AN AGE OF DIVERSITY: WHERE TO NEXT FOR THE JUDICIAL DIVERSITY PROJECT?

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Review of *Debating Judicial Appointments in an Age of Diversity* (Graham Gee and Erika Rackley (eds), Routledge, 2018, ISBN 978-1-138-22535-0)

I INTRODUCTION

Debates about diversity – why it matters, what it looks like, and how it might be achieved – continue to reverberate around the world. There have been discernible but all too often meandering gains in attempts to ensure that judges better reflect the communities from which they are drawn. Notwithstanding these gains, important questions remain not only about the justifications for judicial diversity but, perhaps most interestingly, the contested implications of judicial diversity. Gee and Rackley's impressive edited collection *Debating Judicial Appointments in an Age of Diversity* provides a timely account of these debates. By reframing familiar debates about merit, quotas, and the respective role of judges and politicians in the selection process, they ensure their collection is relevant beyond the United Kingdom ('UK'). Moreover, the extent to which the collection brings together what are sometimes conflicting views in an attempt to move past a seemingly insurmountable impasse between 'insider' and 'outsider' views means that it provides an instructive, thoughtful and novel blueprint for considering (and reconsidering) how to best advance the judicial diversity project.

Gee and Rackley's edited collection grew out of an international conference held at the University of Birmingham in November 2015, which marked the 10th anniversary of the Judicial Appointments Commission's ('JAC') operation. The conference was attended by members of the JAC, the judiciary, civil servants from the Ministry of Justice and the Supreme Court of the United Kingdom, and practitioners and academics from across the UK, and internationally.[1] Although the collection is primarily about the UK, contributions from academics and lawyers

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1 Graham Gee and Erika Rackley, 'Introduction: 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, 2–3 ('Introduction').

from Australia, Canada and South Africa expand the book's reach. It is noteworthy that the collection brings together contributions not only from leading scholars, but also practitioners, members of the judiciary and people with personal experience of the JAC, including former lay and judicial members of the JAC, and the first Chief Executive of the Supreme Court of the United Kingdom. These contributions are linked only by their focus on diversity in the making of judicial appointments and otherwise cover a broad range of topics, including critiques of the JAC, discussion of merit, diversity and quotas, suggestions as to models for achieving greater judicial diversity, and consideration of the differing approaches to judicial appointments in Australia, Canada and South Africa. The reflections obtained are remarkable for the personal insights they provide into the experiences of those who have had intimate dealings with the JAC and the judicial appointments process.

To provide further context to the book's examination of the JAC, prior to 2005 the appointments system in the UK was substantially the same as that still operating in Australia. Ongoing criticism of that system eventually led to the enactment of the *Constitutional Reform Act 2005* (UK) ('*CRA*') which, inter alia, created the JAC.[2] Despite its name, the JAC is a *recommending* rather than an *appointing* body, responsible for recommending appointees to all courts up to and including the High Court.[3] The JAC is comprised of six judges, one solicitor, one barrister, one magistrate, and five laypersons, of whom one serves as chair.[4] Under the JAC's regime, a judicial vacancy is advertised, and applications are considered only from those who formally apply.[5] The Commission assesses applications and prepares a short list for interview, following which it makes recommendations for the relevant appointment.[6] Gee and Rackley inform us that, at the time of their writing, the JAC oversaw the appointment of between 300 and 800 judges each year.[7]

Of course, the Australian system of judicial appointments remains, formally, entirely in the hands of the state and federal executive governments.[8] Particularly at the federal level (especially the High Court), it is an opaque system, which 'incorporates neither transparency nor genuine political accountability',[9] and is described in Lynch's contribution to this collection as being subject to 'unconstrained executive discretion'.[10] There is no formal requirement that judicial

2 Alan Paterson, 'Power and Judicial Appointment: Squaring the Impossible Circle' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 32, 41–2.

3 Gee and Rackley, 'Introduction' (n 1) 6.

4 'Commissioners', *Judicial Appointments Commission* (Webpage) <https://www.judicialappointments.gov.uk/commissioners>. See also Gee and Rackley, 'Introduction' (n 1) 5.

5 Frances Kirkham, 'Reflection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 142, 142.

6 Lady Hale, 'Appointments to the Supreme Court' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 302, 310.

7 Gee and Rackley, 'Introduction' (n 1) 5.

8 Sir Harry Gibbs, 'The Appointment and Removal of Judges' (1987) 17(3) *Federal Law Review* 141, 141.

9 Justice Ronald Sackville, 'The Judicial Appointments Process in Australia: Towards Independence and Accountability' (Speech, Sheraton on the Park, 27 October 2006).

10 Andrew Lynch, 'Diversity without a Judicial Appointments Commission: The Australian Experience' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 101, 101.

vacancies be advertised,[11] nor that there be any consultation between the Attorney-General and the judiciary as to the appointees.[12] Similarly, at least at the apex of Australia's judiciary, there is no formal application process, no formal system for the checking of references, and no requirement that candidates undertake interviews.[13] Although there is little doubt that the Australian judiciary is 'of outstanding quality and has enjoyed the public's confidence', there are also concerns that its members do not presently reflect – at least in terms of gender and ethnicity – the diversity seen in the Australian population.[14] Granted even with fluctuating commitment to reforming the judicial appointment process there has been marked improvement in terms of gender balance in both state and federal courts.[15] But as McLoughlin has elsewhere argued, only by 'formalising a commitment to judicial diversity across Australia's judiciary' will we 'safeguard any gains so that they are not at the whim of the politics of the day and further enhance the capacity to improve upon them'.[16]

It is fair to say that the Australian experience of judicial diversity has been markedly different to that of the UK. Although it may be argued that the Australian experience of judicial diversity has advanced without a JAC-style commission, this collection illuminates the possibilities for reforming judicial appointment and provides important insights into the strengths and weaknesses of different strategies, both conceptually and politically. The suggestion of the introduction of a JAC-style commission into Australia has been made many times over recent decades[17] but there is little political appetite for such a move. In 2007, then Attorney-General Robert McClelland instituted a number of reforms to the judicial appointment process, which included the introduction of publicly available selection criteria for appointments, the requirement that vacancies be advertised, and the use of advisory panels to make recommendations to the Attorney-

11 See Elizabeth Handsley and Andrew Lynch, 'Facing Up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–2013' (2015) 37(2) *Sydney Law Review* 187, 197 where they note that even the now abandoned McClelland reforms did not extend so far as changing appointment procedures in respect of the High Court of Australia. They note, '[t]hose particular vacancies were not advertised in order to procure expressions of interest or nominations directly from interested individuals themselves. Nor was an advisory panel convened by the Attorney-General to assist him or her in narrowing down potential appointees for these positions': ibid.

12 Sir Gibbs (n 8) 143–4.

13 See Lynch (n 10) 103; HP Lee, 'Appointment, Discipline and Removal of Judges in Australia' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 27, 28–30.

14 Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30(2) *Sydney Law Review* 295, 295.

15 See the Australasian Institute of Judicial Administration's most recent gender statistics, compiled in March 2019. These statistics are illustrative of the continuing struggle to improve gender diversity in Australia's judiciary. Despite the 'almost equal' composition of the High Court, women make up 36% of Commonwealth judges. The Australian Capital Territory was the only state or territory where women make up more than half of the judiciary, with 54% of judges. In South Australia, women make up 31% of the State's judges, Tasmania 24%, New South Wales 37%, Victoria 42%, Northern Territory 35%, and 34% in Western Australia: Australasian Institute of Judicial Administration, 'Judicial Gender Statistics' (Statistics table, March 2019) <https://aija.org.au/wp-content/uploads/2018/03/JudgesMagistrates.pdf>.

16 Kcasey McLoughlin, 'The Politics of Gender Diversity on the High Court of Australia' (2015) 40(3) *Alternative Law Journal* 166, 170 ('The Politics of Gender Diversity').

17 See, eg, Lynch (n 10) 102–4; Sackville (n 9); Evans and Williams (n 14).

General.[18] Nonetheless, the reforms specifically stopped short of placing judicial appointments into the hands of a commission,[19] and were abandoned in 2013 when the Coalition Government came to power.[20] Although the recent re-election of the Coalition Government suggests that reforms to the judicial appointment process in Australia (at least federally) might be off the table, this is likely to amplify, rather than diminish, calls for reforms to the Australian appointment process.

Gee and Rackley identify their collection as having three objectives: to illustrate the range of views and experiences of the JAC-run regime; to identify possible reasons for, and suggestions on how to respond to contrasting assessments of those inside and outside the regime, especially as those assessments relate to the rate of progress on diversity; and to reframe in novel and fruitful ways some of the familiar debates that have led to impasse between insiders and outsiders, including in relation to merit, quotas, and the respective role of judges and politicians in the selection process.[21]

The collection includes 15 chapters and six personal reflection essays drawing on experiences of 'insiders' and 'outsiders' alike. The collection begins with an introduction where Gee and Rackley not only introduce the book's contents, but also set the scene recounting the first 10 years of the JAC. The following chapter contributed by Christopher Stephens CBE likewise provides an introduction to the first 10 years of the JAC, from the perspective of his own experience. It is followed by a reflection from Sir Thomas Legg KCB QC, reflecting 'as a voice from the past' about his experiences as Permanent Secretary to the Lord Chancellor and Clerk of the Crown in Chancery from 1989 to 1998. Alan Paterson OBE's chapter 'Power and Judicial Appointment: Squaring the Impossible Circle' examines power in the context of making judicial appointments, proposing a realignment of distribution of power in the UK which would provide a greater role for executive or Parliament and therefore somewhat diminish the role of the judiciary. Graham Gee's chapter similarly considers how much influence judges themselves should have over judicial appointments.

The experience of judicial diversity in other jurisdictions is set out in four separate chapters: Jan van Zyl Smit's chapter about the growing role of commissions in judicial selection in the Commonwealth, Cora Hoexter's chapter about South Africa, Andrew Lynch's chapter about Australia and Samreen Beg and Lorne Sossin's joint chapter 'Diversity, Transparency and Inclusion in Canada's Judiciary'. The latter chapter is followed by two reflections: one from Frances Kirkham CBE reflecting on her role as judicial member of the JAC between 2006 and 2011, and another from the late Noel Lloyd CBE reflecting on his experiences as a lay member of JAC between 2012 and 2018. As its title suggests, Alysia Blackham's chapter 'Judicial Diversity and Mandatory Retirement: Obstacle or Route to Diversity?' considers the relationship between mandatory retirement and diversity, and is followed by a reflection from Karon Monaghan QC, barrister and joint author of the 2014 report *Judicial Diversity:*

18 Lynch (n 10) 102–3.
19 Ibid 102.
20 Ibid 110.
21 Gee and Rackley, 'Introduction' (n 1) 4.

Accelerating Change.[22] Contributions from Hilary Sommerlad, John Morison, Rosemary Hunter, Kate Malleson and a chapter jointly written by Erika Rackley and Charlie Webb each interrogate conceptual understandings of diversity. Sommerlad's chapter 'Judicial Diversity: Complexity, Continuity and Change' seeks to provide a conceptual understanding for slow levels of progress in improving judicial diversity. Chapters from Morison and Malleson revisit arguments about merit and quotas and provide fresh insights about strategies for remedying the over-representation of men in the judiciary. Hunter's chapter 'Problems of Scale in Achieving Judicial Diversity' attempts to bridge the gap between different perceptions of the JAC's progress and Rackley and Webb's chapter examines the ongoing need to make the case for diversity (and by extension, interrogate what we really mean by diversity). Reflections from Cordella Bart-Stewart (solicitor and Executive Director of the Black Solicitors Network) and Jenny Rowe CB (first Chief Executive of the Supreme Court of the United Kingdom) punctuate these chapters. Finally, and perhaps fittingly, the collection concludes with a chapter 'Appointments to the Supreme Court' by Lady Hale DBE. Although the chapter was drafted before Hale's elevation to President of the Supreme Court of the United Kingdom, it nonetheless considers the evolution of the judicial appointment process and the meaning and importance of diversity.

In this review we consider how this comprehensive collection contributes to ongoing and important debates about judicial diversity. In particular, we seek to interrogate the conceptual and theoretical insights the book provides about assessing the successes and failures of the judicial diversity project. Finally, we consider what insights might be drawn from the collection in order to inform debate about reforming the Australian judicial appointment system.

II THE JAC'S PROGRESS TOWARDS ACHIEVING GREATER JUDICIAL DIVERSITY

Borne out of criticism about the homogeneity of the judiciary, the JAC is frequently on the receiving end of criticism for a perceived failure to make significant progress towards increasing diversity.[23] One strength of this book is the extent to which the editors have sought contributions from both 'insiders' and 'outsiders' advocating for the JAC and critical positions, respectively. The JAC position – typically articulated by the JAC and its supporters – maintains that the JAC is doing everything it can to achieve greater judicial diversity, and that good progress is being made. Reflections in this collection from the late Noel Lloyd CBE (a lay member of the JAC from 2012–2019) and Frances Kirkham CBE (a judicial member of the JAC from 2006–2011) are illustrative of this position and paint a decidedly more upbeat picture than that advocated by critics, although both

22 See Sir Geoffrey Bindman QC and Karon Monaghan QC, *Judicial Diversity: Accelerating Change* (Final Report, November 2014).

23 Karon Monaghan, 'Reflection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 198, 198–200.

acknowledge that there remains important work to be done. For example Lloyd notes that '[g]ood progress has been made on increasing the proportion of women at most levels (for example, in 2015/16, 44 per cent of recommendations to legal positions were women)' but further acknowledges that progress at the most senior levels and the 'under-representation of black and minority ethnic individuals remains a significant challenge'.[24]

Whereas, the critical position – typically articulated by legal academics including feminists and members of minority groups within the profession – argues that progress has been 'minimal, fragile and disappointing'.[25] One of the clearest criticisms of the JAC's progress towards diversity – or lack thereof – comes from Monaghan who argues that, for senior appointments, there is no evidence of sustained significant improvement since the establishment of the JAC, and suggests that '[i]f an increase in the proportion of underrepresented groups in the senior judiciary is to be taken as the measure of the JAC's success, then there is not much to celebrate'.[26]

Noting that '[i]nsiders and outsiders often have markedly differing assessments of the scale of the diversity deficit, the pace of progress so far and the tools needed to address it', Gee and Rackley observe that over the last decade 'constructive debate has proved very challenging because views diverge so markedly, with insiders and outsiders often seeming to speak past each other'.[27] Perhaps the greatest triumph of this book then is the extent to which it attempts to create a genuine dialogue to resolve this impasse. To this end we found Hunter's chapter particularly enlightening in its attempt to bridge the gap between those differing views, through a reinterpretation of 'the JAC position' and 'the critical position'. Hunter draws on the work of Mariana Valverde in *Chronotopes of Law: Jurisdiction, Scale and Governance*[28] in an attempt to shift the argument between the two groups to a level of abstraction that allows immediate disagreements to be transcended, such that both arguments might be accepted as being '"correct" while effectively talking past each other'.[29] In so doing, Hunter looks at the chronotopes of spatiality, temporality and mood. Hunter argues that the JAC position approaches spatiality only in terms of England and Wales, and so does not undertake international comparisons as to progress. As to temporality, she queries 'what is the duration over which progress towards judiciary ought to be measured?'[30] pointing out that 'from a critical perspective, equality has been a very long time coming'.[31] Hunter argues that the JAC tends to view diversity in the

24 Noel Lloyd, 'Reflection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 146, 150–1.

25 Rosemary Hunter, 'Problems of Scale in Achieving Judicial Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 240, 240. It is worth noting here that Hunter acknowledges at the outset that she is not a 'disinterested observer, but a well-known proponent of the critical position': ibid.

26 Monaghan (n 23) 200.

27 Gee and Rackley, 'Introduction' (n 1) 3.

28 See Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015).

29 Hunter (n 25) 241.

30 Ibid 243.

31 Ibid 244.

context of its own processes rather than in the context of the achievement of a particular outcome, and has no particular view as to the pace of change.[32] She argues that these factors ultimately result in a mood of optimism, consistent with the JAC's view that good progress is being made towards greater diversity.[33]

The critical perspective, on the other hand, adopts an international gaze, and so looks to global benchmarks to assess progress towards diversity. Hunter argues that, temporally, the critical gaze looks back to as early as the 1850s and the first wave of feminism in Britain,[34] and its view of the future is seen in terms of the desired outcome, being gender parity and proportionate representation, which it hopes will be achieved in a short period. Hunter argues that projections that anticipate a long future are therefore greeted with dismay, and it follows, from the critical view, that if the current system is likely to produce a long future, it needs to be changed.[35] As a result, the critical mood is one of urgency, impatience for change, and a 'profound pessimism' about the prospect for real progress towards diversity.[36]

Adding to the chronotype analysis offered by Valverde, Hunter notes that there is a difference between the JAC and the critical approaches to jurisdiction. The JAC is directly involved only in appointments up to and including the High Court, while appointments to the Court of Appeal and the Supreme Court are subject to a separate process and, Hunter argues, the JAC views its jurisdiction through that limited lens.[37] On the other hand, the critical view sees references to 'the judiciary' as typically meaning the senior judiciary. As such, the success that the JAC has seen in increasing the appointment of women and Black, Asian and Minority Ethnic ('BAME') judges at the lower levels is of limited value where diversity does not reach the upper levels of the judiciary.[38] Hunter argues that the JAC adopts 'the fiction' that everyone who meets the statutory criteria is eligible for judicial appointment, which would include 40% women and 9% BAME candidates, whereas in practice, it is generally understood that only judges with experience in the High Court will be appointed to the Court of Appeal.[39] It follows that the only effective way to increase diversity in the Court of Appeal is to increase diversity in the High Court, and this exercise falls clearly within the JAC's jurisdiction.[40] She therefore argues for a change in the JAC's perception of itself 'only as receivers of recommendations, not as sources of applications'.[41]

Hunter concludes that, through the above lens, it is possible to see that both the JAC position and the critical position are 'for the most part, rational and defensible. But they exist on fundamentally different planes'[42] and that it is therefore not

32 Ibid 241–7.
33 Ibid.
34 Ibid 243–4.
35 Ibid 244–5.
36 Ibid 247–8.
37 Ibid 248.
38 Ibid 248–9.
39 Ibid 250.
40 Ibid 240, 250.
41 Ibid 251.
42 Ibid 253.

possible to adjudicate in any meaningful way between them. She goes on, however, to argue that the exception is in relation to jurisdiction, where some of the differences appear to be a product of self-imposed restrictions which may not be defensible.[43] Hunter's contribution is insightful and compelling in its novel application of Valverde's thesis. From the Australian perspective, Hunter's contribution – particularly read in conjunction with that of Gee's, discussed further below – provides an important blueprint for policy makers about how disagreements – either about the appropriateness of the JAC system in the Australian context, or about balancing of judicial and executive power – might be transcended to see progress towards a more transparent judicial appointments system.

III (REVISITING) MERIT AND QUOTAS

The concept of merit is deeply woven within the JAC's processes. Statutorily, the JAC is tasked with making recommendations for judicial appointments on the sole basis of merit, and that the recommended person be of good character.[44] The *CRA* requires that the JAC 'have regard to the need to encourage diversity in the range of persons available for selection for appointments'[45] and allows that, where two candidates are considered to be of equal merit, the JAC is permitted to recommend the more diverse candidate.[46] Of course the concept of merit has elsewhere been problematised as being imbued with hierarchies of class, race, and sex.[47] Nonetheless, a number of contributors take up the issue of merit critiquing JAC's approach which allows consideration of diversity *only where* merit is equal, arguing that it creates a false dichotomy between merit and diversity which requires reconceptualisation.[48] The JAC has received strong criticism as a result of its interpretation of the 'equal merit' provision, in particular, for its decision to apply the provision only at the final stage of the appointments process, when it makes its recommendations, and not at the stage of shortlisting of candidates. In her contribution to Gee and Rackley's collection, Lady Hale DBE argues that this application of the provision leads to a narrowing of options by the JAC 'before it knows whether the candidates are truly equal'.[49]

Rackley and Webb's contribution to the collection draws in large part on Rackley's previous work; in particular, her prize-winning 2013 book, *Women, Judging and the Judiciary: From Difference to Diversity* ('*Women, Judging and*

43 Ibid.

44 *Constitutional Reform Act 2005* (UK) ss 63(2)–(3) ('*CRA*').

45 Ibid s 64(1). However, pursuant to s 64(2), s 64(1) is specifically noted to be '*subject to section 63*' (emphasis added).

46 Ibid s 27(5A). This subsection was not included in the Act until 2013, by the *Crime and Courts Act 2013* (UK).

47 In the Australian context see, eg, Margaret Thornton, 'Otherness on the Bench: How Merit is Gendered' (2007) 29(3) *Sydney Law Review* 391; McLoughlin, 'The Politics of Gender Diversity' (n 16).

48 John Morison, 'Beyond Merit: The New Challenge for Judicial Appointments' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 223, 234.

49 Lady Hale (n 6) 312.

the Judiciary'). They note that there is now little argument that ensuring greater diversity amongst judges is an important goal for a properly functioning judicial appointment system. They argue, however, that diversity ought not to be seen simply as an ends, but as a means, and that the question of why judicial diversity is important leads us to a greater understanding of why it ought to be pursued, and to a reconceptualisation of merit and diversity as complementary, rather than incompatible.[50]

For Rackley and Webb there are three reasons judicial diversity ought to be pursued. The first two have been discussed at length by other commentators, being first that judicial diversity is the outcome of equality of opportunity in that judicial appointments are open to all persons able to do the job well[51] and, second, that judicial diversity provides the judiciary with democratic legitimacy, by creating a judiciary that is reflective of the public it serves.[52] The third argument posited by Rackley and Webb is somewhat more novel. In this argument, the primary reason for wanting judicial diversity is grounded in recognition that different judges have different specialties, and a judiciary that deals with a range of different cases requires a selection of judges with specialisms spanning that range. This interpretation is similarly based on recognition that judges, and particularly senior judges, are not just law-appliers, but lawmakers.[53] Understood this way then it follows that a diversity of perspectives, observations and insights drawn from different life experiences and backgrounds is akin to this diversity of perspectives drawn from different legal specialisms.[54] They are cautious to point out that their argument is not simply that because women might be better placed to provide some insights, *only* women are able to provide that insight. Rather, it is hoped that once these insights and arguments are introduced, they become woven into the common law, 'adding to the stock of insights and arguments to which any judge – man or woman – may have recourse'.[55] It is perhaps useful here to emphasise that justifications for judicial diversity matter – arguments that justify diversity *only* on the basis of the 'difference' judicial 'others' might make have been rendered problematic (or at least unpersuasive) because women (and other minority appointments) have not necessarily evidenced this particular manifestation of

50 Erika Rackley and Charlie Webb, 'Three Models of Diversity' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 283, 284–5.

51 Ibid 285–8.

52 Ibid 289–93.

53 Ibid 294.

54 Ibid 295.

55 Ibid. Rackley expands on this argument in *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 99–100 ('*Women, Judging and the Judiciary*'). She notes that the Supreme Court, which is to appoint judges on the basis of merit, is also under a statutory requirement to 'ensure that between them the judges will have knowledge of, and experience of practice in, the law of each part of the United Kingdom': at 99, citing *CRA* s 27(8). This statutory requirement is typically complied with through the appointment of two justices from Scotland and one from Northern Ireland, and Rackley notes that this requirement is not seen as antagonistic to appointment on merit, because it is recognised that there is value in having those perspectives represented when determining points of law related to those jurisdictions: at 99. Rackley finds that 'if we could make the same argument for women (and other under-represented groups) then we would have a solution to the diversity problem without running against appointment on merit': at 100.

difference.[56] Importantly, while making a compelling argument about (various) justifications for judicial diversity, Rackley and Webb demonstrate a sophisticated awareness of the contested consequences of diversity and in turn, the way in which this informs a range of justificatory arguments.

If there is a deficiency in their contribution to this collection, it arises from the fact that it does not deal with the questions of what groups ought to be represented in a 'diverse' judiciary. Ought we to focus only on women and BAME candidates, or should the scope be expanded to, for example, LGBT+ persons, or persons with a disability? How should this greater diversity be implemented – for example, should quotas or targets be imposed – and in what proportions should the identified groups be represented within the judiciary? These questions are taken up in more detail, however, in *Women, Judging and the Judiciary*, wherein Rackley argues that the 'trickle-up' idea that, as women continue to enter the profession in greater numbers, they will naturally begin to enter the upper echelons of the profession and therefore the judiciary, simply has not been borne out by reality.[57] She argues that there is a need to increase diversity in the upper echelons of the legal profession – and therefore the applicant pool for judges – by removing the barriers to women making it into those echelons.[58] In her book, Rackley points out that the 'difference' argument may be the best route to securing a representative bench, because it goes directly to how judges judge and the substantive impacts of a more diverse bench, rather than the less tangible benefits of public confidence and improved opportunities.[59]

Quotas of course link in to arguments about how merit is understood, and by extension, how diversity is understood and valued. Although quotas are not considered in great detail in this collection, they are nonetheless revisited in these debates. As Legg (a former civil servant) recognises, 'beneath the visible tip of conscious and rational decision-making there inevitably lies a subconscious mass of assumptions, impressions and even prejudices'.[60] Reflecting on his own experiences, Legg notes 'I came to realize how subjective the concept of merit was, and how vague and inexact a measure it was and is'.[61] Perhaps reflecting a relatively common stance, Legg does not rule out quotas but frames them as a last resort. Similarly, suggestions of quotas for the achievement of greater judicial diversity have, historically, not been well received in Australia, even by those who espouse an interest or commitment to enhancing judicial diversity.[62]

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56 See, eg, Kcasey McLoughlin, '"A Particular Disappointment?" Judging Women and the High Court of Australia' (2015) 23(3) *Feminist Legal Studies* 273; Rosalind Dixon, 'Female Justices, Feminism and the Politics of Judicial Appointment: A Re-Examination' (2010) 21(2) *Yale Journal of Law and Feminism* 297.

57 Rackley, *Women, Judging and the Judiciary* (n 55) 31–6.

58 Ibid 47–65.

59 Ibid 28.

60 Sir Thomas Legg, 'Reflection' in Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2018) 27, 29. See also Morison (n 47) 228–32.

61 Ibid 29.

62 See, eg, Mark Dreyfus, 'George Brandis Has Failed the Test on Appointments to the Bench' *Mark Dreyfus QC MP* (Opinion, 18 December 2015) <http://markdreyfus.nationbuilder.com/george_brandis_has_failed_the_test_on_appointments_to_the_bench>.

Malleson, drawing on the work of Rainbow Murray,[63] theorises how quotas might be reframed to reconceptualise how judicial diversity is understood. She argues that it ought to be viewed as an issue of *over-representation* of the dominant identity group (in this instance, white male barristers from affluent backgrounds), rather than in terms of *under-representation* of non-traditional groups.[64] By reframing the issue in this way, Malleson argues for the introduction of a cap or ceiling on the proportion of persons representing the dominant group, as opposed to a floor or minimum requirement for persons from non-dominant groups.[65] This in turn causes a shift in onus from a situation where under-represented populations are required to justify their belonging (for example, through showing 'merit') to one where over-represented groups are required to demonstrate why their over-representation ought to persist.[66]

In this way, quotas are not necessarily tied to a particular gender or race. Rather, as power structures within society change, so too does the onus to substantiate ongoing over-representation. As a matter of practicality, this means that, if the system operates in such a way that, for example, women become over-represented within the judiciary, they will be required to either justify or relinquish that over-representation.[67] Malleson argues that, through this prism, quotas not only promote appointments on merit but are a prerequisite to a merit-based judicial appointment process. She argues that '[w]hen quotas are designed as a ceiling rather than a floor, their purpose is to *keep out* weaker candidates who are currently the beneficiaries of the preferential treatment built into the system rather than *allow in* weaker candidates who are currently excluded'.[68] This important and persuasive reconceptualisation has the potential to disrupt accepted understandings of inclusion, diversity, privilege and opportunity, and by illuminating the extent of over-representation of some groups might go some way to at least diminishing the political unpopularity associated with traditional quotas.

IV THE ROLE OF JUDGES AND POLITICIANS: LESSONS FOR AUSTRALIA

There is broad agreement amongst the contributors to this collection that some degree of judicial involvement in the selection and appointment of judges is highly desirable. As Paterson observes, 'they really do know better than anyone what the job entails and who might be some of the best candidates'.[69] However, several commentators raise concerns about the consequences where judicial influence is

63 See Rainbow Murray, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (2014) 108(3) *American Political Science Review* 520.

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

65 Ibid 273.

66 Ibid 259.

67 Ibid 278–9.

68 Ibid 273 (emphasis in original).

69 Paterson (n 2) 54.

too great, key amongst them being that the hegemony of the judiciary tends to have a cloning effect on the selection of those they appoint.[70] This argument is taken up in detail in Gee's chapter, 'Judging the JAC: How Much Judicial Influence over Judicial Appointments Is Too Much?'. Gee begins his contribution with the acknowledgement that '[j]udicial involvement in judicial appointments is valuable. Judges possess unique perspectives on the qualities required for judicial office as well as the needs of the judicial system'.[71] He does not dispute that judges should exercise influence over the appointments process, but rather, considers the pertinent questions are 'how much, what sorts and at which stages of the appointment process'.[72] He argues that discussion of these questions has been limited over the first decade of the JAC's existence, and notes the view of '[a] handful of academics' – himself included – that judges today exercise too much influence, is not held by other JAC stakeholders, in particular the JAC and the senior judiciary.[73]

In support of the above comment, Gee refers to the 2015 publication of *The Politics of Judicial Independence in the UK's Changing Constitution*, of which he was one of the authors. That work identified the basic dynamic at the heart of the JAC system, being that the Lord Chancellor's relative retreat from involvement with appointments and the running of the regime had been offset by the growing influences of judges, and in particular, of senior judges.[74] The authors of that work argued that judicial influence in the JAC-run system is evident through their shaping of job descriptions, designing of qualifying tests and role-playing tasks, supplying of references, involvement with selection panels, and provision of views as statutory consultees on shortlisted candidates.[75] They argued that, despite widespread judicial recognition and genuine concern regarding the lack of judicial diversity, judges had 'resisted or diluted initiatives that might have led to faster transformation of the bench'.[76]

This critique was not well received by many JAC stakeholders, and following the publication of that collection, 'the JAC, several senior judges and a number of officials made it very clear to us that they viewed our critique about judicial influence and its implications for diversity as wrong'.[77] In this collection, Gee reflects upon the various reasons the JAC and senior judges may have rejected academic concerns about judicial influence, including an acknowledgement that those critiques might be 'outdated, overstated or simply wrong, whether in whole or in part'.[78] He elects, however, to consider another explanation as to the

70 Ibid; Morison (n 48) 232.
71 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.
72 Ibid.
73 Ibid 152–3.
74 Ibid 153, discussing Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015).
75 Ibid.
76 Ibid 154.
77 Ibid.
78 Ibid 155.

reluctance, being a lack of shared understanding as to what it means to talk of 'judicial influence', which he argues has made it challenging to foster a constructive debate about whether judges now exercise excessive influence.[79] Gee therefore sets out to identify a framework within which to assess judicial influence over appointments in England and Wales, in order to determine when it is 'too great', ultimately developing five 'rebuttable presumptions' by reference to which we might assess whether judges enjoy too much, too little, or the right amount of influence.

Gee argues that judicial influence is too great if:

1. It contributes to squeezing out the scope for ministerial involvement.[80]
2. It seriously exacerbates accountability deficits in the selection regime.[81]
3. Judges repeatedly succeed in ensuring that the public interest is subordinated to judicial interests.[82]
4. Judicial influence has become essentially unstructured, lacks transparency, and is not subject to effective checks.[83]
5. Judges succeed in co-opting other stakeholders, including in ways that undermine the JAC's independence.[84]

For Gee, the application of the rebuttable presumptions leads to the conclusion that judges now exercise too much influence under the JAC regime.[85] He maintains, however, that the purpose of his contribution is not to persuade JAC stakeholders that this assessment is correct, but to assist those stakeholders in recognising and remedying the fact that the issue of judicial involvement in the appointments process has largely been neglected during the JAC's first decade.[86] As already noted, the criticisms of the pre-JAC appointment system in the UK

79 Ibid 155–6.

80 Ibid 171 ff. Gee argues that, while the Lord Chancellor remains an important driver of reform, even policy development is a collaborative enterprise, with judges possessing a much more significant say than they did prior to the introduction of the JAC: at 172. He further notes that the Lord Chancellor's involvement in individual appointments is now very limited and that, in reality, the JAC's recommendations as to appointments are almost universally accepted: at 171.

81 Ibid 173 ff. Gee argues that the Lord Chancellor remains accountable for the regime as a whole but has limited levers available to shape individual selection: at 173. He notes that there is no reliable mechanism for holding judges to account for their considerable influence over the selection regime: at 174.

82 Ibid 175 ff. Gee here refers, by way of example, to the limited interpretation of the equal merit provision, which he argues was the result of judicial influence over the terms of its use, and that there is evidence of judicial resistance to the policy in the years since its adoption.

83 Ibid 177 ff. Gee recognises that statutory consultation with judges has an important role to play in the selection of candidates but notes that his research revealed that such consultation sometimes operated as a de facto 'veto' for senior judges, and that there remained concern amongst some in the JAC and the Ministry about the quality, consistency and relevance of the views expressed by judges during that consultation.

84 Ibid 178 ff. Here Gee outlines that the research that led to the publication of *The Politics of Judicial Independence in the UK's Changing Constitution* identified concerns that the JAC's first two lay chairs seemed to have been coopted by the senior judicial members of the JAC, that the senior judges who sat on the JAC at times exerted disproportionate influence on individual selections and the JAC's policies, and that the JAC's lay and legal commissioners might be deferential to the judicial commissioners on questions of both individual appointments and policy.

85 Ibid 181.

86 Ibid.

centred largely around a concern that the influence of the executive branch of government was too great, and resulted in appointments on the basis of political expedience.

In the Australian context, it is 'unconstrained executive discretion',[87] rather than the involvement of the judiciary, that has been seen as a problematic when it comes to judicial appointments. This is an interesting and important contrast but it does not necessarily diminish the potential for Australia to draw lessons from the JAC experience. Despite the difference in approaches between the two jurisdictions, and even notwithstanding the fact that at times it seems like the judicial diversity project in Australia has been more effective, there is still much to glean from the JAC experience. In this respect Gee's contribution might be salutary regarding the need to avoid allowing the pendulum to swing too starkly away from executive involvement. As Lynch argues in his insightful chapter recounting the Australian experience of judicial diversity, a comparison of the two jurisdictions reveals that 'in the desire to achieve maximum independence from the political arms of government, a model may underperform against the objectives of accountability and judicial diversity'.[88] Lynch concludes that '[p]reserving a sufficient degree of political responsibility for the composition of the courts seems prudent for the attainment of a more diverse bench'.[89] This seems to get to the nub of the issue in both jurisdictions; as Lynch convincingly argues, without accountability the judicial diversity project will be weakened because the 'executive can be inconsistent in its focus on diversity, while the judiciary and the legal profession, spared any formal responsibility for appointments, may be complacent about the issue and any action they might initiate to address it'.[90] We agree; the issue is squarely one of accountability. Although we do not think there are persuasive arguments for the adoption of a JAC-style judicial appointment commission in Australia, we agree that in both the UK and Australia the success or otherwise of the judicial diversity project is about achieving greater transparency in making these appointments and holding decision-makers accountable for improving diversity. In our view, the role of the executive in Australia is not itself problematic, and any reforms to the appointment process in Australia need not diminish the overarching role of the executive branch – formalising diversity as a relevant consideration in making appointments would entrench these considerations, creating a formal responsibility that would transcend the whims and political objectives of the government of the day.[91]

V CONCLUSION

Debating Judicial Appointments in an Age of Diversity is an authoritative and comprehensive collection about the justifications and mechanisms for achieving a

87 Lynch (n 10) 101.
88 Ibid 117.
89 Ibid.
90 Ibid.
91 See McLoughlin, 'The Politics of Gender Diversity' (n 16) 170.

more diverse judiciary. The collection will be of interest not only to constitutional lawyers, but political theorists and policymakers considering options for achieving a more diverse judiciary and a more transparent judicial appointments system. The collection more than meets its stated objectives – it will no doubt continue to shape and inform debates about judicial appointments as we embark on an age of diversity. In our view, though ostensibly relating to the UK experience and the JAC, it provides valuable lessons for Australia and elsewhere. The collection not only illustrates the range of views and experiences of the JAC-run regime but also responds thoughtfully to contrasting assessments of those inside and outside the regime. It revisits familiar debates that have led to impasse between insiders and outsiders and in so doing provides fresh insights into how these complex issues relating to merit, quotas, and the respective role of judges and politicians in the selection process might be untangled.