PIERCING THE VEIL OF MERIT:

THE PATH TO A REPRESENTATIVE AUSTRALIAN JUDICIARY

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> *By all accounts, Mr Ah Ket was a remarkable man. Despite his high profile and achievements, it would seem that others were advanced while he was not. He was neither appointed Silk nor a judge. Sir Robert Menzies wrote that he and Mr Ah Ket "were great friends". He said that "William Ah Ket did not ever sit on the Bench, though he would have been a very competent judge…He was a sound lawyer and a good advocate".*[1]

Despite his ambitions to be appointed a judge,[2] the first Victorian barrister of Chinese heritage Mr William Ah Ket,[3] never became one. And almost a century after his passing,[4] no judge of colour has been appointed to the High Court of Australia,[5] nor has an Asian Australian been appointed to the Federal Court of Australia or any state or territory Supreme Court.[6] Virtually all judicial appointees are "*white male barristers, usually of Anglo-Celtic origin*".[7] This is the case despite Australia becoming one of the most culturally diverse countries in the world,[8] following a shift away from the 'White Australia' policy almost 50 years ago.[9]

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[1] Chief Justice Susan Kiefel AC, 'William Ah Ket's Contribution to Diversity in the Legal Profession' (Asian Australian Lawyers Association, William Ah Ket Scholarship Presentation, Great Hall, High Court of Australia, 9 October 2019) 6 citing Karin Derkley, 'William Ah Ket Legacy Recognised' (2018) 92(3) *Law Institute Journal* 83, 83-84 and Sir Robert Menzies, *The Measure of Years* (Cassell Australia, 1970) 249.

[2] Isabel Carter, *Woman in a Wig: Joan Rosanove, QC* (Lansdowne Press, 1970) 13.

[3] William Lye OAM, 'Introduction to William Ah Ket at the Victorian Bar and Scholarship' (William Ah Ket Inaugural Scholarship Launch at Maddocks, 21 November 2017) 1-2.

[4] Mr William Ah Ket died on 6 August 1936.

[5] Andrew Leigh, 'Why Has No Person of Colour Ever Served on the High Court?', *Australian Financial Review* (online, 21 December 2021) <https://www.afr.com/politics/federal/why-has-no-person-of-colour-ever-served-on-the-high-court-20211221-p59j8x>.

[6] Carrie LeFrenz, 'IP Law Expert Katrina Rathie Joins Bubs Board', *Australian Financial Review* (online, 15 July 2021) <https://www.afr.com/companies/manufacturing/ip-law-expert-katrina-rathie-joins-bubs-board-20210713-p589e5>.

[7] George Winterton, 'Appointment of Federal Judges in Australia' (1987) 16(2) *Melbourne University Law Review* 185, 190.

[8] Tim Soutphommasane, 'Cultural Diversity in Leadership: What Does It Say About Australian Multiculturalism?' (2017) 41(3) *Journal of Australian Studies* 287, 287; Australian Human Rights Commission, *Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership* (Report, July 2016) 5.

[9] Anthony Moran, 'Multiculturalism as nation-building in Australia: inclusive national identity and the embrace of diversity' (2011) 34(12) *Ethnic and Racial Studies* 2153, 2156; Eddy S Ng and Isabel Metz, 'Multiculturalism as a Strategy for National Competitiveness: The Case for Canada and Australia' (2015) 128(2) *Journal of Business Ethics* 253, 255.

In the wake of the release by the Australian Law Reform Commission (**ALRC**) of its report into judicial impartiality, *Without Fear or Favour,*[10] the government is now consulting widely on the issues identified and recommendations made in the report.[11] There is momentum brewing for the established processes and ancient regimes of the judiciary to be reconsidered and for substantive and palpable change to be effectuated. This essay examines the issue of underrepresentation of the Australian judiciary within the context of *Without Fear or Favour*.

The first part of this essay examines the current state of play of cultural representation in Australia and the legal profession and identifies that throughout the history of the Australian legal system the judiciary has been dominated by white, middle-aged men –the 'somatic norm' for the judicial space – which continues to limit the representation of culturally diverse people at the bench. The second part of this essay finds that the somatic norm exists largely as a result of the current system for judicial appointments, which are conducted behind closed doors under the veil of merit. The third part examines how this veil can be pierced through an interwoven approach of the establishment of judicial appointments commissions and setting of ceiling quotas, with the collection of diversity data for the monitoring and assessment of such an approach. I consider how these structural changes go beyond improving the representative nature of Australia's judiciary, and extend to central issues of judicial independence, impartiality and the rule of law.

It is acknowledged that improving representation at the bench will require changes to be made at all stages, and in all spaces, of the legal profession (e.g., law school admissions, law firms and the bar),[12] but the focus of this essay will be on the immediate structural changes that can be made to the judicial institution to address cultural underrepresentation in the Australian judiciary.

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[10] Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report No 138, December 2021) ('*Without Fear or Favour*').
[11] Michael Pelly, 'Judges are Mostly Anglo-Celtic, Married and Speak Only English', *Australian Financial Review* (online 2 August 2022), quoting Attorney-General Mark Dreyfus <https://www.afr.com/politics/judges-diversity-report-anglo-celtic-married-and-only-speak-english-20220802-p5b6l8>.
[12] Brian Opeskin, 'Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary' in Gabrielle Appleby and Andrew Lynch (eds) *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021) 83, 111-2.

I THE CURRENT STATE OF PLAY

When William Ah Ket was practising at the bar in the early 1900s, only 1.07% of the Australian population identified as having a non-European background, with 0.87% of Australians identifying as being of Asian descent.[13] This is not the picture of Australia today. Australia is now more culturally diverse than ever with more than 24% of the Australian population identifying as being of a non-European background,[14] and the latest census data showing that more than half of all Australians born overseas or having a parent born overseas and 24.8% of Australians speak a language other than English at home.[15]

From the limited data available (of which are largely collected through scholarly research), the legal profession is not representative of the cultural composition of the Australian population, particularly at the upper echelons of the profession. For example, though there is statistically reasonable Asian representation at a non-partner level at top firms,[16] it has been estimated that only 7.7% of partners at top law firms,[17] 1.55% of barristers and 0.76% of judges are Asian Australians.[18] The situation is worse for Aboriginal and/or Torres Strait Islander people. Though 3.2% of the Australian population identify as being of Aboriginal and/or Torres Strait Islander origin,[19] Aboriginal and/or Torres Strait Islander people only represent 0.8% of solicitors[20] and 0.3% of barristers.[21] Based on media reports and anecdotal information, there

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[13] Australian Bureau of Statistics, *Census of the Commonwealth of Australia* (Catalogue No 2212.0, 3 April 1911) 903.
[14] Australian Human Rights Commission, *Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership* (Report, July 2016) 5. 'Non-European' encompasses all European backgrounds including Anglo-Celtic, North-West European, Southern European and Eastern European.
[15] Australian Bureau of Statistics, 'Cultural Diversity: Census', *Australian Bureau of Statistics* (Web Page, 28 June 2022) <https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/2021/Cultural%20diversity%20data%20summary.xlsx>.
[16] Michael Pelly, 'Asian lawyers hit 'bamboo ceiling'', *Australian Financial Review* (online, 26 April 2019), <https://www.afr.com/work-and-careers/workplace/asian-lawyers-hit-bamboo-ceiling-20190425-p51h8w>.
[17] Ibid.
[18] Asian Australian Lawyers Association, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015* (Report, 2015) 6 <https://www.aala.org.au/_files/ugd/083074_24719d0f811345b8b6e324656ea8264a.pdf>.
[19] Australian Bureau of Statistics, 'Aboriginal and Torres Strait Islander People: Census', *Australian Bureau of Statistics* (Web Page, 28 June 2022) < https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-people-census/2021>.
[20] Law Society of NSW, 2020 National Profile of Solicitors (Final Report, 1 July 2021) 2 <https://www.lawsociety.com.au/sites/default/files/2021-07/2020%20National%20Profile%20of%20Solicitors%20-%20Final%20-%201%20July%202021.pdf>.
[21] Law Council of Australia, Submission No 37 to Australian Law Reform Commission, *Review of Judicial Impartiality* (8 July 2021) 22 <https://www.alrc.gov.au/wp-content/uploads/2021/07/37.-Law-Council-of-Australia.pdf> citing Australian Bar Association, *Member Information* (Web Page) <https://austbar.asn.au/for-members/member-information>.

were only three sitting judges and eight sitting magistrates that identified as Aboriginal and/or Torres Strait Islander in 2021,[22] and only one is a member of the federal judiciary.[23]

Beyond the simple notion of diversity to count heads, one only needs to look at the walls of the High Court[24] to identify that the judiciary has never been culturally representative of the Australian population, and has long designated its 'somatic norm':

> *For much of its history, the Australian judiciary has been highly homogenous – comprising largely white, middle-aged, Christian males from privileged socio-economic backgrounds, following similar career trajectories.*[25]

The concept of the somatic norm discussed in the work of Nirmal Puwar in the context of official institutions,[26] is a useful lens with which to better understand cultural under-representation within the Australian judiciary. Through ethnographic fieldwork, Puwar identified in the context of the British senior civil service, a supposedly meritocratic institution, had very few senior staff differing from the "*white, male, upper/middle class body*" norm.[27] She argued that the somatic norm is the form of an institution "*naturalised*"[28] or "*made flesh*".[29] It becomes so intertwined with the institution itself and what is deemed to be an idealised conception of human embodiment of the institution that it "*acts to deny any conception of this subject as classed, gendered and – particularly – raced*".[30] It is not so easily visible by those that encompass some aspect of the norm, and even more so invisible to those that fit the norm completely, which allows the somatic norm to deny the validity and recognition of, and to exclude, the somatic 'other'.[31]

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[22] Ibid.
[23] *Without Fear or Favour* (n 10) 454 [12.55].
[24] 'Portraits of Chief Justice and the First Bench', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/artworks/portraits-of-chief-justices>.
[25] Opeskin (n 12) 83.
[26] For example, the British senior civil service in Nirmal Puwar, 'The Racialised Somatic Norm and the Senior Civil Service' (2001) 35(3) *Sociology* 651, and British parliament in Nirmal Puwar, *Space Invaders: Race, Gender and Bodies Out of Place* (Berg, 2004) 135 ('*Space Invaders*') and Nirmal Puwar, 'The Force of the Somatic Norm: Women as Space Invaders in the UK Parliament' in Shirin M Rai et al (eds) *The Oxford Handbook of Politics and Performance* (Oxford University Press, 2021) 25.
[27] Puwar, 'The Racialised Somatic Norm and the Senior Civil Service' (n 26) 652.
[28] Puwar, *Space Invaders* (n 26) 135.
[29] Nicola Ingram and Kim Allen, ''Talent-Spotting' or 'Social Magic'? Inequality, Cultural Sorting and Constructions of the Ideal Graduate in Elite Professions' (2019) 67(4) *The Sociological Review* 723, 729 quoting Pierre Bourdieu, *The Logic of Practice* (Polity Press, 1990) 57.
[30] Sam Friedman and Dave O'Brien, 'Resistance and Resignation: Responses to Typecasting in British Acting' (2017) 11(3) *Cultural Sociology* 359, 363.
[31] Ingram and Allen (n 29) 728-9.

In the context of the judiciary, the "*white, middle-aged, Christian male*"[32] has inconspicuously become synonymous with the judicial institution and the deemed conception of the ideal judge.[33] The somatic other is not validated in any statistical sense as judicial workplace data is "*sparse and patchy*",[34] and any acknowledgement through meaningful research is often only led by groups and associations that represent somatic others. For example, in 2015 the Asian Australian Lawyers Association conducted the first research project into the level of Asian Australian representation at the bench.[35] No similar research on judicial Asian Australian representation has been conducted to date. In respect of Aboriginal and Torres Strait Islander representation, the Law Council of Australia in its submission to the ALRC for the Review of Judicial Impartiality had to rely on media reports and anecdotal information to 'acknowledge' the level of underrepresentation of Aboriginal and Torres Strait Islanders in Australian courts.[36]

As stated above, Puwar argues that the somatic other is invisible to the somatic norm, which further acts to deny the validity and recognition of the 'other'. The lack of acknowledgement of underrepresentation on the bench by its own kind perpetuates the conceptualisation of a somatic norm that denies entry into that space by those that do not fit the mould of the "*white, middle-aged, Christian male*".[37] Glimpses of the somatic norm's lack of acknowledgement of its own identity can be seen in Justice Patrick Keane's swearing-in speech:

> *It is my firm conviction that the Australian judiciary is, as a matter of social history, a truer reflection of our people and their values and aspirations than has been the case with judges in previous times and in other places. ... the suggestions that one occasionally sees in the media to the effect that our judges are some sort of remote elite are quite wrong.*[38]

[32] Opeskin (n 12) 83.
[33] Steven Rares, 'What is a Quality Judiciary?' (2010) *Federal Judicial Scholarship* 44.
[34] Rachel Cahill-O'Callaghan and Heather Roberts, 'Hidden Depths: Diversity, Difference and the High Court of Australia' (2021) 17 *International Journal of Law in Context* 494, 495.
[35] Asian Australian Lawyers Association, n 18.
[36] Law Council of Australia, n 21.
[37] Opeskin (n 12) 83.
[38] Justice Patrick Keane, 'Ceremonial Sitting to Mark the Occasion of the Swearing-In of the Honourable Patrick Anthony Keane as a Justice of the High Court of Australia' (Speech, High Court of Australia, 5 March 2013) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2013/40.html>.

But how has this duality of somatic norm and other been allowed to persist, despite the significant shifts in the demographic makeup of the Australian population – and its legal profession – from which judges are plucked?

II THE MYSTIQUE AND MAGIC OF MERIT

Some have suggested that the cultural underrepresentation within the Australian judiciary is a pipeline issue,[39] that will be solved by the "*trickle up*" effect.[40] It is not hard to make the conclusion that for there to be a diverse bench, there must also be a diverse bar, as almost all judicial appointees are barristers.[41] Similarly, for there to be a diverse bar, Australia requires diverse law firms and law graduates. Even further, Opeskin argues "*it is critical to view judicial diversity not as an endpoint, but as the outcome of a dynamic process that involves a career pipeline stretching back to secondary school*".[42] Though cultural underrepresentation at the bench, the bar and in the legal profession generally can be characterised as a "*pipeline issue*",[43] the whole of the issue cannot be attributed to just that. Looking comparatively at the United States, where people of colour represent 38.4% of the American population,[44] and more than a quarter of associates at law firms are culturally diverse,[45] people of colour make up 20% of sitting judges and 27% of active judges that sit on Article III U.S. District Courts and U.S. Courts of Appeal. In Australia, we are seeing similar levels of cultural diversity at a junior solicitor level,[46] but the not at the judicial level, which suggests there is more than a pipeline issue. For example, 4% of active federal judges are Asian American,[47] in comparison with only 0.76% of Asian Australians making up the whole of the Australian judiciary.[48] This suggests there is something more complex at play here in Australia.

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[39] Opeskin (n 12) 111; Ervin Tankiang, 'Asian Australians and the Judiciary: Does Cultural Diversity Matter?' (2020) 20 University of New South Wales Law Journal Student Series 30 <http://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2020/30.html>; Opeskin (n 12) 83.
[40] Hilary Sommerlad, 'The "Social Magic" of Merit: Diversity, Equity and Inclusion in the English and Welsh Legal Profession' (2015) 83 *Fordham Law Review* 2325, 2333.
[41] Winterton, n 7.
[42] Opeskin (n 12) 111.
[43] Tankiang (n 39).
[44] 'Race and Ethnicity in the United States: 2010 Census and 2020 Census', *United States Census Bureau* (Web Page, 12 August 2021) <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.
[45] National Association for Law Placement, *Report on Diversity in U.S. Law Firms* (Report, February 2021) <https://www.law.berkeley.edu/wp-content/uploads/2021/02/2020_NALP_Diversity_Report.pdf>.
[46] Pelly (n 16).
[47] Centre for American Progress, *Examining the Demographic Compositions of U.S. Circuit and District Courts* (Report, February 2020).
[48] Asian Australian Lawyers Association (n 18).

Throughout the history of the Australian judicial system, the appointment of judges has been both magical and mysterious:

> *…the judicial whisper goes around and someone ends up miraculously on the bench…there is all this mystique, as if it is somehow by magic that it happens.*[49]

The 'magic' lies in the fact that there is not much to say on the current process for the appointment of judges in Australia. Federal judges appointed by the Governor-General,[50] on the advice of the Attorney-General following a decision made by Cabinet.[51] Appointees must be younger than 70 years of age[52] and are required to have been a legal practitioner for not less than 5 years.[53] Beyond that, there are no procedural requirements or other qualifications or criteria that are mentioned in the Australian constitution or the legal instruments pertaining to the federal courts. Judges and magistrates of state and territory courts are appointed by the Governor or Administrator on the recommendation or advice of the Attorney-General.[54] The states and territories largely mirror the basic statutory eligibility requirements of the federal judiciary in the statutes governing their respective courts.[55] Beyond this, the process for the appointment of judges and magistrates across Australia is opaque,[56] closed[57] and secretive,[58] allowing appointments to essentially be "*a gift of the executive government*"[59] exercised with "*unfettered discretion*".[60] The exception is that outside of the statutory requirements, there has

[49] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Gender Bias and the Judiciary* (Report, 1994) 77.
[50] *Australian Constitution* s 72.
[51] Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2012) 85.
[52] *Australian Constitution* (n 50).
[53] *High Court of Australia Act 1979* (Cth) s 7; *Federal Court of Australia Act 1976* (Cth) s 6(2); *Federal Circuit and Family Court of Australia Act 2021* ss 11(2) and 111(2).
[54] 'The Judiciary', *Australian Judicial Officers Association* (Web Page) <https://www.ajoa.asn.au/the-judiciary/>.
[55] Ibid.
[56] *Without Fear or Favour* (n 10) 440 [12.27].
[57] Kathy Mack and Sharyn R Anleu, 'Entering the Australian Judiciary: Gender and Court Hierarchy' (2012) 34(3) *Law and Policy* 313, 318.
[58] Cahill-O'Callaghan and Roberts (n 34).
[59] Simon Evans, 'Appointment of Justices' in Tony Blackshield, Michael Coper and George Williams (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), 21.
[60] 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, 188.

long been consensus amongst Australian judges and those that appoint them, that judges be selected and appointed on the basis of "*one criterion and one criterion alone*"[61] – merit.[62]

Currently at a federal level, there is no clear and public articulation of what makes one candidate meritorious over another. Nor is there a transparent and openly consultative process for finding and assessing potentially meritorious candidates. This was not always the case. In 2008, the then Commonwealth Attorney-General Robert McClelland instituted significant reforms to the federal judicial appointments process.[63] The reforms included publishing appointment criteria online, seeking expressions of interests and advertising judicial vacancies, and convening advisory panels.[64] Though the changes were "*modest*" when compared with the judicial appointment processes in other jurisdictions at the time,[65] they were certainly welcomed by the legal and political community.[66] However, these reforms were quickly discontinued after George Brandis was appointed the Commonwealth Attorney-General following a change in government in 2013.[67] There was a return to the traditional approach of a process behind closed doors. All trace of McClelland's processes has been removed from the Attorney-General's department website.[68] Vacancies are no longer advertised before appointments are made, and there have been no media releases announcing appointments to suggest they have been made as a result of some particular process.[69]

Maintenance of this mysterious and opaque status quo has not been helped by the fact that the most recent appointments to the High Court have been the subject of controversy. In respect of the appointment of Justice Steward in December 2020 and Justice Gleeson in January 2021, some senior lawyers "*were privately critical of the government for not picking "superior" candidates*" with such criticism focused on Justice Steward's limited experience outside of

[61] George Brandis, 'Ceremonial Sitting to Mark the Occasion of the Swearing-In of the Honourable Geoffrey Arthur Akeroyd Nettle as a Justice of the High Court of Australia' (Speech, High Court of Australia, 5 February 2015) <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2015/5.html>.
[62] Handsley and Lynch (n 60) 209. See also Phillip Ruddock, 'Selection and Appointment of Judges' (Speech, University of Sydney, 2 May 2005) [21].
[63] Handsley and Lynch (n 60) 187-8.
[64] Attorney-General's Department, *Judicial Appointments: Ensuring a Strong, Independent and Diverse Judiciary Through a Transparent Process* (Report, September 2012) 1-2.
[65] Handsley and Lynch (n 60) 187.
[66] *Without Fear or Favour*, (n 10) 448, [12.50].
[67] Handsley and Lynch (n 60) 188.
[68] 'Court Appointments', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/legal-system/courts/court-appointments>.
[69] Ibid.

taxation law and Justice Gleeson's short time as senior counsel.[70] Others "*question[ed] whether those choosing our top judges should look further afield*"[71] – of the five appointed to the High Court by the Coalition government since 2015, two are children or spouses of former High Court justices.[72] Some in the legal profession have pondered whether the High Court is "*haunted by, at best the apparent politicisation of the appointment of [j]ustices of the High Court and, at worst, the spectre of nepotism and [g]overnment patronage*".[73]

At a state and territory level, the appointments process is largely just as 'mysterious' and 'magical' as that for the federal courts,[74] but some structural changes have been made. For example, following significant controversy over the appointment and tenure of Tim Carmody as Chief Justice of the Supreme Court of Queensland,[75] the Queensland Government adopted the Protocol for Judicial Appointments (**Protocol**) which applies to Queensland chief justices and magistrates alike.[76] The Protocol has created an expression of interest process, requirements for public notice of current vacancies, and an advisory panel to undertake a shortlisting process based on merit criteria that is defined and disclosed.[77] Tasmania has a similar Protocol for Judicial Appointments.[78] In Victoria, an expression of interest process is also available, and the assessed attributes are publicly disclosed.[79] In New South Wales, some semblances of an expression of interest process and panel review process exists, and the criteria

[70] Ronald Mizen and Michael Pelly, 'High Court Appointments a Move Against 'Adventurism'', *Australian Financial Review* (online, 28 October 2020) <https://www.afr.com/politics/high-court-appointments-a-move-against-adventurism-20201021-p567a6>.
[71] Elizabeth Byrne, 'Jacqueline Gleeson, Daughter of Australia's Former Chief Justice, Sworn in as 55th High Court Judge', *ABC News* (online, 1 March 2021) <https://www.abc.net.au/news/2021-03-01/jacqueline-gleeson-sworn-in-as-high-court-justice/13201208>.
[72] Leigh (n 5).
[73] Amber Agustin, 'Federalism and the High Court: Fixing the Appointment Process', (2006) 58(1) *Institute of Public Affairs Review* 22, 22.
[74] Michael McHugh 'Women Justices for the High Court (Speech, High Court of Australia, 27 October 2004), <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/mchughj/mchughj_27oct04.html>.
[75] 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>; Joshua Robertson, 'Tim Carmody, Queensland's Chief Justice, Resigns From Position', *The Guardian* (online, 1 July 2015) <https://www.theguardian.com/australia-news/2015/jul/01/tim-carmody-queenslands-chief-justice-resigns-from-position>.
[76] Gabrielle Appleby and Heather Roberts, 'Explainer: How Are Chief Justices Appointed and How Can the Process Be Improved?' *The Conversation* (online, 17 February 2022) <https://theconversation.com/explainer-how-are-chief-justices-appointed-and-how-can-the-process-be-improved-177212>.
[77] Queensland Department of Justice and Attorney-General, 'Protocol of Judicial Appointments in Queensland' *Queensland Courts* (Web Page) <https://www.courts.qld.gov.au/about/judicial-appointments>.
[78] 'Protocol for Judicial Appointments', Tasmanian Government Department of Justice (Web Page, August 2016) < https://www.justice.tas.gov.au/__data/assets/pdf_file/0006/326769/Protocol-for-Judicial-Appointments-August-2016.pdf>.
[79] 'Judicial Appointments', *Victorian Government* (Web Page) <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments>.

for merit has been broken down into twelve professional and seven personal qualities.[80] It is noted that though the above processes are current at the time of this essay, they can be changed within a moment's notice, depending upon the preferences of the government of the day.[81]

However, even in jurisdictions that have greater transparency on the appointments process and the criteria by which candidates are assessed, the result is not necessarily what is hoped or intended. Judges of state courts have remarked that they have observed appointments, in all jurisdictions, being made to "*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"*,[82] while others have said that the current process is "*subject to criticism for lack of transparency, favouritism, bias and 'stacking'*".[83] In another recent survey of judicial officers, the majority of participants identified integrity and quality of the appointments to be current challenges in their jurisdiction.[84] Even within its own ranks, meritocracy is described as myth.

Unclear or undisclosed articulations of what makes one applicant meritorious over another allows the concept of merit to "*become almost wholly subjective, allowing each decision-maker to construct his or her own features which are significant*".[85] And though it is "*not the role of the judiciary as a whole to be representative of any group or* constituent", the appointment of predominantly the somatic norm in a less than transparent and consistent manner, is "*less likely to command public confidence in the impartiality of the* [judicial] *institution*".[86] The 'veil' of mystique and magic that is the conceptualisation of merit must be pierced. I do not mean to say that we should do away with merit, as it is one of the foundational principles to ensure that the duty of a judicial officer – to "*do right to all manner of people according to law without fear or favour, affection or ill-will*"[87] – does not ever go unfulfilled. Instead, the status quo as it

[80] 'Judicial Careers', *NSW Government Communities and Justice* (Web Page) <https://www.careers.justice.nsw.gov.au/appointments>.
[81] *Without Fear or Favour* (n 10) 435, [12.16].
[82] Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' (2019) 42(2) *Melbourne University Law Review* 298, 315.
[83] Ibid, 316.
[84] Appleby (n 82) 322.
[85] Sharon Roach Anleu and Kathy Mack, 'Judicial Appointment and the Skills for Judicial Office' (2005) 15(1) *Journal of Judicial Administration* 37, 38.
[86] Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30(2) *Sydney Law Review* 295, 297-8.
[87] *High Court of Australia Act 1979* (Cth) s 11; *Federal Court of Australia Act 1976* (Cth) s 11; *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 115(1).

stands is susceptible to falling ill and to losing the public confidence it still enjoys, so we must reform and adapt structures of the Australian judicial institution accordingly (and in the Australian profession more generally).

III PIERCING THE VEIL

Some years before coming into office as the Solicitor-General of Australia and subsequently being appointed to the High Court, Justice Gageler reflected on how best to ensure the bench is filled with persons that have the attributes of a good judge:

> *If I had to choose an ideal method of judicial appointment, it would probably be something of a hybrid. It would have two stages. 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.*[88]

As discussed in the second part of this essay, the paramount concern currently is that the executive is permitted to hide behind the 'veil' of merit, which allows for miraculous and magical appointments that create questions about the integrity and quality of appointees and leave no space for the somatic other. Gageler's ideal presents an alternative that would do away with the current system and instead institute a process that is based in merit and transparency, balanced with representation to ensure public confidence in the judiciary, in support of the foundational principles of judicial impartiality and neutrality. This can be achieved through an interwoven two stage approach in the vein of Gageler's ideal. First, a judicial appointments commission is established in a jurisdiction (whether that be state or federal) which is aptly structured to transparently find, assess and recommend judicial candidates on the basis of a clear conceptualism of merit. Secondly, the executive will continue its historical role in the appointment of judicial officers, but subject to the application of "*broader considerations*", including the introduction of diversity ceiling quotas.

[88] Stephen Gageler, 'Judicial Appointment' (2008) 30(1) *Sydney Law Review* 157, 161.

A Judicial appointments commission

One of the recommendations coming out of the recent ALRC report *Without Fear or Favour*, is that a more transparent process for the appointment of judges needs to be developed, and such process should involve publication of criteria for appointment, public calls for expressions of interest and a commitment to promoting diversity in the judiciary.[89] This recommendation, which essentially suggests that the Federal Government should mirror changes made in some of the states and territories, may be the result of the limited scope of the initial consultation proposal question, which only referred to those three mechanisms to improve the appointment process.[90] As discussed in the second part of the essay, the minimum is not enough to deal with issues of underrepresentation, favouritism and bias as the states and territories continue to be struck by the same. The ALRC has not proposed any particular model.[91] However, the creation of an independent judicial appointments commission, similar to the Judicial Appointments Commission (**JAC**) in the United Kingdom,[92] was referred to in most of the submissions made to the ALRC on the development of a more transparent process.[93]

Prior to 2005, the United Kingdom had in place a process for judicial appointments that was "*substantially the same as that still operating in Australia*".[94] With commissions similar to the JAC already introduced in a number of Commonwealth countries, and increasing criticisms of the judicial appointments process,[95] the JAC was created through the *Constitutional Reform Act 2005*.[96] The JAC was and continues to be responsible for recommending candidates for judicial vacancies to courts and tribunals in England and Wales, all the way to up to the High

[89] *Without Fear or Favour* (n 10) 14.
[90] Australian Law Reform Commission, *Judicial Impartiality* (Consultation Paper, April 2021) 26.
[91] *Without Fear or Favour* (n 10) 448, [12.50].
[92] 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, 3.
[93] Deakin Law Clinic, Submission 16 to Australian Law Reform Commission, *Review of Judicial Impartiality* (28 June 2021) 18 <https://www.alrc.gov.au/wp-content/uploads/2021/07/16.-Deakin-Law-Clinic-Policy-Advocacy-Practice-Group-Public.pdf>; Monash University Faculty of Law, Submission 34 to Australian Law Reform Commission, *Review of Judicial Impartiality* (June 2021) 34 < https://www.alrc.gov.au/wp-content/uploads/2021/06/34.-Assoc-Prof-Maria-OSullivan-Dr-Yee-Fui-Ng-and-Assoc-Prof-Genevieve-Grant-Public.pdf>; Australian Bar Association, Submission 43 to Australian Law Reform Commission, *Review of Judicial Impartiality* (28 June 2021) 4 <https://www.alrc.gov.au/wp-content/uploads/2021/07/43.-Australian-Bar-Association.pdf>.
[94] Kcasey McLoughlin and Joan Williams, 'An Age of Diversity: Where to Next for the Judicial Diversity Project?' (2019) 9 *UNSW Law Journal Forum* 1, 2.
[95] Alan Paterson, 'Power and Judicial Appointment: Squaring the Impossible Circle' in Graham Gee and Erika Rackley, *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 32, 41.
[96] *Constitutional Reform Act 2005* (UK) s 61 and sch 12.

Court.[97] It is statutorily required to select shortlisted candidates "*solely on merit*"[98] and consider the need to "*encourage*" diversity in performing its functions.[99] It is generally not involved in the selection process, though there are some exceptions (e.g. by request, the JAC will be involved in the selection of more senior judicial officeholders, and the Chairman of the JAC is on the selection panel for the appointment of justices to the Supreme Court of the United Kingdom).[100] The JAC also attends to the advertising of judicial vacancies, and only considers applications from those that formally apply.[101] Interestingly, the composition of the JAC is a mix of judicial officers, solicitors, barristers and lay members.[102]

Since its inception, the JAC has persistently been the subject of criticism for a perceived failure of broadening the diversity of the UK judiciary,[103] "*with only modest advances in the percentage of women [at the bench]*" and "*minimal change*" to the number Black, Asian and ethnic minority (**BAME**) judicial officers.[104] The JAC reports that out of the recommendations made by the JAC, the number of BAME candidates recommended is roughly in line with BAME representation in the working age population,[105] and are broadly in line with numbers in the eligible pool of lawyers,[106] suggesting that the JAC is achieving better cultural representation in its limited role in providing recommendations for judicial appointments. However, in a recent study commissioned by the JAC following a "*drop-off*" in progression rates for BAME applicants, it was identified that even after controlling for legal profession and Oxbridge attendance, overall BAME candidates do less well than white candidates in most of the selection tools used by the JAC.[107] In response to its adversaries, the JAC is developing

[97] 'About Us', *Judicial Appointments Commission* (Web Page) <https://judicialappointments.gov.uk/about-the-jac/>. Some tribunals that the Judicial Appointments Commission recommends candidates for have jurisdictions that extend to Scotland and Northern Island.
[98] *Constitutional Reform Act 2005* (UK) s 63.
[99] Ibid s 64.
[100] Judicial Appointments Commission (n 97).
[101] Frances Kirkham, 'Reflection' in Graham Gee and Erika Rackley (eds*), Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 142, 142.
[102] Gee and Rackley (n 92) 5.
[103] Appleby et al (n 82) 324; Karon Monaghan, 'Reflection' in Graham Gee and Erika Rackley (eds*), Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 198, 198-200; Gee and Rackley (n 102) 1.
[104] Appleby et al (n 82) 324.
[105] Judicial Appointments Commission, *Diversity Update* (Report, September 2020) 2 <https://judicialappointments.gov.uk/wp-content/uploads/2020/11/Diversity-Update-Sept-2020-PDF.pdf>.
[106] Judicial Appointments Commission, *Statistical Analysis of Candidate Progression Through Judicial Selection Tools 1 April 2015 to 30 March 2021: Key Findings and Next Steps* (Report, December 2021) <https://judicialappointments.gov.uk/wp-content/uploads/2021/12/Deep-dive-JAC-narrative-text.pdf>.
[107] 'Statistical Analysis of Candidate Progression Through Judicial Selection Tools 1 April 2015 to 31 March 2021', *Judicial Appointments Commission* (Web Page, 9 December 2021) <https://www.gov.uk/government/statistics/ad-hoc-analysis-of-judicial-diversity-statistics-2021/statistical-analysis-of-candidate-progression-through-judicial-selection-tools-1-april-2015-to-31-march-2021

more ways of monitoring and reporting on diversity, and is finding ways to use the resultant data to "*make evidence-based improvements to selection tools and outreach activity to support increased judicial diversity*".[108]

Though the JAC is far from a perfect system, it has removed some barriers to appointment which would otherwise deny the somatic other entry into the judicial space,[109] and brought about more diverse outcomes for its judiciary than Australia (comparatively and based on the very limited data available on the demographics of Australian judges). There are clear lessons for us to take away. The JAC is statutorily instituted,[110] and therefore unwavering in the face of changing governments. And unlike most Australian jurisdictions, the criteria upon which recommended candidates are selected is comprehensive,[111] and the methods by which applicants are assessed are made public and statistically compared to determine how best each method achieves the objectives of the commission.[112] The JAC also only considers applications from those that formally apply,[113] which acts to restrict the potential for political appointments that have stained the executive-only approach.[114] Similarly, the criticisms of the JAC should be considered accordingly. For example, some legal academics have argued that the composition of the JAC, in particular that the majority of its members hold judicial office,[115] has resulted in the judicial appointments process swapping out excessive executive influence for undue judicial influence.[116]

The establishment of a judicial appointments commission allows for the creation of clear parameters within which a transparent and consistent assessment process can operate. By lending on the lived experience in the United Kingdom and in other jurisdictions, an Australian

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[108] Judicial Appointments Commission (n 106) 2.
[109] Ingram and Allen (n 31).
[110] *Constitutional Reform Act 2005* (UK) s 63.
[111] 'Am I Ready to Apply?', *Judicial Appointments Commission* (Web Page) <https://judicialappointments.gov.uk/am-i-ready-to-apply/>.
[112] 'Guidance on the Application Process', *Judicial Appointments Commission* (Web Page) <https://judicialappointments.gov.uk/guidance-on-the-application-process-2/>.
[113] Frances Kirkham, 'Reflection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 142, 142.
[114] See, eg, Andrew Lynch, 'Chief Justice Carmody and the "Merit Principle"', *Inside Story* (online, 18 August 2014) < https://insidestory.org.au/chief-justice-carmody-and-the-merit-principle/>.
[115] Gee and Rackley (n 92) 5.
[116] Graham Gee, 'Judging the JAC: How Much Judicial Influence Over Judicial Appointments is Too Much?' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 152, 152, citing Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) and Alan Paterson and Chris Paterson, *Guarding the Guardians: Towards an Independent, Accountable and Diverse Senior Judiciary* (CentreForum, 2012.

judicial commission can be established with a clear conceptualisation of merit to best remove subjectivity, and the appropriate assessment methods and commission composition for the transparent and consistent selection of candidates to be recommended to the executive for appointment. In limiting the commission's jurisdiction to the preliminary candidate pool application process, it will not encroach on the foundational principle of merit.[117] The revised system should naturally see an increase in judicial representation of underrepresented groups, as bias and favouritism is hampered, and a space for the somatic other is created. However, reform limited to the establishment of such a commission largely relies on the 'trickle up' effect, as is evident in the "*modest advances*" in judicial diversity in the UK since the establishment of the JAC fifteen years ago. [118] For real and more rapid change, a more radical approach is required.[119]

B Ceiling quotas

The introduction of diversity ceiling quotas in the judicial appointments process, which would essentially cap the number of appointments from traditionally over-represented groups,[120] would allow for the application of "*broader considerations*" after meritorious candidates are transparently and consistently picked from the potential pool.[121] As it would not be feasible to remove the influence of the somatic norm from the judicial appointments process, some legal academics have maintained that the only way to reverse the over-representation of the somatic norm at the bench is by "*reducing the space reserved for those from dominant groups who have traditionally secured office in disproportionate numbers*", i.e. the somatic norm.[122] It is a "*necessary level of disruption*" for the Australian judiciary to 'catch up' with the rest of the world.[123]

[117] Deakin Law Clinic (n 93) 18.
[118] Appleby et al (n 82) 324.
[119] Kate Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing Over-Representation in the Judiciary' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2007) 259, 262.
[120] *Without Fear or Favour* (n 10) 449, [12.52].
[121] Gageler (n 88).
[122] Malleson (n 119) 267. See also, McLoughlin and Williams (n 94) 10, citing Erica Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013), 31-6.
[123] Malleson (n 119) 267.

Though the introduction of broad diversity quotas for leadership of private and public institutions is still in its infancy,[124] the use of gender-based targets and quotas is widespread in both spaces.[125] What is less known is that quotas are already being used in judicial settings in comparative jurisdictions around the world. The Supreme Court of Canada is statutorily required to maintain a bench that contains at least three judges from Quebec,[126] the Constitutional Court in Belgium requires a fifty-fifty split of Dutch and French speaking judges;[127] and in India, seats on the Supreme Court are distributed between different states.[128] Gender targets and quotas operate in the International Criminal Court,[129] and have been used by the Victorian Government to improve the representation of women in new appointments to Victorian courts.[130] The suggestion that the use of quotas in a judicial context is untested is quickly doubted, though there is limited research as to the effectiveness of quotas in achieving set outcomes.

Proponents of the introduction of quotas in a judicial context will often cite the risk that the appointing body will result in the appointment of less well-qualified candidates over better qualified candidates.[131] This is clearly an issue where there is limited control over the quality of applications received, but in a two-staged approach, the risk is mitigated as the pool of candidates are first screened through transparent assessment methods against clear, comprehensive and appropriate assessment criteria. It must be acknowledged that the quotas may pose a threat to the fundamental principle of merit, so its introduction must be carefully considered, and appropriate protections and safeguards be put in place.

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[124] For example, Nasdaq has recently introduced a listing rule mandating that Nasdaq-listed companies must have minimum numbers of directors identifying as either an unrepresented minority or LGBTQ+ (with some exceptions, including that in the alternative, companies may provide a public explanation for not adhering to the rule). See Nasdaq, *Listing Rule 5600 Series* (at 6 August 2021) rr IM-5605-7(f) and 5606<https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series> and Nasdaq, 'Nasdaq's Board Diversity Rule What Nasdaq-Listed Companies Should Know' (Media Release, 18 February 2022) 1 <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>.
[125] Malleson (n 119) 268.
[126] 'Québec's Place Within the Supreme Court' *Secrétariat du Québec* (Web Page, 7 May 2015) <https://www.sqrc.gouv.qc.ca/relations-canadiennes/institutions-constitution/place-qc/cour-supreme-en.asp>.
[127] Malleson (n 119) 268.
[128] Malleson (n 119) 268, citing Abhinav Chandrachud, 'An Empirical Study of the Supreme Court's Composition', (1 January 2011) *Empirical and Political Weekly*.
[129] Ruth Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 22 July 2010).
[130] Victorian Government, *Safe and Strong: A Victorian Gender Equality Strategy* (Report, 2016) 13 <https://www.vic.gov.au/safe-and-strong-victorian-gender-equality>.
[131] Kate Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36(3) *Journal of Law and Society* 376, 394.

Ceiling quotas progress the concept of the quota to the next level. Instead of *"asking under-represented populations to justify their inclusion, we should ask over-represented populations to justify their over-inclusion*".[132] Even though such a change may be politically contentious,[133] the introduction of ceiling quotas will "*promote genuine competition for the appointment of the best and so will directly address the important priority of greater public confidence in the suitability and quality*" of those that are appointed to the bench.[134]

C Diversity data

Regardless of what changes are made to the structures of the Australian judicial institution, it is important for data on the demographics of judges to be collected and analysed. As noted in *Without Fear or Favour*, there is no official collection of statistics on the diversity of the federal judiciary.[135] This is the case in all jurisdictions of Australia, as judicial scholars frequently are required to point out in their work that their observations and analysis are based on very limited data on demographic statistics of the Australian judiciary, including ethnic background and ancestry.[136] Even in this essay, there has been a hesitancy to compare the progress of judicial diversity in other jurisdictions because of the very limited and potentially obsolete data available on the Australian judiciary as a whole. Support for the collection and reporting of statistics on the diversity of the judiciary is almost universal amongst those within the legal sphere.[137] Regardless of what types of reforms are implemented at a federal and state and territory level as a result of *Without Fear or Favour*, the collection and analysis of methodically sound data on the demographic characteristics of the Australian judiciary is paramount to assessing the effectiveness, and track the success (or failure) of reforms to generate a more representative bench.[138]

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[132] John Tearle, Submission No 28 to Australian Law Reform Commission, *Review of Judicial Impartiality* (2021) 3.
[133] Mark Dreyfus, 'George Brandis Has Failed the Test on Appointments to the Bench', *Mark Dreyfus QC MP* (Opinion, 18 December 2015 <https://www.markdreyfus.com/media/opinion-pieces/george-brandis-has-failed-the-test-on-appointments-to-the-bench-mark-dreyfus-qc-mp>.
[134] *Without Fear or Favour* (n 10) 445.
[135] *Without Fear or Favour* (n 10) 453, [12.53].
[136] Appleby et al (n 82) 311; Kathy Mack and Sharyn R Anleu, 'The National Survey of Australian Judges: An Overview of Findings' (2008) 18 *Journal of Judicial Administration* 5, 6; Opeskin (n 12) 115.
[137] *Without Fear or Favour* (n 10) 455, [12.58].
[138] Opeskin (n 12) 94.

IV CONCLUSION

As the government undertakes the task of unpacking the observations and recommendations in the ALRC's report *Without Fear or Favour*, now is more a time than any for all of stakeholders in the legal profession, from the humble law student to each High Court Justice, to reconsider the established processes and ancient regimes within the legal profession as a whole.

As has been done in this essay, the unrepresentative nature of the Australian judiciary must be examined closely, and its root causes must be identified for any meaningful and enduring structural change to be determined and implemented. This essay identifies that throughout the history of the Australian legal system, the judiciary has been marked by a 'somatic norm' of the "*white, male, upper/middle class body*".[139] Though the Australian legal system as a whole is plagued by a systemic cultural issue, the judicial appointment processes that are conducted behind the 'veil' of merit perpetuate an institutionalised form of exclusion and detachment of any body that does not fit that archetype. An overhaul of the current system is required, and this essay suggests that such can be done through an interwoven approach of the establishment of judicial appointments commissions, setting of ceiling quotas and using the collection of diversity data for the monitoring and assessment of such an approach. However, it is in the hands of parliament to determine what structural changes, if any, be implemented.

Just as Former Chief Justice Robert French said on his retirement from the High Court that he looked forward to the day when a woman leading the High Court is "*unremarkable*", I also look forward to the day when a person of colour being appointed as the Chief Justice of the High Court is unremarkable.[140]

[139] Puwar, 'The Racialised Somatic Norm and the Senior Civil Service' (n 26) 652.
[140] Michaela Whitbourn ''Thoughtful' Debate Takes a Hit in Social Media Age: Outgoing Chief Justice Robert French', *Sydney Morning Herald* (online, 14 December 2016) <https://www.smh.com.au/politics/federal/thoughtful-debate-takes-a-hit-in-social-media-age-outgoing-chief-justice-robert-french-20161213-gta6zw.html>.