to judicial workload, we probably have our most developed sense of the judiciary's views. Former New South Wales Chief Justice James Spigelman has said 'the most important aspects of the work of the courts are qualitative and cannot be measured'.[152] Opeskin has observed that the Productivity Commission 'has not yet found a suitable indicator of the quality of courts for its annual review of government services'.[153]

Mack and Roach Anleu's 2007 judicial survey revealed a number of aspects of working conditions that judicial officers identified as a cause of dissatisfaction, including policies and administration, control over amount of work, scope for improving the court system, court facilities, and availability of adequate support.[154] In that research, many judges were also reported as regarding the volume of work as a source of stress.[155] Wallace, Mack and Roach Anleu have also conducted significant studies into the more specific question of judicial workload allocation — including allocating cases to lists or cases to judicial officers — across Australia.[156] They argue that the task of judicial workload allocation requires a delicate balancing of competing principles relating to efficiency, fairness, impartiality and independence,

[150] Opeskin, 'The State of the Judicature' (n 24) 491.

[151] See, eg, Chief Justice JJ Spigelman, 'Measuring Court Performance' (2006) 16(2) *Journal of Judicial Administration* 69; Roach Anleu and Mack, 'Judicial Performance' (n 11).

[152] Spigelman (n 151) 70.

[153] Opeskin, 'The Supply of Judicial Labour' (n 107) 864.

[154] Mack and Roach Anleu, 'The National Survey' (n 6) 17–18.

[155] Ibid 18–19.

[156] Kathy Mack, Anne Wallace and Sharyn Roach Anleu, *Judicial Workload: Time, Tasks and Work Organisation* (Australian Institute of Judicial Administration, 2012) ('*Judicial Workload*').

which will often contain implicit evaluation of judicial performance.[157] The proper funding of courts in Australia is fundamental to addressing concerns over judicial workload, staffing and support. In Australia, it is the executive and the legislature who have the final say over judicial funding levels.[158] As former Chief Justice of the High Court Robert French pointed out, profound issues are at stake when court funding is considered, and '[i]t is difficult because it must respect the independence of the judicial branch and because it requires judgments about needs and efficiency where criteria to guide such judgments are difficult to define with precision.'[159]

Wayne Martin, the Chief Justice of Western Australia, warned that the effect of reduced or stable judicial numbers and freezes on the employment of support staff in the face of rising demand is the creation of 'delays [which compound] the losses suffered by victims and [corrupt] the judicial process'.[160] As Sir Gerard Brennan has explained:

> [T]he courts are not an Executive agency … The courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the rule of law would be immediately imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the rule of law.[161]

In the survey, respondents were asked in two separate questions about the extent to which they agreed that 'workload' and 'staffing and support' were a

[157] For published studies from this research, see Wallace, Mack and Roach Anleu, 'Work Allocation' (n 11); Anne Wallace, Sharyn Roach Anleu and Kathy Mack, 'Evaluating Judicial Performance for Caseload Allocation' (2015) 41(2) *Monash University Law Review* 445 ('Evaluating Judicial Performance').

[158] See, eg, *Judicial Entitlements Act* (n 110), which establishes a 'Judicial Entitlements Panel' responsible for presenting the Victorian Attorney-General with advisory opinions on the question of judicial entitlements. See also *Remuneration Tribunal Act 1973* (Cth).

[159] Chief Justice RS French, 'Boundary Conditions: The Funding of Courts within a Constitutional Framework' (Speech, Australian Court Administrators' Group Conference, 15 May 2009) 1.

[160] Nicola Berkovic, 'Fewer Judges Equals More Delays: Martin', *The Australian* (Canberra, 19 May 2014) 2. See generally Sean Fewster, 'SA Chief Justice Chris Kourakis Says Retiring Judges Will Not Be Replaced Due to Funding Cuts', *The Advertiser* (online, 25 June 2013) <https://www.adelaidenow.com.au/news/south-australia/news-story/675fd2aa0301b3ffcf795bbaa2979986>, archived at <https://perma.cc/NC9C-LNQW>; Sean Parnell, 'Chief Justice Takes on Abbott Over Cuts', *The Australian* (Canberra, 21 February 2014) 5.

[161] Sir Gerard Brennan, 'The State of the Judicature' (1998) 72(1) *Australian Law Journal* 33, 35.

challenge in their jurisdiction. The responses were overwhelmingly in agreement, with 77% of respondents agreeing or strongly agreeing that workload posed a challenge, and 73% agreeing or strongly agreeing that staffing and support also did so (Figure 5).

Only one demographic factor was correlated with different responses, namely the level of court. Respondents from superior courts (Supreme/Federal/Family, n = 34) and lower courts (Magistrates/Local, n = 48) were more likely to see workload as a challenge (82% and 87% respectively agreed or strongly agreed with this proposition), compared to the intermediate courts (District/County/Federal Circuit, n = 48) (60%).

Only a small number of comments reflected the position that judges' workloads were not a challenge. For instance, one respondent commented:

> Judges work hard, but so they should — it is an important public office, and a privilege. The workload is manageable, and our court is well resourced. However, it is another reason why judges shouldn't work on too late in life — it is demanding.[162]

Another indicated that they thought the current processes for distributing workload, at the least, were fair:

> Those judges who are responsible for overseeing listing of matters make a conscious effort to be fair in the spread of matters amongst the judges.[163]

Some comments in relation to workload revealed high levels of stress and concerns over judicial health:

> It is recognised across the board that caseloads are high (and higher than in the past), there is a pressure to keep taking more work to keep up with demand, and a resultant feeling [that] the work is unremitting and judges have no control over their lives.[164]
>
> ***
>
> Cutbacks on judicial appointments affecting mental health and quality of life for judicial officers.[165]

[162] Respondent (Female, 0–4 years' service, Federal, Supreme/Federal/Family, March 2016).

[163] Respondent (Female, 15–19 years' service, Qld, Supreme/Federal/Family, March 2016).

[164] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[165] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

Some respondents expressed concern with the workload (and presumably stress) of working in areas beyond their expertise:

> I would like to see the option of judges being able to work only in the areas in which they have had experience (eg, crime only).[166]

Other respondents who were concerned about workload indicated the variety of factors that had contributed to it, including a lack of adequate resources, the introduction of new performance measures and the changing nature of legal practice:

> Courts expect too much from judges. Bodies such as the Productivity Commission, which produce statistics purporting to assess judicial 'productivity' as if judges were making widgets rather than engaging in a difficult process of evaluating a number of different factual and legal propositions, nevertheless agitate heads of jurisdiction (who should know better) to demand faster 'turn around' from judges so their court 'looks' better. They impose immense stress in what is an already stressful environment.[167]
>
> ***
>
> Presently and hitherto the solution to increasing workloads appears to have been to exact greater efficiency from judicial officers but [sic] 'transacting' more matters in a shorter time per matter. This damages the integrity of the proper and fair consideration of each case on an individual basis and inherently the quality of justice administered.[168]
>
> ***
>
> There is an ever-increasing quantity of work combined with increasing complexity and frequently changing legislation with ever-reducing support.[169]
>
> ***
>
> As mediation and other alternative dispute resolution [methods] continue to impact, the residue of hearings are more complex and need more reflection and writing time.[170]

[166] Respondent (Female, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

[167] Respondent (Female, 10–14 years' service, NSW, Supreme/Federal/Family, March 2016).

[168] Respondent (Male, 5–9 years' service, Vic, Magistrates/Local, March 2016).

[169] Respondent (Male, 25 + years' service, WA, Magistrates/Local, March 2016).

[170] Respondent (Male, 10–14 years' service, Federal, Supreme/Federal/Family, March 2016).

Others expressed their understanding that workloads differed depending on a variety of factors, particularly experience, level of court and type of work:

> I think this depends on the area in which you are working and the length of time on the bench. As a new judge, the load is undoubtedly greater as you develop systems to ensure you stay on top of reserve decisions.[171]

***

> This is an enormous challenge. Magistrates have no control, or indeed input into how their courts function, unless based in a country location where there is some measure of control/influence. Over time volume has significantly increased, the jurisdiction of magistrates has increased significantly. Magistrates do not have their own staff, are now expected to do data entry which was the work of the Judicial Support Officer (Associate) without recognition of the impact on the role of the judicial officer and justice.[172]

Respondents took an opportunity in their comments to elaborate on the exact nature of the staffing and support challenges facing their jurisdiction. Chief among these were inadequacy of IT support:

> We are very badly resourced. For example, this week I am in a court which has no audio visual link and so I have to swap courts to conduct the court case requiring that link. Also this week the prime exhibits in my trial are DVDs. I have just discovered the jury are in a room without the ability to watch them.[173]

***

> This is generally good but as I sit in a regional court, it inevitably follows that we do not have the same level of technical support available to a Brisbane judge.[174]

***

> The staffing for the judges directly is adequate, but we should have better technological assistance (e,g, we are not provided with smart phones or with iPads). Court resources more generally are a problem. My court has one person providing free ADR [Alternative Disupte Resolution] services to the whole of the State, doing a job which is done by multiple people in other jurisdictions.

[171] Respondent (Female, 0–4 years' service, Qld, District/County/Federal Circuit, March 2016).

[172] Respondent (Female, 10–14 years' service, WA, Magistrates/Local, March 2016).

[173] Respondent (Female, 5–9 years' service, NSW, District/County/Federal Circuit, March 2016).

[174] Respondent (Male, 20–24 years' service, Qld, District/County/Federal Circuit, March 2016).

> It took much effort to get minor funding for creating and then extending e-search facilities and we still can't get e-filing. These are just examples.[175]

Another concern identified was the level of support for judges who are subject to online trolling or attack:

> There is no support for judges who are threatened, trolled, or the subject of sustained attack.[176]

Others expressed their views about the lack (and reduction) of staff support, a comment made particularly often by respondents working in the lower courts:

> The move to get rid of tipstaves worries me. As a criminal trial judge regularly on circuit, my tipstaves' role is very important.[177]
>
> ***
>
> Cuts to public sector employees mean the courts are dealing with more cases, more outcomes need to be processed, courts are sitting for longer periods of time and there are less court staff available to process the work generated by the court. There are simply some tasks such as entering offenders into good behaviour bonds, issuing warrants for remand prisoners by way of example which cannot, under any circumstance, be postponed to another day.[178]
>
> ***
>
> Registry staff [are] more than decimated under previous government, not rectified or likely to be.[179]
>
> ***
>
> There is no support at all for magistrates. We type our own judgments, we do our own research and generally have the privilege of paying for the latter also.[180]

[175] Respondent (Male, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

[176] Respondent (Demographic data not provided, March 2016).

[177] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[178] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

[179] Respondent (Female, 15–19 years' service, Qld, Supreme/Federal/Family, March 2016).

[180] Respondent (Female, 15–19 years' service, NSW, Magistrates/Local, March 2016).

Other concerns were that judicial officers do not have sufficient autonomy over the hiring and supervision of support staff:

> The court staff are employed by the department rather than the court and there are too few of them.[181]

As with workload, many respondents identified their concerns with staffing and support as directly attributable to funding cuts and productivity expectations:

> Staffing is constantly being reduced in order to meet the ludicrous and arbitrary 'productivity' percentage which has no place in the delivery of justice in a democracy.[182]

6 *Judicial Remuneration and Access to Pensions*

Judicial remuneration and pension arrangements have been the cause of ongoing tensions between the judiciary and the executive, and adequacy of remuneration can cut to the heart of judicial independence.[183] For example, there was a successful challenge to the federal attempt to charge state judges a surcharge on their pensions,[184] and an unsuccessful challenge by federal magistrates (now federal circuit judges) to their contributory superannuation scheme.[185] At the federal level, there is a constitutional guarantee that remuneration will not be reduced during a judge's tenure under s 72 of the *Constitution*. But the *Constitution* is otherwise silent about the quantum of remuneration or how it is determined. Across Australia, remuneration is generally set by independent tribunals, such as the Commonwealth's Remuneration Tribunal, subject to disallowance by the Parliament.[186] In a broader sense, the sufficiency of remuneration may also adversely affect the administration of justice by its impact upon the attraction and retention of high quality candidates for appointment to the bench.

[181] Respondent (Female, 15–19 years' service, Qld, Supreme/Federal/Family, March 2016).

[182] Respondent (Male, 5–9 years' service, Federal, Supreme/Federal/Family, March 2016).

[183] See George Winterton, *Judicial Remuneration in Australia* (Australian Institute of Judicial Administration, 1995) 19–31.

[184] *Austin v Commonwealth* (2003) 215 CLR 185.

[185] *Baker v Commonwealth* (2012) 206 FCR 229.

[186] See Australian Government, 'About Us', *Remuneration Tribunal* (Web Page) <https://www.remtribunal.gov.au/about-us>, archived at <https://perma.cc/HHQ3-RAMS>. See also Brian Opeskin, 'The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population (2011) 39(1) *Federal Law Review* 33, 40–3 ('The High Cost of Judges').

In their 2007 survey of judicial officers, Mack and Roach Anleu reported high levels of satisfaction with the rate of salary and benefits (69.4% and 76.3% respectively).[187] However, just under one third of judges (30.9%) agreed that '[c]onsidering all the factors associated with my work, my remuneration is low'.[188] One third (33.6%) were neutral and just over one third (35.6%) disagreed with the statement.[189]

With the exception of many lower courts and Tasmania, which operate contribution-based superannuation schemes, the general pension scheme that operates in Australia is a non-contributory, non-capped entitlement.[190] Subject to certain conditions related to age and prior service, the judicial pension is generally set at 60% of the current judicial salary.[191] If a judge dies in office or retirement before his or her spouse, the spouse retains an entitlement to a percentage of the judicial pension.[192] While judicial pensions are generally considered one of the most significant attractions of judicial office, the current scheme is not without its critics. For instance, Opeskin has warned that, at a time of population ageing, the resulting increase in the government's unfunded liability for the current judicial pension system poses a significant strain on resources and ultimately the system itself.[193]

The survey asked respondents whether they thought 'judicial remuneration and pensions' were challenges in their jurisdiction. There was little disagreement with this proposition (only 19% of respondents disagreed or strongly disagreed), with 49% of respondents agreeing or strongly agreeing and 32% neutral (Figure 5).

Only one demographic factor was correlated with different responses, namely the level of court. Judicial officers working in the lower courts (Magistrates/Local, n = 48) were significantly more likely to see judicial remuneration and pensions as a challenge (71% of respondents agreed or strongly agreed with this proposition). In contrast, respondents from the intermediate courts (District/County/Federal Circuit, n = 48) appeared less concerned (42% of respondents agreed or strongly agreed with this proposition); and superior courts (Supreme/Federal/Family, n = 34) even less

187 Mack and Roach Anleu, 'The National Survey of Australian Judges' (n 6) 18.

188 Ibid.

189 Ibid.

190 Opeskin, 'The High Cost of Judges' (n 186) 43, 45–6.

191 See, eg, *Judges' Pensions Act 1968* (Cth) ss 6(1), 6A; *Constitution Act 1975* (Vic) s 83; *County Court Act 1958* (Vic) ss 14, 17B.

192 Opeskin, 'The High Cost of Judges' (n 186) 46–7.

193 Ibid 33–4.

(26% of respondents agreed or strongly agreed with this proposition). This reflects the current arrangements in which magistrates are not given the same pension entitlements as other judicial officers, and was evident again in the commentary provided by respondents.

A number of judges expressed their satisfaction with the current levels of remuneration and the pension scheme featured prominently in this consideration. For instance:

> [There is a] [v]ery good public sector salary and regular review.[194]

***

> Judges focus too much on their remuneration and benefits and not enough on their responsibilities. When one of the world's most generous pensions is taken into account, we are very well looked after.[195]

Others, however, were very concerned about the current remuneration and pension arrangements, with a particular eye to the need to attract appropriate candidates:

> It's absurd that Judges do not even receive CPI [Consumer Price Index] increases over a two-year period.[196]

***

> Pension rules are complex and arbitrary.[197]

***

> Our remuneration is linked to decisions of the federal tribunal. Those determinations of late have made judicial remuneration less attractive to those leading practitioners who would make the best appointees. Further, our 'entitlements', including travel allowances, are not linked to the federal determinations or to anything, have not been reviewed in more than a decade, are very low and there is no plan for review.[198]

[194] Respondent (Male, 5–9 years' service, NSW, District/County/Federal Circuit, March 2016).

[195] Respondent (Male, 5–9 years' service, Federal, Supreme/Federal/Family, March 2016).

[196] Respondent (Male, 5–9 years' service, WA, District/County/Federal Circuit, March 2016).

[197] Respondent (Female, 0–4 years' service, Vic, District/County/Federal Circuit, March 2016).

[198] Respondent (Male, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

One respondent expressed their concern over remuneration as explicitly tied to their workload:

> [I am] generally happy [that] remuneration is tied to federal increases, but [in] a general sense, the increase in workload and complexity means remuneration should be higher.[199]

There were also other concerns expressed regarding the disparity of remuneration and pensions across jurisdictions within the federation:

> There is dissatisfaction with those Victorian provisions which affect us adversely, comparative to interstate counterparts: minimum retirement age is 65, not 60, and pension is suspended if a practicing certificate is taken out.[200]

***

> The Div 293 tax[201] only applies to Northern Territory Supreme Court judges — Federal Circuit judges and Supreme Court judges from other states are exempt.[202]

There was some dissatisfaction about the current processes for setting remuneration and, interestingly, this spanned jurisdictions that used government and tribunal mechanisms. For instance:

> This process should be independent of government and not determined by political expediency. There is no effective mechanism to support, advance or advocate for proper conditions and remuneration for Victorian judicial officers, particularly magistrates.[203]

***

> Too much time is taken up in the federal sphere making submissions to the Remuneration Tribunal.[204]

[199] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[200] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[201] The Division 293 tax on superannuation contributions (introduced from the 2012–13 financial year) applies to individuals earning over $250,000: *Income Tax Assessment Act 1997* (Cth) div 293.

[202] Respondent (Male, 0–4 years' service, NT, Supreme/Federal/Family, March 2016).

[203] Respondent (Female, 15–19 years' service, Vic, Magistrates/Local, March 2016).

[204] Respondent (Female, 15–19 years' service, Federal, Supreme/Federal/Family, March 2016).

There was specific concern around the move in some jurisdictions to a contributory superannuation scheme in lieu of the traditional pension entitlement:

> The position of magistrates having no access to either a pension or at least support for medical retirement is critical.[205]

In contrast, another respondent was in favour of a broader move to the contributory model:

> In my view, it would be better to pay people a larger salary from which they make savings into superfunds like everyone else in the community. The salary package would also be far more transparent.[206]

Some suggestions for reform were made to improve the current pension scheme, particularly in light of concerns around the ageing of judicial retirees:

> Given longevity of judges, pension should in fairness not commence until 15 years of service or attaining 65 or more.[207]

7 *Mandatory Retirement and Capacity Testing*

It is only a short distance from the topic of remuneration and pensions to that of judicial retirement. Indeed, financial considerations are made particularly acute by the fact that, in all Australian jurisdictions, judicial officers are subject to a mandatory retirement age. This is constitutionally entrenched for members of the federal judiciary following the 1977 amendment by referendum of s 72 of the *Constitution*.[208] The introduction of mandatory retirement from judicial office at the federal level followed the earlier imposition of age limits upon the length of judicial service in the Supreme Courts of all states, with New South Wales being the first to do so in 1918.[209]

At the federal level, the mandatory judicial retirement age is set at 70 years, but s 72 expressly empowers Parliament to prescribe a lower maximum age

[205] Respondent (Male, 5–9 years' service, NSW, Magistrates/Local, March 2016).

[206] Respondent (Male, 20–24 years' service, NSW, Magistrates/Local, March 2016).

[207] Respondent (Male, 10–14 years' service, Federal, Supreme/Federal/Family, March 2016).

[208] Before that amendment, s 72 had been interpreted by a majority of the High Court as providing for life tenure: *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 434 (Griffith CJ, Barton, Isaacs, Powers and Rich JJ) ('*Waterside Workers*'').

[209] *Judges Retirement Act 1918* (NSW). See generally Tony Cunneen, 'A Creature of Momentary Panic' [2010] (Winter) *Bar News* 74, 83 (for an account of the enactment as motivated by 'a variety of political imperatives and personal agendas and … the product of a unique time').

for federal judicial officers other than High Court judges. Seventy years is also the age limit for state and territory judicial officers with just a few exceptions.[210] The mandatory retirement age in New South Wales and Tasmania for all judicial officers is set two years higher at age 72,[211] and the mandatory retirement age for magistrates in Western Australia and the Australian Capital Territory is 65 years.[212] The appropriateness of the current age limits has been questioned, particularly in light of medical advancements that have greatly increased life expectancy, with some arguing that the age of 70 years is too low.[213] At the federal level, any upward change to that limit would require a constitutional referendum.[214]

Arguments have been made in favour of, and against, the use of judicial age limits. In 1976, a report of the Senate Standing Committee on Constitutional and Legal Affairs examined the judicial retirement age.[215] It argued that mandatory judicial retirement would maintain vigorous and dynamic courts, provide greater opportunity for younger, able legal practitioners to serve on the bench, and reduce the likelihood that judges who lack capacity would continue in office.[216] It also saw mandatory retirement as consistent with a growing acceptance of a mandatory retirement age across the world.[217] To these have been added the social benefits that can be gained

[210] See, eg, *Constitution* s 72; *Supreme Court Act 1933* (ACT) s 4(3); *Supreme Court Act 1979* (NT) s 38; *District Court of Queensland Act 1967* (Qld) s 14(1); *Supreme Court of Queensland Act 1991* (Qld) s 21(1); *Magistrates Act 1991* (Qld) s 42(d); *Supreme Court Act 1935* (SA) s 13A(1); *District Court Act 1991* (SA) s 16(1); *Magistrates Act 1983* (SA) s 9(1)(c); *Constitution Act 1975* (Vic) s 77(3); *County Court Act 1958* (Vic) ss 8(3), 14(1)(b)–(c); *Magistrates' Court Act 1989* (Vic) s 12(a); *District Court of Western Australia Act 1969* (WA) s 16; *Judges' Retirement Act 1937* (WA) s 3.

[211] *Judicial Officers Act 1986* (NSW) ss 44(1), (3); *Magistrates Court Act 1987* (Tas) s 9(4)(a); *Supreme Court Act 1887* (Tas) s 6A(1). It should be noted that transitional provisions preserving a judicial age limit of 72 for judicial officers in the Supreme Court and County Court of Victoria are now spent and all presently serving judicial officers in that state must retire at 70 years: *Constitution Act 1975* (Vic) s 77(4); *County Court Act 1958* (Vic) s 14(1).

[212] *Magistrates Court Act 1930* (ACT) s 7D(1); *Magistrates Court Act 2004* (WA) sch 1 cl 11(1)(a).

[213] See, eg, Alysia Blackham, 'Judges and Retirement Ages' (2016) 39(3) *Melbourne University Law Review* 738, 778.

[214] *Waterside Workers'* (n 208) 486–7 (Powers J).

[215] Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Report on Retiring Age for Commonwealth Judges* (Report, October 1976).

[216] Ibid 11–13.

[217] Ibid. See also Brian Opeskin, 'Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges' (2015) 35(4) *Oxford Journal of Legal Studies* 627, 639–40 ('Models of Judicial Tenure'). Opeskin explains that '[t]he issue became a live one from the

from retired judges applying their experience in other roles, including acting as royal commissioners.[218] However, some have argued that mandatory retirement ages are 'an arbitrary, discriminatory and outdated feature of Australian constitutional law'[219] that results in the premature loss of judicial talent.[220]

More recent reviews, while accepting the limitations and problems associated with mandatory age limits, have considered them nonetheless necessary. In 2012, the United Kingdom's House of Lords Select Committee on the Constitution acknowledged that 'age is undoubtedly a blunt tool by which to assess whether someone is no longer fully capable of performing their job' but was resigned to its use because 'the principle of judicial independence necessarily makes it very difficult to force a judge to retire on the grounds of declining capacity to act'.[221]

Judicial officers were asked to 'indicate whether or not you think there should be a mandatory retirement age for judicial officers'. Those who answered 'Yes' were then asked to 'indicate at what age retirement from the judiciary should be mandated'. Of the 135 respondents, only 9% (n = 12) gave 'No' as their answer, reflecting overwhelming support amongst the judiciary for the current system of age limits determining judicial service in all Australian jurisdictions.

There were 120 responses to the follow up question asking for an indication of the age at which retirement should be mandated (Figure 6). Excluding the ages of 60, 65, 78 and 80, which each had a very small number of adherents, there were three ages that received substantial support for mandatory retirement. These were 70 years (42%), 72 years (17%) and 75 years (25%). A small number of respondents (7%) indicated age ranges, such as 70–72 or 70–75 years, which are indicated in Figure 6 as 'Other Range'.

mid-1970s as the Australian Parliament began to create new federal courts, invest them with jurisdiction and appoint judges to hear and determine the new matters': at 639.

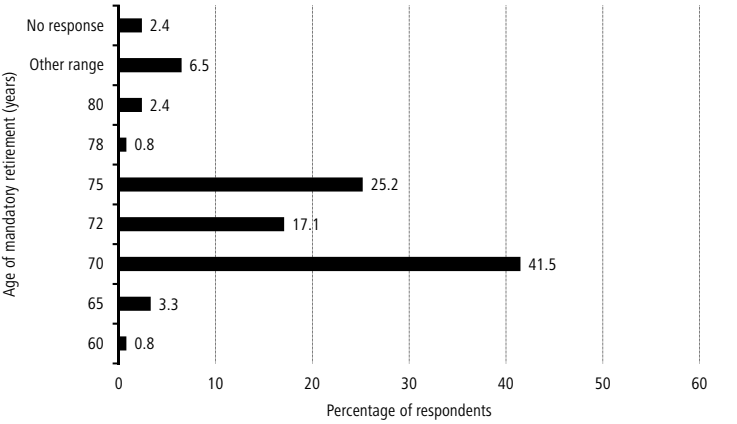
218 Blackham (n 213) 771.

219 Ibid 784. See also Australian Law Reform Commission, *Access All Ages: Older Workers and Commonwealth Laws* (Report No 120, March 2013) 100–1 [4.97]–[4.103]; Opeskin, 'Models of Judicial Tenure' (n 217) 635.

220 See Blackham (n 213) 772–3; Sir Louis Blom-Cooper, 'The Age of Judicial Responsibility: The Retirement and Resignation of Appellate Court Judges' in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012) 339, 340–1.

221 Select Committee on the Constitution, *Judicial Appointments* (House of Lords Paper No 272, Session 2010–12) 59 [191].

Figure 6: Age of Mandatory Retirement



As New South Wales and Tasmania currently have an age limit of 72 years, one might have expected this to be apparent in a decomposition by jurisdiction. Interestingly, of the 32 respondents from New South Wales, only eight favoured the existing age limit, while nine favoured 70 years and 13 favoured 75 years. Only three judicial officers from Tasmania responded to this question, two favouring that state's existing retirement age limit of 72 years and one preferring 75 years.

Few respondents commented on this question explaining their view of the appropriate age limit, but a sample includes the following:

> I think 70 works well. The legal profession is cumulative in terms of knowledge and experience and I think many people do their best work in their 50s and 60s.[222]
>
> ***
>
> I believe 70 is about right. I would make an exception for the High Court of 75.[223]
>
> ***
>
> Around 70 is acceptable as long as service for at least 10 years is also a criterion (eg, to receive a full pension).[224]

[222] Respondent (Female, 0–4 years' service, Federal, Supreme/Federal/Family, March 2016).

[223] Respondent (Female, 15–19 years' service, Federal, Supreme/Federal/Family, March 2016).

***

> Eighty, but subject to earlier declaration of incapacity.[225]

One comment addressed the question of retirement age by reference to different types of appointment, pointing out the need for two age limits upon judicial service, namely 72 years for permanent judicial officers and 75 years for acting appointments.[226] This comment highlighted an issue that was the subject of a separate survey question.

Respondents were asked to indicate 'the extent to which you agree that post-retirement age limits on the use of acting judicial officers are appropriate' (Figure 5). The response was largely positive and indicates that a majority either agreed or strongly agreed with existing arrangements (64%), or were neutral (18%). Some 19% had concerns about the appropriateness of the post-retirement age limits.

The main thrust of the comments on the question of age limits for acting judges focused on capacity. For instance:

> There are some judges who need to retire early while others are forced to retire when they are still perfectly capable. A good, experienced, competent judge is a really valuable asset and, as long as appropriate capacity checks are in place, I don't see the need for an age limit. People are far more healthy and vigorous than in the past, so expecting a person to be less able at a particular age is not necessarily a reliable indicator. In the community, generally, people are expected to work longer, the age pension is expected to be lifted to 70 years, which although not totally on all fours with my argument, there is no reason why people's increased capacity to work to a later stage should not be reflected among judges.[227]

One respondent noted that capacity problems could be easier to manage in the context of an acting appointment:

> As the positions are acting only, there can be more discretion and an easier termination if a person is no longer acute enough to fill the role.[228]

[224] Respondent (Female, 10–14 years' service, NSW, Supreme/Federal/Family, March 2016).

[225] Respondent (Male, 0–4 years' service, NSW, Supreme/Federal/Family, March 2016).

[226] Respondent (Female, 25+ years' service, NSW, District/County/Federal Circuit, March 2016).

[227] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[228] Respondent (Female, 15–19 years' service, Qld, District/County/Federal Circuit, March 2016).

Judicial officers were also asked to 'indicate the extent to which you agree it would be appropriate for judicial officers to be asked to undergo capacity checks at the request of a Head of Jurisdiction or a relevant body constituted by judges' (Figure 5). Of the 135 respondents, just 12% expressed any form of disagreement, while 11% were neutral on the question. Those in agreement constituted 77% of respondents, with 56% selecting 'agree' and 21% selecting 'strongly agree'.

Comments in favour indicated that, although rare, the problem of judicial officers serving while at less than full capacity was not a theoretical one and a better response system was required. The more pointed comments included the following:

> This is a very vexed issue and would require extraordinary sensitivity and safeguards, but the reality is that every Head of Jurisdiction would say that most of their 'pastoral' time with members of their court is taken up with a small number and the rest just get on with the job. I think that there is much more understanding of depression and other debilitating health issues and certainly my experience is that if the individual asks for help it will be given generously and without judgment. The problem is the judicial officer who has problems (which are reflected adversely in her work) and they are not prepared to seek help. It is then that I think that the Head of Jurisdiction (perhaps after consulting senior colleagues) should have the capacity to compel such tests.[229]
>
> ***
>
> Although comparatively rare, senile judges present real problems. The existence of a formalised structure would make it easier to deal with.[230]

Several responses emphasised the importance that any such power of request be accompanied by 'safeguards'[231] or 'a proper and fair procedure'.[232]

C *Discussion*

In the work cycle of a judge, 50% or more respondents identified education of judicial officers, workload, and staffing and support services as current challenges in their jurisdiction. The issue of judicial remuneration and

[229] Respondent (Male, 20–24 years' service, Qld, District/County/Federal Circuit, March 2016).

[230] Respondent (Male, 5–9 years' service, Federal, Supreme/Federal/Family, March 2016).

[231] Respondent (Male, 10–14 years' service, Qld, Magistrates/Local, March 2016).

[232] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

pensions was very near to inclusion in this list, with 49% of respondents agreeing or strongly agreeing that it was a current challenge.

It might have been expected that workload, staffing and support services would be identified as such. These issues, implicating as they do the resourcing of the judicial arm, have been identified in other research as matters of concern for judicial officers.[233] Despite the persistence of these results, there is no indication that these concerns are being systematically addressed. What our survey responses indicate is that, from the judicial perspective, the failures of support often manifest themselves in prosaic ways similar to those shared in other government departments and business; for instance, a lack of adequate IT support or insufficient direct control over support staff. The survey also provides a revealing inside perspective on the stress that workload and under-resourcing causes. This ranged from the additional stress that Productivity Commission reporting has caused for the judiciary, to the stresses and mental health issues flowing from unmanageable workloads, to the inadequate resourcing of support services to judges who might suffer harassment. The significance of jurisdiction and court level also provided some guidance in relation to this issue. The challenge of workloads in the superior and lower courts suggests that these areas warrant particular attention. This likely reflects the 'churn' factor of a large volume of smaller matters in the lower courts — in the superior courts, the burden of lengthy judgment writing is perhaps the factor at work.

The significant concern among respondents that education of judicial officers remains a challenge for the judiciary is, on the one hand, somewhat surprising given the recent advancements in the provision of continuing education to judicial officers.[234] On the other hand, it reflects a growing consensus around the importance of judicial education, and a more critical perspective on the adequacy of the efforts to achieve it to date.[235] The comments reveal criticisms of the availability of education programs, the resources that support them, and their quality. The variability of education between the different jurisdictions was also a matter for comment that might

[233] Mack, Wallace and Roach Anleu, *Judicial Workload* (n 156) 30–1. See also Wallace, Roach Anleu and Mack, 'Evaluating Judicial Performance' (n 157) 452–4.

[234] See, eg, *Courts Legislation Amendment (Judicial Education and Other Matters) Act 2007* (Vic) s 1(a); J Allsop, 'Continuing Judicial Education: The Australian Experience' (2013) 21(3) *Legal Education Digest* 18.

[235] Justice James Douglas, 'Judicial Education for Judges' (Speech, International Bar Associaton's Judges' Forum and the Academic and Professional Development Committee, 20 October 2014) 6.

suggest further investigation of ways to support education opportunities across jurisdictions is warranted.

The divided response to whether the use of temporary judicial officers is a challenge reflects an ongoing division amongst the judiciary about such appointments, with some openly expressing concern, and others happily accepting temporary appointment after retirement (often adding to the disquiet of others). Judges are actively attempting to address this division and unresolved tension; for instance, the Judicial Conference of Australia commissioned a report into the practice.[236] It demonstrates the complex nature of such appointments, which deliver significant benefits for the efficient administration of justice while simultaneously raising real concerns about the independence of the judiciary.

The high proportion of neutral responses to the question of 'whether part-time appointments represent a challenge' perhaps reflect the underdeveloped use of part-time judges, even in those jurisdictions that permit them, and the prohibition on part-time appointments at the higher levels, so that judicial officers have not had sufficient experience of these appointments to have formed a view. The otherwise mixed responses are likely to reflect the fact that, in the judicial sphere, it is not yet clear whether the arguments in favour of part-time and flexible working arrangements outweigh the perceived costs. The correlation of gender with greater concern regarding part-time appointments is likely explained by the largely gendered foundation that underpins the need for greater workplace flexibility.[237]

The question of whether sufficient ethical support is being provided is one in which the individual judicial perspective is particularly pertinent. The responses reveal that it is considered a challenge, at least for a significant percentage of judges (35%). The introduction of new ethical support systems — including consideration of more formalised support — should not require the agreement of a majority of judges before its introduction, and the data provide an important contribution in this area to prompt further consideration of how to better formalise and institutionalise reform. The suggestions of the judges themselves as to how this might be achieved provides jurisdictions with a solid starting point.

The responses to the question of judicial retirement ages represented a significant intervention in this issue. While there was no clear consensus on the most appropriate age for retirement, the responses support the

[236] Appleby et al (n 92).

[237] See above n 113 and accompanying text.

proposition that there is little disquiet amongst the judiciary about the prospect of capacity testing for older judicial officers. This is a highly significant finding, challenging assumptions often made by those outside the judiciary about the extent to which certain proposals for judicial accountability will be tolerated as compatible with the principle of judicial independence.[238]

Finally, in relation to remuneration, it is unsurprising that a number of judges found judicial remuneration a challenge. In this dimension, judges are perhaps self-interested, but their concerns should not be so simply dismissed. If governments take seriously the stated objective of attracting the most qualified individuals to the job (although this represents only one of many objectives underpinning judicial remuneration), a number of comments reveal that the current levels of remuneration may not be achieving this.

VI Complaints, Discipline and Removal

A *Context*

Overall, the Australian judiciary is dedicated, competent, and acts with high levels of integrity. Nevertheless, there are occasions where judicial officers fail to meet the standards expected of them, either as a consequence of misconduct or incapacity. In those instances, their conduct warrants a measured, transparent and appropriate response. Regulation of judicial conduct has proved to be quite sensitive, with the major concern being the challenge of crafting a system that provides accountability without derogating from judicial independence. The first legislative reform occurred in 1986 in New South Wales,[239] and was followed by a long hiatus before a number of jurisdictions introduced reforms this century.[240]

As a result, regulation in this area is in a period of transition. Traditionally, concerns about judicial conduct are managed in six key ways. The first is by selecting judicial officers of appropriate character, who are less likely to cause difficulties during their tenure. The second is through the appeal process. While this process primarily considers matters of professional judgment, it

[238] See, eg, Blackham (n 213) 747.

[239] *Judicial Officers Act 1986* (NSW).

[240] Courts *Legislation Amendment (Judicial Complaints) Act 2012* (Cth); *Judicial Conduct Commissioner Act 2015* (SA); *Judicial Commission of Victoria Act 2016* (Vic); *Magistrates Court Act 2004* (WA).

can also raise conduct issues.[241] For example, a misogynistic comment may be both misdirection to a jury leading to an appealable error, and a conduct issue.[242] The third is through the transparency of open court procedures, which expose a judge to public scrutiny. The fourth is through the adoption and promulgation of standards of judicial conduct. Fifth, there is an informal role for fellow judges (in particular the Heads of Jurisdiction) in counselling offending judges and assisting them in remedying inappropriate behaviour. Finally, there is the 'nuclear option' of removal of a judge from office in cases of serious misconduct or incapacity.

Naturally, the removal option is rarely employed, and in almost all Australian jurisdictions it requires the involvement of Parliament. For example, the *Constitution* provides that federal judges 'shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.[243]

In several of the jurisdictions that have introduced judicial complaints and disciplinary reforms, little more has been achieved than the codification of the traditional approach.[244] Typically they provide some (mostly administrative) power to the Heads of Jurisdiction to provide a limited response to misconduct. For instance, under the federal system, Commonwealth legislation provides:

> The [Head of Jurisdiction] may take any measures that the [Head of Jurisdiction] believes are reasonably necessary to maintain public confidence in the Court, including, but not limited to, temporarily restricting another [judicial officer] to non-sitting duties.[245]

This suggests the Head of Jurisdiction has the power to speak to the judge involved and, where necessary, use their administrative powers to try to resolve the issue. In New South Wales, the Judicial Commission has the power to refer complaints to Heads of Jurisdiction if 'it does not justify the attention

241 Appleby and Le Mire (n 16) 7–8.

242 Transcript of Proceedings, *R v Johns* (Supreme Court of South Australia, SCCRM/91/452, Bollen J, 26 August 1992) 12–13, quoted in *Question of Law (No 1 of 1993)* (1993) 59 SASR 214, 219 (King CJ), 232–3 (Perry J), 237 (Duggan J). The Court of Criminal Appeal found that the direction 'was apt to convey the impression that consent might be induced by force': at 234 (Perry J, Duggan J agreeing at 238, King CJ dissenting at 222).

243 *Constitution* s 72(ii).

244 See, eg, *Judicial Officers Act 1986* (NSW) s 41.

245 *Family Law Act 1975* (Cth) s 21B(1A)(d); *Federal Court of Australia Act 1976* (Cth) s 15(1AA)(d); *Federal Magistrates Act 1999* (Cth) s 12(3)(d).

of the Conduct Division',[246] but the heads of jurisdiction have even more limited power than is provided by the federal legislation.[247] South Australia and Western Australia also rely on the Head of Jurisdiction to manage complaints short of those, which (if established) could warrant removal.[248] An additional procedure in the *Magistrates Court Act 2004* (WA) allows the Attorney-General to suspend magistrates where they have demonstrated a physical or mental incapacity or engaged in misconduct.[249]

The approaches that tend towards codification of the traditional system can be contrasted with more comprehensive formal responses, such as those in place in England and Wales.[250] The most recent effort in Victoria appears to move towards this by incorporating lay voices in the disciplinary system, creating a system for compulsory medical testing in situations where there are concerns about capacity, and providing support for Heads of Jurisdiction faced with misconduct problems.[251]

B *Survey Data*

This patchwork of regulation across Australia provided the backdrop for a series of six survey questions about complaints, discipline and removal. The distribution of responses is illustrated in Figure 7.

246 *Judicial Officers Act 1986* (NSW) s 21(2).

247 Ibid ss 21(2)–(3).

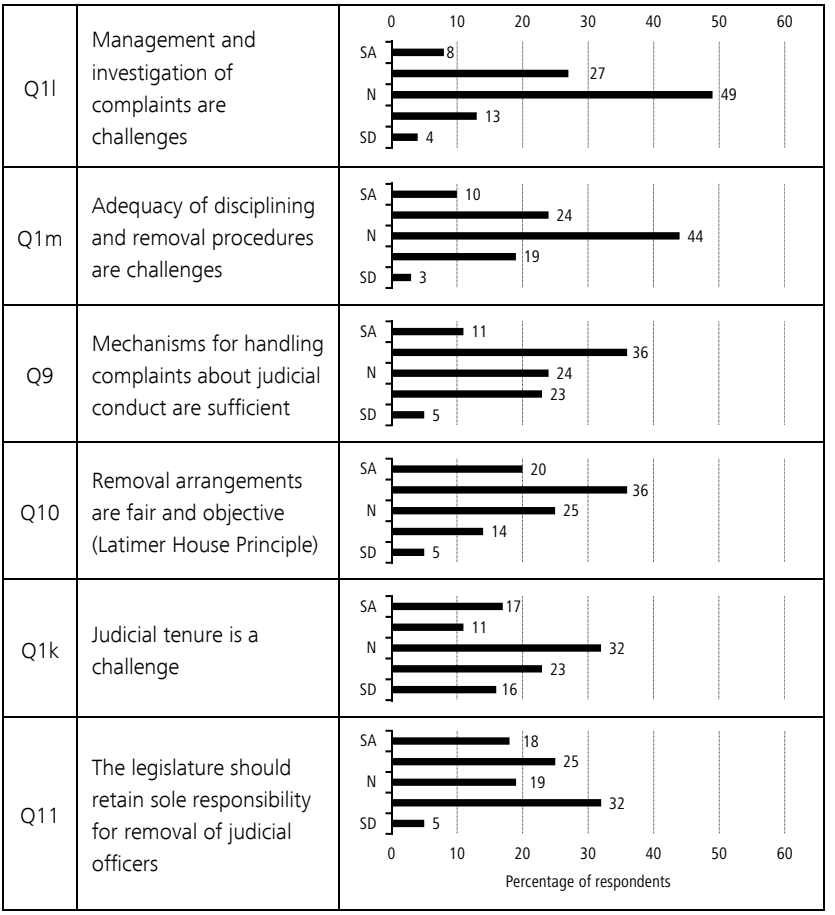
248 *Judicial Conduct Commissioner Act 2015* (SA) s 18; Supreme Court of Western Australia, *Protocol for Complaints against Judicial Officers in Western Australian Courts* (27 August 2007) 3–5 [9]–[17].

249 *Magistrates Court Act 2004* (WA) sch 1 cls 13–14.

250 Graham Gee, 'Judicial Policy in England and Wales: A New Regulatory Space' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 145, 149–53.

251 *Judicial Commission of Victoria Act 2016* (Vic).

Figure 7: Complaints, Discipline and Removal



1 *Management and Investigation of Complaints*

The first question asked judicial officers to indicate the extent to which they agreed that 'management and investigation of complaints' was a challenge in their jurisdiction (Figure 7). The most frequent response was neutral (49%), while 35% agreed or strongly agreed that that the complaints processes constituted a challenge; 17% disagreed or strongly disagreed.

The respondents' comments reflected the transition in arrangements in several jurisdictions. Some explained that Victorian judicial officers were waiting to see how the new institutional approaches would work out. A number of comments from New South Wales expressed satisfaction with the judicial commission model operating there:

> [The] New South Wales system is OK. Except that it could be more efficient.[252]
>
> ***
>
> I am quite satisfied with the role of the Judicial Commission in NSW and believe there should be a constitutionally acceptable complaints process available to the public for every court. Judicial office should not confer immunity from investigation of complaints if undertaken in an acceptable way.[253]
>
> ***
>
> The Judicial Commission is set up to handle such challenges and does so admirably.[254]

In other jurisdictions, there was a high level of satisfaction expressed with the traditional system, with a wariness of judicial commissions:

> The internal process is thorough and, I think, fair. I support the theory of a Judicial Commission, but beware (a) the bureaucracy and (b) effectiveness being impaired by dealing with the mad and sad.[255]

Others were more critical of the traditional system:

> In 21 years, I have had very little reason to complain, so I am not qualified to comment. As far as complaints about judicial behaviour in court (and of course the major problem of delay in giving judgment), my opinion is that the in-house method is out of date. That is not in any way to reflect on any Head of Jurisdiction in my time, but the reality is the lawyer writing to the chief judge about a judgment that is a year old, must feel at least a tiny bit of concern that his or her complaint may affect the ultimate outcome. The New South Wales Judicial Commission system seems to work well so that is what I favour.[256]
>
> ***
>
> The existing system is entirely unsatisfactory. There is no established process and no independent oversight of the Head of Jurisdiction's handling of a complaint, should there be a difference of opinion between the magistrate and

[252] Respondent (Demographic data omitted, March 2016).

[253] Respondent (Female, 0–4 years' service, Federal, District/County/Federal Circuit, March 2016).

[254] Respondent (Male, 10–14 years' service, NSW, Magistrates/Local, March 2016).

[255] Respondent (Male, 5–9 years' service, Federal, Supreme/Federal/Family, March 2016).

[256] Respondent (Male, 20–24 years' service, NSW, District/County/Federal Circuit, March 2016).

> Head of Jurisdiction. Magistrates have been moved from one location to another, involving very significant disruption to family life, with no avenue for review, where there has been a disagreement with Head of Jurisdiction. In Western Australia, relocation can be up to 3,000 kms, having a significant impact on employment of a partner and schooling for children etc. Fear of being directed to move to a country or other location, which would disrupt the magistrate's family life, operates to constrain magistrates from raising issues regarding the operation of the court.[257]

2 *Discipline and Removal Procedures*

The next question focused on the follow-up to complaints or other instances of misconduct or incapacity. Judicial officers were asked to indicate the extent to which they agreed that 'adequacy of disciplining and removal procedures' was a challenge in their jurisdiction (Figure 7). While 44% of respondents were neutral, 34% agreed or strongly agreed and 22% disagreed or strongly disagreed.

The data indicate that only gender was correlated with different responses. Female respondents were more likely to indicate that disciplinary and removal procedures were challenges: 37% of female respondents agreed or strongly agreed with this statement, in contrast to 24% of male respondents. Correspondingly, 29% of male respondents disagreed or strongly disagreed in comparison to 11% of female respondents.

Several comments reflected dissatisfaction with the existing arrangements, with typical comments pointing out the difficulties associated with managing poor performance and proceeding to removal:

> There needs to be a moderate reassessment of how to manage or remove judicial officers who are clearly bad appointments.[258]
>
> ***
>
> Peer group pressure is a strong disincentive to misbehaviour but a bad appointee can stay for a long time and have a negative effect on other judges and the public.[259]
>
> ***

[257] Respondent (Female, 10–14 years' service, WA, Magistrates/Local, March 2016).

[258] Respondent (Female, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

[259] Respondent (Female, 15–19 years' service, Qld, Supreme/Federal/Family, March 2016).

> Some process is needed to ensure judges keep up to date with their work.[260]

Others put forward options for reform:

> It is very hard (and appropriately so) to remove judicial officers. In my view, appointments should be made independently through a Judicial Appointments Commission, as in the UK. Perhaps disciplinary procedures and removals should also be conducted in the same way. So, for example, the NSW Judicial Commission might be given the power to remove, rather than merely to recommend removal by Parliament.[261]
>
> ***
>
> Judicial independence is required. Removal only after the five most senior judges of the court vote by majority to remove the investigated judge and then such removal approved by a majority vote of both houses of Parliament.[262]

But not everyone was convinced that enhanced discipline and removal processes are the answer:

> It is a mistake to think that there is a way of 'disciplining' a judge other than removal in accordance with the traditional parliamentary process. Anything else fundamentally undermines judicial independence, which is by definition individual and fundamental.[263]

3 *Complaints Handling*

The next question asked respondents to focus specifically on the 'extent to which you agree that the current mechanisms for handling complaints about judicial conduct are sufficient in your jurisdiction' (Figure 7). Some 47% indicated their agreement; 24% were neutral and 28% either disagreed or strongly disagreed that current practices were sufficient. No demographic variables were correlated with the different responses.

There were fewer comments in response to this question. One respondent provided a strong critique of the uncertainty associated with the traditional approach:

> There are no formal mechanisms currently, and informal mechanisms are inadequate and not transparent. There are not even customs and conventions,

[260] Respondent (Male, 5–9 years' service, Federal, Supreme/Federal/Family, March 2016).

[261] Respondent (Male, 20–24 years' service, NSW, Magistrates/Local, March 2016).

[262] Respondent (Male, 5–9 years' service, WA, District/County/Federal Circuit, March 2016).

[263] Respondent (Male, 0–4 years' service, Qld, Supreme/Federal/Family, March 2016).

> which can set a norm. If an individual Head of Jurisdiction wanted to ignore past practice or to introduce changes, they are free to do so. There is no enforceable mechanism to compel a judge to engage with a complaint process, if they choose not to or do not accept or respect the informal authority of the Head of Jurisdiction. There is no guarantee of consistency of practice. There is nothing that can give a member of the public who complains, any sense of a fair and transparent process for dealing with complaints. That is ironic, given the role of the courts and judges as impartial, transparent and accountable arbiters of disputes.[264]

4 *Best Practice Removal Procedures*

The next question drew on principles contained in the Commonwealth Latimer House Principles to seek views on the fairness of those same removal mechanisms.[265] Principle VII(b) relevantly states:

> In addition to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered. Disciplinary proceedings which might lead to the removal of a judicial officer should include appropriate safeguards to ensure fairness.[266]

Participants were asked to indicate the extent to which they agree that 'the current arrangements for removing judicial officers in their jurisdiction satisfy the Bingham Report's invocation of this principle as "best practice"' (Figure 7). This was the first of the questions relevant to complaints, discipline and removal where there was a majority view. A majority of respondents (56%) indicated that they agreed or strongly agreed that their jurisdiction was compliant with the Bingham Report's best practice; 25% were neutral and 19% disagreed or strongly disagreed.

[264] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[265] See Commonwealth Secretariat, *Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government* (Report, 17–20 October 2005) 401. These principles are intended to set out the 'an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values': at 401.

[266] Ibid 404.

5 *Judicial Tenure*

The next question asked respondents to reflect on the topic at a more general level by indicating whether they agreed that 'judicial tenure' was a challenge in their jurisdiction (Figure 7). This question allowed respondents to consider judicial tenure broadly, and also provided the opportunity to use the comments facility to reveal the ways in which they understood the topic beyond the understandings that may be assumed by outsiders.

In sum, judicial opinions were mixed, although there was some consensus against this proposition. Of the 142 respondents, 28% agreed or strongly agreed that judicial tenure is a challenge, 32% indicated neutrality and 39% either disagreed or strongly disagreed.

Only one demographic factor — level of court — was correlated with different responses. Respondents from superior courts (the Supreme, Federal and Family Courts) were more likely not to see judicial tenure as a challenge (59%) when compared with those respondents appointed to either the lower courts (Magistrates, Local, 27%) or the intermediate courts (District, County, Federal Circuit, 40%). The lower courts were most concerned with judicial tenure, with 46% indicating they believed this to be a challenge (compared with 25% in the intermediate courts and 12% in the superior courts).

The comments supported the current protections for judicial tenure:

> Courts and governments are often at odds, and judicial tenure is important to ensure judicial independence.[267]

One respondent expressed concern about the ability of governments to undermine tenure protections through removal mechanisms:

> Tenure is fundamental to independence, but also linked to issues such as pensions and disability/retirement entitlements. Tenure is a meaningless concept if a judicial officer can be removed for incapacity for example (illness) and there is no disability pension.[268]

[267] Respondent (Female, 10–14 years' service, Vic, District/County/Federal Circuit, March 2016).

[268] Respondent (Female, 15–19 years' service, Vic, Magistrates/Local, March 2016).

One respondent expressed concern, not with the security of tenure offered to her in her judicial capacity, but in contrast to when she sat as a tribunal member, where equivalent security of tenure is not provided:

> In the tribunal jurisdiction in which I also work, this is a real issue, particularly tenure amongst senior members of that jurisdiction who are responsible for reviewing government decisions.[269]

6 *Power of Removal*

The final question sought judicial views on vesting the power of removal in an independent disciplinary body, separate from both executive and legislature, or retaining the status quo, with the legislature retaining sole decision-making responsibility for determining the removal of judicial officers. The question again drew on the Bingham Report (Figure 7).

Again, the responses expose the diversity of opinion within the judiciary as to the most appropriate way to manage judicial removal. Some 44% considered parliamentary approval as the only appropriate mechanism, with 18% of those strongly agreeing with that proposition. By contrast, 19% were neutral and 37% of respondents were open to an alternative model with a disciplinary body holding the power to remove.

A number of those judicial officers who endorsed the process of parliamentary removal qualified their comments by indicating that an investigatory process should precede the parliamentary process. The following comments were typical:

> Some form of a tribunal or disciplinary council should exist to work with the executive and legislature.[270]

***

> Removal of a judge is very serious and ought not be delegated. Certainly, judicial commissions can and should make recommendations but the final decision ought to be by the legislature in full public view.[271]

Those who indicated openness to a disciplinary body removing a judicial officer cited concern with the way the parliamentary process works:

> This enables politics and popularity to override reason and objectivity.[272]

[269] Respondent (Female, 0–4 years' service, Qld, District/County/Federal Circuit, March 2016

[270] Respondent (Male, 10–14 years' service, Qld, District/County/Federal Circuit, March 2016).

[271] Respondent (Male, 10–14 years' service, Federal, Supreme/Federal/Family, March 2016).

***

> As the experience with professional bodies shows (and contrary to public perception), disciplinary bodies made up of peers are much more severe than the public. A judicial disciplinary body made up of senior judges would be a very good idea and would see many more judges disciplined.[273]

There was some diversity of interpretation of the question. Some judicial respondents disagreed with the question, but indicated in their comments that they thought that a disciplinary tribunal (or the like) should investigate and make recommendations to Parliament. Others agreed, indicating that they believed Parliament should hold sole decision-making power over removal, but also made comments suggesting that they also thought the involvement of a tribunal to investigate and make recommendations was appropriate.

C *Discussion*

None of the issues regarding complaints, discipline, tenure and removal was seen as a challenge by 50% or more of respondents. While much recent reform has clustered around creating systems and processes for managing complaints, this was not a matter that aroused much concern in the respondents. Misconduct remains an area in which there are significant differences of opinion about how it should be managed. Perhaps this reveals that, as it is an area in which there has been considerable change, judges are waiting to see whether the new institutional approaches will address their concerns. Certainly, the responses indicate that some of the hesitancies that accompanied the introduction of Australia's first reforms in this area in New South Wales have lessened, with many respondents indicating their satisfaction with this model.

The apparent correlation between gender and concern about disciplinary and removal processes is something of a puzzle. There are a number of possible reasons for the fact that female judicial officers are less satisfied with these processes, such as a sense that they are ineffective or unfair. However, no conclusion can be drawn from the data collected in this survey. Further qualitative study is needed.

The revelation by one respondent of her concern about the tenure of tribunal members (rather than judicial officers) highlights the need for greater

[272] Respondent (Female, 25+ years' service, NSW, District/County/Federal Circuit, March 2016).

[273] Respondent (Male, 5–9 years' service, Federal, Supreme/Federal/Family, March 2016).

attention to be paid to the position of statutory officeholders who are given quasi-independence under their constituting legislation, and whether this is sufficient where they have obligations to review government decisions and actions. This would include tribunal members, as well as officers such as the Ombudsman, human rights commissioners and the Australian Information Commissioner.[274]

The fact that respondents in the lower courts appeared more concerned about judicial tenure is consistent with the findings of Mack and Roach Anleu that magistrates do not in every respect enjoy the same protections as judges with regard to tenure.[275] Despite the evolution of magistrates over the past few decades from public servants to independent judicial officers, anomalies remain in some jurisdictions with regard to the consequences of abolishing lower courts, ages of mandatory retirement, protections against reduction in remuneration, and procedures and standards for suspension and removal. It is plausible that these were weighty considerations for respondents from lower courts when answering the questions relating to tenure.

VII Conclusion

This article has tried to achieve two things. First, it has sought to interrupt the current scholarship and regulatory study of the judiciary by indicating the need to consider the wider judiciary's views on these issues. The data have revealed the diverse array of concerns that are held by the Australian judiciary with respect to their profession and its operation as the third arm of government. It illuminates much of the current debate around the regulation of the judiciary. In some respects — for instance, in relation to diversity and appointments, and in relation to the challenges of judicial workload and resourcing — it reinforces existing regulatory reform trajectories. But it may also be said to give added impetus to those efforts where political will is indifferent or enthusiasm has wavered. In other respects, the survey results challenge a relative lack of academic and regulatory interest. A good example of this is the concerns expressed by many respondents over the need for greater education and ethical support. This represents a clarion call for more academic attention, and possibly even a more direct regulatory contribution to addressing this need of the judiciary.

[274] See also initial consideration of such questions in Gabrielle Appleby, 'Horizontal Accountability: The Rights-Protective Promise and Fragility of Executive Integrity Institutions' (2017) 23(2) *Australian Journal of Human Rights* 168.

[275] Mack and Roach Anleu, 'The Security of Tenure' (n 11).

In more than a few areas, our empirical research reveals deep divisions within the judiciary. These often mirror divisions that have marked the scholarship and regulatory commentary on these topics. In other cases, the results highlight the weakness of assumptions that appear frequently in academic and other commentary.

Second, this article has reinforced the need for deeper research, including empirical research conducted with the co-operation of, if not in partnership with, the Australian judiciary. With the exception of the landmark research of Mack and Roach Anleu, much of the public or professional understanding of judicial views on these issues have been shaped through individual judicial contributions to public debates, or the confidential consultation that occurs between government and Heads of Jurisdiction. While efforts to bridge the divide between the judiciary and the academy are not uncommon in this country, they are typically focused on substantive areas of law, rarely on the institution that judicial officers themselves constitute.

The value of broader empirical work emerges from this study at a number of levels. As judges are educated and intelligent, with significant experience in the different facets of the judicial system gained over the course of their careers, they have valuable contributions to make to debates about regulation and the future directions of reform. They also bring a unique perspective from *within* the courts, and thus have an understanding of, for instance, the causes of stress within judicial ranks, or the internal institutional challenges of creating part-time appointments, or the level of ethical support they feel is needed. Such inside perspectives might reveal the true complexity of the task of reform, or it might reveal that reform is more achievable than previously believed. Our survey has also demonstrated that while judicial perspectives are important, they should be considered one source of information, which needs to be supplemented, verified and contrasted with others.

This article has demonstrated that this broader empirical research must be considered foundational in scholarly and regulatory debate. Only in this way can we aim to understand better, and analyse competing arguments on, the contemporary state of the judiciary, let alone its future.