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RECONCEIVING JUDICIAL OFFICE THROUGH A LABOUR LAW LENS

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Abstract: *Judges fulfill a fundamental constitutional role in democratic systems. Most research on judges, though, focuses on the public and constitutional significance of the judicial role, not the needs of individual judges. This article applies a labour law lens to help reconceive the judicial role in a way that balances the individual and collective needs of judges with the institutional and constitutional needs of the third arm of government, drawing on comparative analysis of Australia and the United Kingdom, and examples from common law countries. I argue that, while some progress has been made towards using labour law to structure and inform judicial roles, labour law offers new insights into how judges and judicial work might be supported. This may both assist judges in their individual capacity, and support the judiciary as an institution. It therefore has significance for judges as individuals, and the judiciary's fundamental constitutional role.*

Keywords: *judges, judiciary, labour law, Australia, United Kingdom*

I INTRODUCTION

Judges fulfil a fundamental constitutional role in democratic systems, including in resolving disputes,¹ applying (and making) law,² acting as 'a safeguard against arbitrary power'³ by scrutinising government acts and legislation,⁴ upholding the rule of law, and protecting individual rights.⁵ In constitutional law scholarship, much focus has been paid to how judicial institutions can secure and balance judicial accountability with judicial independence, with the ultimate goal of maintaining public confidence in the judicial system to secure the courts' constitutional role.⁶ While some attention has been paid to how the terms and conditions of judicial office might impact upon constitutional principles, the fundamental concern remains with securing the constitutional role of judicial institutions, not the position of judges as individuals.

¹ *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959) 60.

³ W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 322.

⁴ See further TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 1993) 282 ('*Law, Liberty, and Justice*').

⁵ See *Entick v Carrington* (1765) 19 St Tr 1030, 1066 (Lord Camden CJ); *Sommersett's Case* (1772) 20 St Tr 1, 82 (Lord Mansfield).

⁶ See, for example, Marilyn Warren, 'From Evaluation to Improvement: A Chief Justice's Perspective' (2014) 4(5) *Onati Socio-Legal Series* 953, 956, 957 ('From Evaluation to Improvement'); J McIntyre, 'Evaluating Judicial Performance Evaluation: A Conceptual Analysis' (2014) 4(5) *Onati Socio-Legal Series* 898, 905–908 ('Evaluating Judicial Performance Evaluation'); Francesco Contini and Richard Mohr, 'Reconciling Independence and Accountability in Judicial Systems' (2007) 3 *Utrecht Law Review* 26. For further on public confidence, see Sharyn Roach Anleu and Kathy Mack, 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20(1) *Journal of Judicial Administration* 3 ('The Work of the Australian Judiciary').

Scant attention has been paid to judicial careers in the existing literature:⁷ research on work, careers and the professions rarely includes or considers the judiciary.⁸ Most research on judges, then, arguably tends to ignore that judges are human, instead focusing on the public and constitutional significance of the judicial role.⁹

Increasingly, however, there is an acknowledgement that judges are not just ‘judicial officers’: they are also individuals, with particular needs and requirements. Further, there is growing recognition that if judges are not supported effectively, they will be unable to fulfil their constitutional role optimally. The contemporary judiciary faces fundamental institutional and personal challenges, including in relation to the pursuit of diversity; part-time work; managing mental health, stress and capacity issues; ensuring proper support for judges, including in relation to ethical concerns; and providing proper resourcing to the court.¹⁰ These are challenges that go to the heart of the sustainability and efficacy of the judicial role. Thus, it is timely to reconsider how judges are supported and treated as they fulfil their constitutional function.

In a general employment setting, labour law provides a means of balancing the interests of workers with those of employers, to reach outcomes that support both individual needs and organisational priorities. Kahn-Freund sees this as balancing the inequality of bargaining power inherent in the employment relationship.¹¹ Given the limited power that resides in individual workers, and the limited effectiveness of law in regulating the workplace, Kahn-Freund posits unions as having a fundamental role in balancing employer power: ‘On the labour side, power is collective power’.¹² Labour law offers ‘reasonably predictable procedures’ by which the inevitable conflicts of interest between capital and labour might be adjusted and negotiated.¹³

Similarly, Collins argues that employment law aims to ensure that the labour market functions effectively as a market, while also protecting workers against excesses of market logic.¹⁴ Any balance between these competing interests will be ‘complex and contested’, and has no fixed solution: rather, it is continually adapting to new contexts and demands.¹⁵ From an industrial pluralism perspective, collective bargaining could then be seen as a means of reducing social conflict, and preventing industrial conflict from escalating into political revolution.¹⁶ Organisations of workers are therefore

⁷ Robert P Davidow, ‘Beyond Merit Selection: Judicial Careers through Merit Promotion’ (1981) 12 *Texas Tech Law Review* 851, 852 (‘Beyond Merit Selection’); Robert P Davidow, ‘Law Student Attitudes towards Judicial Careers’ (1981) 50 *University of Cincinnati Law Review* 247, 248.

⁸ Kathy Mack and Sharyn Roach Anleu, ‘The National Survey of Australian Judges: An Overview of Findings’ (2008) 18 *Journal of Judicial Administration* 5, 6 (‘The National Survey of Australian Judges’).

⁹ GY Ng, ‘Judicial Performance and Experiences of Judicial Work: Findings from Socio-Legal Research by Sharyn Roach Anleu and Kathy Mack: Commentary’ (2014) 4(5) *Onati Socio-Legal Series* 1041, 1045.

¹⁰ Gabrielle Appleby et al, ‘Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption’ (2018) 42(2) *Melbourne University Law Review* advance (‘Contemporary Challenges Facing the Australian Judiciary’).

¹¹ Otto Kahn-Freund, PL Davies and MR Freedland, *Kahn-Freund’s Labour and the Law* (Stevens, 3rd ed, 1983) 14–15, 18.

¹² *Ibid* 17.

¹³ *Ibid* 27–28.

¹⁴ Hugh Collins, *Employment Law* (Oxford University Press, 2nd ed, 2010) 5.

¹⁵ *Ibid*.

¹⁶ *Ibid* 19.

granted rights to bargain collectively and engage in industrial action, but also accept limits being placed on their activities, such as through restrictions on allowable industrial action and political strikes.¹⁷

In the judicial context, a labour law lens could provide a means of reconceiving the judicial role, in a way that balances the individual and collective needs of judges with the institutional and constitutional needs of the third arm of government. A ‘labour law lens’ in this context means a view of judicial office that is informed by individual and collective labour rights and entitlements, which considers the applicability of labour law to the work of judging. Individual labour rights in Australia and the UK focus on a number of similar issues, such as: protection from discrimination; minimum statutory terms and conditions of employment (including those relating to pay, working time, flexible work, pensions, and leave entitlements); protection in the event of termination (including protection from unfair dismissal, notice requirements and redundancy provisions); and occupational health and safety. Collective labour rights in Australia and the UK focus on the right to organise collectively, collectively bargain over terms and conditions of work, and take industrial action.

Judges occupy a comparatively privileged position when compared with most employees in the labour market: as a result, many minimum standards will not apply, particularly those that relate to minimum rates of pay, pension entitlements and protection from termination. In these areas, judges have terms and conditions of work that well exceed the statutory minima.¹⁸ In other areas, however, labour law offers comparative benefits to judges’ existing conditions of work, particularly in relation to collective labour rights, discrimination law and workplace flexibility. It is these areas of labour law that are the focus of this article.

Of course, ‘judges cannot be considered in the same light as employees of commercial organisations or public servants’:¹⁹ the fundamental constitutional role of the judiciary, and the need to secure judicial independence, necessarily temper how a labour law lens might be applied to judicial work. In applying a labour law lens to judging, the ‘state’²⁰ occupies a challenging position as both an ‘employer’ of judges, and a different arm of government, from which judges need separation and independence.²¹ This stands in marked contrast to the level of power and control traditionally exercised by employers over employees, including in how work is performed.²² Navigating this tension and

¹⁷ Ibid 117.

¹⁸ See, for example, the discussion of judicial incapacity in *Gilham v Ministry of Justice* [2017] EWCA Civ 2220 (21 December 2017), [2018] ICR 827: in England and Wales, judges do not have an allocated number of sick days, but are paid for the time in which they hold office, even in the event of incapacity: at [70]. This is substantially more generous than the statutory minima that apply to general employees.

¹⁹ Stephen Colbran, ‘Judicial Performance Evaluation: Accountability Without Compliance’ (2002) 76 *Australian Law Journal* 235, 244 (‘Judicial Performance Evaluation’).

²⁰ The ‘state’ is not monolithic, and could in this context include the executive and/or Parliament, as the other arms of government.

²¹ On the separation of powers in Australia, and its implications for judicial independence, see generally Anthony Mason, ‘Judicial Independence and the Separation of Powers - Some Problems Old and New’ (1990) 13 *University of New South Wales Law Journal* 173 (‘Judicial Independence and the Separation of Powers’). In their analysis of the state as an employer, Fredman and Morris explicitly exclude consideration of the judiciary: Sandra Fredman and Gillian S Morris, *The State as Employer: Labour Law in the Public Services* (Mansell, 1989) 4 (‘*The State as Employer*’).

²² See further John Storey, *Managerial Prerogative and the Question of Control* (Routledge & Kegan Paul, 1983).

acknowledging this difference is one of the key challenges of applying a labour law lens to the judicial context.

While acknowledging these challenges, a labour law perspective still offers an established and well-considered lens for informing and illuminating court practices,²³ and may assist courts to better balance individual, institutional and constitutional needs. A labour law lens draws attention to organisational processes in courts, with a focus on what judges need to function, and other processes that may support a judge in fulfilling their role.²⁴ It therefore adds the human dimension to discussion of the judicial role.²⁵

More particularly, a labour law lens offers four potential advantages if applied in the judicial context, which are increasingly pertinent given the individual and institutional challenges facing the judiciary. First, by helping to balance the needs of individuals and institutions, a labour law lens could enhance individual performance and strengthen the organisation as a whole.²⁶ Thus, it may help to improve the performance and capability of the judiciary, assisting courts in fulfilling their constitutional function and optimising the supply of judicial labour.²⁷

Second, a labour law lens (particularly one that includes discrimination law) may assist with promoting judicial diversity. While a more diverse judiciary may not lead to different decision-making,²⁸ judicial diversity is important for securing judicial legitimacy, and helps ensure public confidence in the judicial branch, and therefore in the rule of law.²⁹ For Malleon, then, judicial diversity and equal participation is ‘an inherent and essential feature of a democracy without which the judiciary will lose public confidence.’³⁰ With a holistic understanding of judicial diversity – acknowledging the interrelationship between judicial appointments, working conditions, appraisals, training, career development, travel and deployment in promoting (or hindering) diversity³¹ – it becomes increasingly evident that promoting diversity requires a reconsideration of the judicial role and terms and conditions of work. It is in this area that a labour law lens might offer significant assistance. This is particularly important given Australia and the UK have not generally been successful at achieving judicial diversity using established methods and programmes, especially

²³ See similarly Marilyn Warren, ‘Enhancing Our Self-Perception: 360-Degree Feedback for Judicial Officers’ (2011) 21 *Journal of Judicial Administration* 3 (‘Enhancing Our Self-Perception’).

²⁴ Ng (n 9) 1044.

²⁵ *Ibid* 1045.

²⁶ See similarly the literature on human resource management, for example, Randall S Schuler and Ian C MacMillan, ‘Gaining Competitive Advantage through Human Resource Management Practices’ (1984) 23(3) *Human Resource Management* 241; Mark A Huselid, ‘The Impact Of Human Resource Management Practices On Turnover, Productivity, And Corporate Financial Performance’ (1995) 38(3) *Academy of Management Journal* 635; Marianne J Koch and Rita Gunther McGrath, ‘Improving Labor Productivity: Human Resource Management Policies Do Matter’ (1996) 17(5) *Strategic Management Journal* 335 (‘Improving Labor Productivity’).

²⁷ See similarly Brian Opeskin, ‘The Supply of Judicial Labour: Optimising a Scarce Resource in Australia’ (2017) 7(4) *Oñati Socio-legal Series* 847 (‘The Supply of Judicial Labour’).

²⁸ Angela Melville, ‘Evaluating Judicial Performance and Addressing Gender Bias’ (2014) 4(5) *Oñati Socio-Legal Series* 880, 884–888.

²⁹ *Ibid* 889; Kate Malleon, ‘Justifying Gender Equality on the Bench: Why Difference Won’t Do’ (2003) 11(1) *Feminist Legal Studies* 1, 18–21 (‘Justifying Gender Equality on the Bench’).

³⁰ Malleon (n 29).

³¹ In Australia, see Kathy Mack and Sharyn Roach Anleu, ‘Entering the Australian Judiciary: Gender and Court Hierarchy’ (2012) 34(3) *Law & Policy* 313 (‘Entering the Australian Judiciary’).

at the higher levels of the judiciary.³² This flags the importance of considering alternative options and strategies.

Third, by promoting the interests of individual judges, a labour law lens may increase judicial satisfaction and retention. In the 2016 UK Judicial Attitude Survey, the results for England and Wales courts and UK tribunals found that 83 per cent of respondents were most concerned by changes to judicial morale since 2014.³³ In the 2014 survey, 86 per cent of respondents in England and Wales courts and UK tribunals saw judicial morale as a key future challenge for the judiciary, and 56 per cent identified the loss of experienced judges as a future challenge.³⁴ Thus, judicial retention and satisfaction are major institutional challenges, at least for the judiciary in England and Wales. Even in Australia, Opeskin has identified judicial retention as a major challenge in seeking to optimise the supply of judicial labour, and flags the need for better working conditions to reduce judicial attrition.³⁵ A labour law lens offers one means of identifying reforms that might promote judicial retention and address barriers to judicial satisfaction.

Fourth, labour law offers a means of channelling and managing collective action. This both offers the potential for judges to work collectively to improve their working situation, and provides a degree of structure or predictability to the collective negotiation process. As Collins notes, employers need industrial relations mechanisms to secure ‘collective cooperation’ from the workforce; negotiation and cooperation between employers and workers can promote trust and confidence in the workplace.³⁶ Thus, labour law offers a working model for how governmental power might be collectively balanced to promote the interests of judges, again increasing judicial satisfaction.

A labour law lens is not without its detractors. The growing emphasis on individual employment rights, and the weakening of collective structures, has been criticised for facilitating a neoliberal individualising of the labour market, and undermining employment terms and conditions in practice.³⁷ Labour law is also limited in scope – relying on the traditional distinction between employees and independent contractors – and is therefore under-inclusive and insufficiently responsive to changing corporate structures to protect vulnerable workers in the modern labour market.³⁸ Further, there

³² In Appleby et al’s 2016 survey of 142 Australian judges, 53 per cent of respondents regarded judicial diversity as a challenge facing the judiciary in their jurisdiction; only 18 per cent disagreed that it was a challenge: Appleby et al (n 10). See also Brian Opeskin, ‘The State of the Judicature: A Statistical Profile of Australian Courts and Judges’ (2013) 35 *Sydney Law Review* 489, 509–513 (‘The State of the Judicature’); 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, 6–8 (‘Introduction’).

³³ Cheryl A Thomas, *2016 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals* (7 February 2017) 67 (‘2016 UK Judicial Attitude Survey’).

³⁴ Cheryl A Thomas, *2014 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals* (4 February 2015) 42 (‘2014 UK Judicial Attitude Survey’).

³⁵ Opeskin, ‘The Supply of Judicial Labour’ (n 27) 863–4.

³⁶ Collins (n 14) 118.

³⁷ See Lizzie Barnes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford University Press, 2016) (‘*Bullying and Behavioural Conflict at Work*’).

³⁸ See Hugh Collins, ‘Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws’ (1990) 10 *Oxford Journal of Legal Studies* 353.

are concerns that the enforcement of labour law is fundamentally flawed, at least to the extent it relies on individuals (and unions) in a weakened position to challenge established corporate power, or regulatory agencies with limited resources to scrutinise many thousands of firms.³⁹ These are all valid criticisms of labour law and its enforcement. However, even recognising these limitations, a labour law lens still offers new insights into how workers might be protected and supported in the labour market, and how we might balance individual and institutional needs more effectively.

This article therefore considers how applying a labour law lens to the judiciary might inform judicial employment, drawing on examples from common law countries such as Australia, the UK, Ireland and the USA, and focusing particularly on emerging case law in the UK on judges as ‘workers’. These international examples provide a striking counterpoint to the general resistance in Australia to viewing judges as ‘workers’ or ‘employees’.⁴⁰ The developing case law in the UK is particularly noteworthy, given Australia and the UK share common legal foundations, similar judicial models, and similar labour laws, making the UK and Australia highly appropriate comparator countries.⁴¹ Further, governments in the UK and Australia are both putting pressure on judicial terms and conditions of work in the name of ‘austerity’ and ‘financial restraint’, potentially causing tension between the government and judiciary. Even with these broad similarities, the UK has made substantially more progress towards viewing judges as workers.⁴² This may reflect the institutional and constitutional differences between Australia and the UK, such as the extensive reliance on recorders in the UK (which may make part-time working more accepted), and the UK’s unwritten constitutional framework for the separation of powers, which may mean that a labour law lens offers more potential to reform UK judicial structures than in Australia. Regardless, the UK remains an illuminating and revealing comparator for the Australian context, and a labour law lens still offers new insights for both jurisdictions.

In Part II the article evaluates trends towards applying labour law to the judiciary, with a particular focus on case law relating to judicial terms and conditions in Australia and the UK. In Part III, the article considers how the use of a labour law lens to view the judiciary might change courts’ operations, focusing on collective labour rights, discrimination law and workplace flexibility. I argue that, while some progress has been made towards using labour law to structure and inform judicial roles, there is still significant scope for this to be extended. This may both assist judges in their individual capacity, and support the judiciary as an institution. It therefore has significance for judges as individuals, and the judiciary’s fundamental constitutional role. Part IV concludes.

II VIEWING THE JUDICIARY THROUGH A LABOUR LAW LENS

³⁹ See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) (‘*Responsive Regulation*’).

⁴⁰ Margaret McMurdo, ‘A Comment on Justice Malcolm Wallis’s Paper, “Judges As Employees”’ (2012) <http://jca.asn.au/wp-content/uploads/2013/11/Judges-as-Employees_commentary.pdf>.

⁴¹ This comparison stems from a ‘problem-solving’ or sociological approach to comparative law, which examines how different legal systems have responded to similar problems: Esin Öricü, ‘Developing Comparative Law’ in Esin Öricü and David Nelken (eds), *Comparative Law: A Handbook* (Hart, 2007) 43, 52.

⁴² Though this may reflect the influence of EU law: see further below.

A Reluctance in Applying a Labour Law Lens

Judges – and the work of judging – are not typically seen through a labour law lens. This may be attributable to three key factors. First, the fundamental importance of judicial independence and impartiality⁴³ has led to reluctance to interfere in the work of judging. There is a fear that labour law will interfere with and affect judicial decision-making, and potentially allow for executive interference in the judicial process.⁴⁴ As argued by Justice Margaret McMurdo, former president of the Queensland Court of Appeal,

we must remain vigilant to ensure that the concepts of separation of powers and judicial independence are not undermined, however subtly, including by the notion of judges as employees. ... judges, like cabinet ministers and members of parliament, collectively govern, not as employees of the executive, but as public officers of their distinct branches of government.⁴⁵

This may reflect the historic vulnerability of judicial office, where judges held their position at the Crown's pleasure.⁴⁶ While judges now generally retain office during good behaviour,⁴⁷ there is an obvious need to rigorously protect judicial independence. 'Independence' in this context has many dimensions, being internal (that is, from colleagues and superiors) and external (from executive interference), personal and collective, substantive and institutional.⁴⁸ Thus, a labour law lens should only be considered to the extent it respects and upholds fundamental features of the judicial role, and judicial independence in particular. This places particular limitations on any view of the state as an 'employer' of judges, and the level of control that status might entail.

Second, and relatedly, the importance of independence and impartiality to the legitimacy of courts and judges may have operated to obscure and deflect attention from the position of judges as individuals. Judges tend to be seen as representatives and servants of the state, exerting authority, and aspiring to an ideal of objectivity.⁴⁹ This has a physical manifestation in court dress and attire, with judges 'covering their individuality with a black robe'.⁵⁰ Judges are transformed into public existence through the use of symbols and court traditions:⁵¹ in this process, judges are dehumanised, and come to symbolise their role rather than their own identity. Thus, ideals of independence and impartiality and court traditions may create an illusion of sameness

⁴³ McIntyre (n 6) 901.

⁴⁴ Ibid.

⁴⁵ McMurdo (n 40) 7–8.

⁴⁶ HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 3–4.

⁴⁷ Ibid.

⁴⁸ Ibid 6; Kate Malleson, 'Judicial Training and Performance Appraisal: The Problem of Judicial Independence' (1997) 60(5) *The Modern Law Review* 655 ('Judicial Training and Performance Appraisal').

⁴⁹ Ulrike Schultz and Gisela Shaw, 'Introduction: Gender and Judging: Overview and Synthesis' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 1, 24.

⁵⁰ Ibid.

⁵¹ Ibid 26.

among judges, which prevents recognition that judges are a group of individuals who work and think differently.⁵²

That said, the presence of a more diverse judiciary increasingly challenges the depersonalisation of judges: as Rackley has argued,

The woman judge continues to be seen as a threat to the aesthetic norm; her presence on the bench is an inescapable irritant, simultaneously confirming and disrupting its established masculinity. ... Her perceived difference challenges traditional understandings of the judge and judging, disrupting the previous uniformity of the bench and revealing an unavoidable gender dimension to previous understandings of adjudication.⁵³

Judicial diversity can therefore be transformative, coming to challenge the very notions of ‘judging’ and ‘the judge’⁵⁴ and undermining the idea of the ‘passionless judge’.⁵⁵ Diversity challenges the homogeneity of the bench, and encourages recognition that judging is contextual and contingent.⁵⁶ Thus, judicial diversity may increasingly come to challenge established ideas and values of judging.⁵⁷ While a labour law lens – and individual employment rights in particular – may have been incompatible with the illusion of sameness created by ideals of independence and impartiality, it is consonant with the growing diversity of the judiciary, which draws attention to unexpressed assumptions about judges and their identity.

Third, differences between judging and other forms of employment may be seen as undermining the use of a labour law lens in this context. In addition to the importance of impartiality and independence, and consequent limitations on the state’s power to direct judicial work, it is arguable that judges (unlike other workers) are not in a position of inequality or inferior bargaining power,⁵⁸ making a labour law lens inappropriate. As the third arm of government,⁵⁹ judges are arguably as powerful as the executive or parliament, and have significant resources with which to protect their own interests. However, this confuses *constitutional* power with *individual* power: while judges may be able to hold the government to account in fulfilling their constitutional role, they are unlikely to have equal bargaining power in relation to their own terms and conditions of appointment and work. This is particularly the case for members of the lower judiciary, who may not wield substantial personal power. Thus, power disparities are relevant when considering the position of judges.

⁵² Ng (n 9) 1043.

⁵³ E Rackley, ‘Difference in the House of Lords’ (2006) 15(2) *Social & Legal Studies* 163, 164.

⁵⁴ Erika Rackley, ‘Rethinking Judicial Diversity’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Hart Publishing, 2013) 501, 511.

⁵⁵ *Ibid.*

⁵⁶ Melville (n 28) 883.

⁵⁷ Erika Rackley, ‘From Arachne to Charlotte: An Imaginative Revisiting of Gilligan’s “In A Different Voice”’ (2007) 13(3) *William & Mary Journal of Women and the Law* 751, 774 (‘From Arachne to Charlotte’).

⁵⁸ cf Kahn-Freund, Davies and Freedland (n 11) 14–15; Collins (n 14) 5.

⁵⁹ The Hon James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 240.

Of course, as noted above, judges cannot be unreflexively equated with employees of commercial organisations or public servants.⁶⁰ Courts operate differently to business: as Marilyn Warren, former Chief Justice of the Victorian Supreme Court, has noted,

as a fundamental democratic institution, the Judiciary has different objectives and processes to commercial enterprises, which are focused on increasing productivity and reducing the bottom line... The link between the inherently inefficient processes of open justice and the institutional legitimacy of the Judiciary means that notions of efficiency relevant to market activities are inappropriate when applied to judicial administration[.]⁶¹

Thus, courts are different to commercial companies, and judges are different to regular employees. While '[j]udging is a profession', it is of a 'special kind',⁶² as judges are also members of a branch of government,⁶³ with a role in creating and legitimising the law.⁶⁴ Unlike in a traditional employment relationship, the state cannot interfere in or direct how judges perform their work, at least while still maintaining the rule of law, separation of powers and judicial independence.⁶⁵ This, however, tempers *how* a labour law lens might be applied to judicial work, rather than negating the approach in its entirety. It means that not all labour law will be relevant or desirable for judges and the judiciary, though it can still be informative in reflecting upon different aspects of the judicial role.

It is important, then, to recognise the potential institutional or structural constraints that may limit how far a labour law lens can be applied to the judiciary. Simultaneously, it is also important to recognise an emerging shift in how judges and the work of judging are viewed. Gee and others map a shift in UK courts from a culture of individualism – with resistance to performance management among judges, and solitary working lives,⁶⁶ largely justified on the basis of judicial independence⁶⁷ – towards a culture of corporatism, with a focus on minimum standards of legal knowledge, courtesy, and the skills of judge-craft.⁶⁸ This has also prompted the centralisation of power in senior judges to manage and enable this culture of corporatism.⁶⁹ This cultural change has been driven by a range of factors, including the growth of the judiciary, the decline in judicial homogeneity with growing diversity, and the development of judicial career paths, which put more emphasis on training and development.⁷⁰ Equally, some courts have experienced a shift towards managerialism, with judges no longer being viewed just as independent decision-makers, but also actors in a public organisation delivering services.⁷¹ This may then justify a focus on court accountability for the use of

⁶⁰ Colbran (n 19) 244.

⁶¹ Warren (n 6) 960.

⁶² Gerard Brennan, 'Foreword', in Thomas (n 59) vii.

⁶³ Malleon (n 29) 18.

⁶⁴ Melville (n 28) 889.

⁶⁵ Or can only do so via the process of legislative reform.

⁶⁶ Graham Gee et al, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press, 2015) 127.

⁶⁷ Ibid.

⁶⁸ Ibid 128. This shift is reflected in the *Constitutional Reform Act 2005* (UK) c 4 ('CRA'), which formalised court management and working structures: Ibid 129–130.

⁶⁹ See *Constitutional Reform Act 2005* (UK) c 4; *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth).

⁷⁰ Gee et al (n 66) 128.

⁷¹ Contini and Mohr (n 6) 27–28.

resources,⁷² and the recasting of the judicial role to focus on the delivery of ‘services’.⁷³ For Hunter, the ‘neo-liberal judge’ is one who works within a bureaucratic ‘KPI-driven regime’ with a focus on settlement.⁷⁴ A labour law lens therefore both reflects emerging trends in court management, and offers a means of critiquing such trends from individual and collective perspectives.

B A Labour Law Lens in Australia

While a labour law lens may significantly enhance our understanding of the judicial role, there has been limited take-up of this approach in existing case law. In Australia at the federal level, the *Australian Constitution* provides limited consideration of the position of judges as individual workers or employees. Provision for judges’ appointment, tenure and remuneration is made in s 72 of the *Constitution*, which provides for: appointment by the Governor-General in Council; removal by the Governor-General in Council, on an address from both Houses of Parliament in the same session, on the ground of proved misbehaviour or incapacity; remuneration as fixed by Parliament, which cannot be diminished during a judge’s continuance in office; and judicial retirement ages (age 70 for members of the High Court; age 70 or less for other judges).

There has been limited consideration in the Australian case law of judges’ terms and conditions:⁷⁵ where these issues have been considered in the courts, the cases have largely focused on judicial tenure, and whether s 72 applies to State or Territory courts.⁷⁶ Other cases have focused on the nature of judicial power.⁷⁷ Thus, most disputes in Australia have arisen in the context of the judiciary as an institution; there has been minimal consideration of judges and judging using a labour law lens in the Australian case law.

A potential exception to this arose in the context of judicial pensions. In *Austin v Commonwealth*⁷⁸ the High Court was asked to consider the constitutional validity of a federal tax on state judges’ pensions. The tax would have exposed the judges in question to significant liability via a ‘superannuation surcharge debt’: the first plaintiff, a judge of the Supreme Court of New South Wales, would have been liable to a debt of AU\$550,780 if he worked until the mandatory retirement age of 72.

⁷² Ibid.

⁷³ James Spigelman, ‘Seen to Be Done: The Principle of Open Justice’ (2000) 74 *Australian Law Journal* 378 (‘Seen to Be Done’).

⁷⁴ Rosemary Hunter, ‘Judicial Diversity and the “New” Judge’ in Hilary Sommerlad et al (eds), *The Futures of Legal Education and the Legal Profession* (Bloomsbury Publishing, 2015) 79, 83.

⁷⁵ This may be compared with parliamentary remuneration, which has been repeatedly considered in the courts: see *Cunningham v Commonwealth* [2016] HCA 39; *Brown v West* (1990) 169 CLR 195; *Griffiths v The Trustees of the Parliamentary Contributory Superannuation Fund* [2012] NSWCA 231.

⁷⁶ See *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 332 (Gleeson CJ, McHugh and Callinan JJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 66 (Gleeson CJ), 141 (Heydon J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 115 (McHugh J); *Spratt v Hermes* (1965) 114 CLR 226, 271 (Windeyer J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 192 ALR 701, [64] (Black CJ and Hely J); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ).

⁷⁷ See, for example, *CGU Insurance Limited v Blakeley* [2016] HCA 2.

⁷⁸ (2003) 215 CLR 185.

For the High Court, it was irrelevant whether the tax operated in a ‘harsh and unreasonable manner’ on individual judges: ‘Unreasonableness is not a ground of invalidity of a tax.’⁷⁹ Instead, the tax was invalid as it treated State judges differently (and disadvantageously) to other high-income earners and federal judges.⁸⁰ This constituted an interference with State arrangements for judicial remuneration, which could have affected the States’ ability to recruit and retain judges to ‘perform an essential constitutional function of the State.’⁸¹ The provisions denied ‘the interest of the State in providing an adequate level of remuneration’ for judges,⁸² which impaired State ‘liberty of action’ in relation to ‘the working of its governmental structure’⁸³ and interfered with the States’ relationships with their judges.⁸⁴ The tax, then, was constitutionally impermissible.

Austin was clearly not a case about the status of judges, except as it related to the integrity of the Australian federal structure. As noted by Gleeson CJ, ‘The issue is one of interference; of impairment of the constitutional integrity of a State government.’⁸⁵ Thus, judges are notable for their constitutional function, not for their individual rights. Further, for Kirby J (in dissent), judicial remuneration is not relevant ‘because it is important to the comfort and lifestyle of the judge’: rather, its ‘governmental importance’ lies in attracting and retaining ‘worthy’ officeholders to the bench.⁸⁶

Similarly, in *Baker v Commonwealth*⁸⁷ Federal magistrates argued that their exclusion from the non-contributory defined benefit pension scheme afforded to Federal judges was invalid, as it undermined the appearance of judicial independence. The Federal Court held that it had not been shown that a reasonable, well-informed lay observer would apprehend that magistrates’ independence and impartiality would be jeopardised by the lack of a judicial pension, having regard to other safeguards of judicial independence and their judicial salary.⁸⁸ However, the majority of the Court did recognise that it was possible that judicial remuneration could be reduced so low that courts ‘would not be recognisable as Ch III courts’,⁸⁹ if they became ‘the exclusive preserve of the idle rich or the corruptible poor’.⁹⁰

These cases reveal that a labour law lens has rarely – if ever – been applied to the position of judges in Australia. Indeed, the High Court of Australia has explicitly denied judges’ status as employees: in *Re Australian Education Union*⁹¹ it was held by the majority that ‘Ministers and judges are not employees of a State.’⁹² However, the Court did not explain what, indeed, judges were, if not employees.

⁷⁹ Ibid 208 (Gleeson CJ). See similarly 306–7 (Kirby J).

⁸⁰ Ibid 219 (Gleeson CJ). See also at 263 (Gaudron, Gummow and Hayne JJ), 283–4 (McHugh J).

⁸¹ Ibid 219 (Gleeson CJ). See also at 265 (Gaudron, Gummow and Hayne JJ), 284 (McHugh J). Cf 304–5, 307, 308, 313 (Kirby J).

⁸² Ibid 265 (Gaudron, Gummow and Hayne JJ).

⁸³ Ibid 265 (Gaudron, Gummow and Hayne JJ).

⁸⁴ Ibid 283 (McHugh J).

⁸⁵ Ibid 220 (Gleeson CJ).

⁸⁶ Ibid 303 (Kirby J).

⁸⁷ (2012) 206 FCR 229.

⁸⁸ Ibid 240–1, 243 (Keane CJ and Lander J).

⁸⁹ This refers to Chapter III of the *Australian Constitution*, which establishes the federal court system.

⁹⁰ Ibid 239 (Keane CJ and Lander J).

⁹¹ (1995) 184 CLR 188.

⁹² Ibid 233.

C Judges as Workers: The UK Context

The Australian context may be compared with the situation in the UK, where there is a much clearer move towards regarding judges as ‘workers’.⁹³ This goes beyond the idea that judges are ‘judicial officers’ with an overriding constitutional function, and acknowledges that judges are individual workers with their own needs, careers, and aspirations, who may be aided by labour law and individual and collective labour rights.⁹⁴

These developments have been particularly prominent in the context of discrimination law, where judges have repeatedly been held to be ‘workers’ for the purposes of EU and UK equality legislation, despite occupying judicial office. In *C-393/10 O’Brien v Ministry of Justice*,⁹⁵ the Court of Justice of the European Union (‘CJEU’) held that ‘the sole fact that judges are treated as judicial office holders is insufficient in itself to exclude the latter from enjoying the rights provided for by that framework agreement [on part-time work].’⁹⁶ Judges could only be excluded from the Framework Agreement if their relationship was held to be substantially different from the relationship between employers and those who fall within the category of ‘workers’ under national law.⁹⁷ While it was for the national court to determine whether this was the case, the CJEU noted that the national court’s decision should be made having regard to the spirit and purpose of the Framework Agreement on part-time work, and in light of the distinction between workers and the self-employed;⁹⁸ and having reference to how judges are appointed and removed, the way their work is organised, and the rights attached to their position (such as sick pay, maternity or paternity pay, and other benefits).⁹⁹ Finding judges to be ‘workers’ would not undermine their independence:¹⁰⁰ indeed, according to the Advocate General, employment rights would strengthen the economic and practical independence of the judiciary.¹⁰¹

The UK Supreme Court, applying the CJEU’s test, held that judges were ‘workers’ for the purposes of the Framework Agreement, on the basis that ‘they are not free agents to work as and when they choose. They are not self-employed persons when working in that capacity [as judges].’¹⁰² The Court considered that: (i) the character of judicial work differed from that of a self-employed person; (ii) the rules for judicial

⁹³ Of course, this contrasts even more markedly with some continental systems, where judges are seen as ‘staff’ (and performance evaluation is therefore a tool of ‘staff management’): J Riedel, ‘Individual Evaluation of Judges in Germany’ (2014) 4(5) *Onati Socio-Legal Studies* 974, 977.

⁹⁴ Similar recognition in Australia may be inhibited by the absence of any third ‘worker’ category in labour and discrimination law. See further Alysia Blackham, “‘We Are All Entrepreneurs Now’: Options and New Approaches for Adapting Equality Law for the “Gig Economy”” (2018) 34(4) *International Journal of Comparative Labour Law and Industrial Relations* 413 (‘We Are All Entrepreneurs Now’).

⁹⁵ [2012] 2 CMLR 25. This decision concerned the application to UK judges of the Framework Agreement on part-time work concluded on 6 June 1997 (‘the Framework Agreement on part-time work’) which appears in the Annex to Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC ([1998] OJ L14/9), as amended by Council Directive 98/23/EC of 7 April 1998 ([1998] OJ L131/10).

⁹⁶ *Ibid* para 41.

⁹⁷ *Ibid* para 42.

⁹⁸ *Ibid* para 44.

⁹⁹ *Ibid* paras 45–46.

¹⁰⁰ *Ibid* para 47.

¹⁰¹ *Ibid* para 50.

¹⁰² *O’Brien v Ministry of Justice* [2013] UKSC 6, [41].

appointment and removal were such that ‘no self-employed person would subject himself’ to them; (iii) the way judicial work was organised *for* them, and that recorders and other part-time judges were expected to work during defined times and periods, meant judges had less discretion over when they worked; and (iv) part-time judges were generally entitled to the same employment-related benefits as full-time judges.¹⁰³

The decision in *O’Brien* echoes the similar result in *Perceval-Price v Department of Economic Development*,¹⁰⁴ where the Court of Appeal in Northern Ireland held that tribunal members were entitled to rely on equal pay legislation as ‘workers’. The Court said:

All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the President of the industrial tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment, as servants of the State, even though as office holders they do not come within the definition of employment in domestic law.¹⁰⁵

Thus, judges are increasingly being regarded as ‘workers’ – particularly under equality legislation – and are recognised as being entitled to at least some labour law rights.¹⁰⁶

However, this does not mean that judges are ‘workers’ for all purposes, or engaged under an employment contract. In *Gilham v Ministry of Justice*¹⁰⁷ it was held that District Court judges were office-holders, and not employed under a contract of employment or contract for services. The judges therefore did not meet the definition of ‘worker’ in s 230(3) of the *Employment Rights Act 1996* (UK) c 18, which depended on the existence of a contract, and were not entitled to whistleblowing protection.

In the Employment Appeal Tribunal’s decision in *Gilham*, judges were categorised as ‘statutory office-holders’, who held an ‘office with duties defined by statute’.¹⁰⁸ Mrs Justice Simler endorsed the definition of ‘office’ adopted by Lord Sumption in *Methodist Conference v Preston*¹⁰⁹ as ‘a position of a public nature, filled by successive incumbents, whose duties were defined not by agreement but by law or by the rules of

¹⁰³ Ibid [37].

¹⁰⁴ [2000] IRLR 380, [2000] NICA 9.

¹⁰⁵ Ibid [26].

¹⁰⁶ See, for example, *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017) and *McCloud v Ministry of Justice* [2018] UKEAT 0071/17/LA (29 January 2018), discussed below, where the provisions of the *Equality Act 2010* (UK) c 15 were applied to judicial pension changes.

¹⁰⁷ [2016] UKEAT/0087/16/LA (31 October 2016); upheld on appeal in *Gilham v Ministry of Justice* [2017] EWCA Civ 2220 (21 December 2017), [2018] ICR 827.

¹⁰⁸ [2016] UKEAT/0087/16/LA (31 October 2016), [9]–[10], [25].

¹⁰⁹ [2013] UKSC 29 (15 May 2013); [2013] 2 WLR 1350, [4].

the institution.’¹¹⁰ Thus, as office holders, judicial posts are defined by their public nature, and the source of their duties (here, statute and rules made under statutory authority¹¹¹). In this context, judicial office could be distinguished from an employment or contract arrangement, as there was no negotiation of the judges’ terms of appointment and remuneration; and the relationship was not at the will of the parties, as it could only be terminated in specific and limited circumstances such as incapacity or misconduct.¹¹²

The Employment Appeal Tribunal in *Gilham* explicitly distinguished *O’Brien* on the basis that the earlier case concerned rights under EU law, rather than domestic employment law.¹¹³ While judges are in an ‘employment relationship’ for the purposes of EU derived rights,¹¹⁴ this does not extend to non-EU derived domestic law.

The Court of Appeal approved the substance of the Employment Appeal Tribunal’s decision.¹¹⁵ A judge’s obligations are derived from judicial office itself, not from an employment contract, and judicial functions are derived from statute.¹¹⁶ The absence of a contractual relationship was also important for perceptions of judicial independence:

it is in principle desirable to have as much visible distance between the judiciary and the executive, and a status that depends purely on the holding of an office is better from that point of view than a contractual relationship of worker and employer, with its inevitable connotations of the former being subordinate to the latter.¹¹⁷

Thus, there appears to be a growing bifurcation in how judges are regarded in EU law (as ‘workers’) and in domestic UK law (as ‘office-holders’). This was recognised by the Court of Appeal in *Gilham*, with the court noting:

We are very aware that our decision that ... [a judge] is not a worker ... creates a distinction between those employment rights accorded to workers which derive purely from domestic law and those which derive from EU law ... and that may not appear to be a coherent or particularly satisfactory state of affairs. But the only way of avoiding the problem is to find that judges work under a contract with the Lord Chancellor, and such a finding is not open to us on the conscientious application of [common law] principles If that is an anomaly it can only be remedied by Parliament.¹¹⁸

This bifurcation could be of particular significance in coming years, particularly given the Brexit process. It also reflects judicial concern in common law countries with regarding the state as an ‘employer’ of judges, and the potential control that might entail.

¹¹⁰ *Gilham v Ministry of Justice* [2016] UKEAT/0087/16/LA (31 October 2016) [15].

¹¹¹ *Ibid* [21].

¹¹² *Ibid* [10], [22], [24].

¹¹³ *Ibid* [6].

¹¹⁴ *Ibid* [27].

¹¹⁵ *Gilham v Ministry of Justice* [2017] EWCA Civ 2220 (21 December 2017), [2018] ICR 827, [63].

¹¹⁶ *Ibid* [66].

¹¹⁷ *Ibid* [69].

¹¹⁸ *Ibid* [74].

III RECONCEIVING JUDICIAL ROLES THROUGH A LABOUR LAW LENS

A labour law lens refocuses attention on individual and collective rights for judges, across the whole lifecycle of their role.¹¹⁹ As discussed above, judges will derive limited benefit from many labour law rights, at least to the extent they represent statutory minima for terms and conditions of work. However, labour law offers potential advantages for judges in relation to collective labour rights, discrimination law and workplace flexibility. These areas will be considered in turn.

A Collective Labour Rights

Collective labour law offers a means of structuring and channelling collective action on the part of workers. Workers are granted rights to collectively organise, bargain and undertake industrial action to support their demands. For example, the *International Covenant on Civil and Political Rights*¹²⁰ protects freedom of association in article 22, which states: ‘Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.’ This is also protected by ILO conventions, including the *Right to Organise and Collective Bargaining Convention, 1949* (No 98),¹²¹ and the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87),¹²² both of which have been ratified by Australia and the UK.

Pay, pensions and working conditions are areas that, for employees, might be the subject of collective action and negotiation. While judges’ terms and conditions of employment likely exceed statutory minima, this does not mean they are subjectively or objectively adequate. While terms and conditions of work are a major factor in judicial retention, and may also affect judicial recruitment,¹²³ it appears that many judges in England and Wales are discontented with their conditions of work. In the 2014 UK Judicial Attitude Survey results for England and Wales, 86 per cent of respondents who had been in the post for at least five years felt that working conditions were worse than they were five years ago, and 48 per cent said they were significantly worse.¹²⁴ Only two per cent said conditions were better; and none said conditions were significantly better.¹²⁵ In relation to pay, 78 per cent of respondents felt that pay and pension entitlements did not adequately reflect the work they did; and 63 per cent did not feel their salary was reasonable.¹²⁶

These findings were even more marked in the results for England and Wales of the 2016 survey: 78 per cent of salaried judges said they had experienced a loss of net

¹¹⁹ cf Brian Opeskin, ‘The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population’ (2011) 39(1) *Federal Law Review* 33 (‘The High Cost of Judges’) which considers the judicial lifecycle from a depersonalised, statistical perspective.

¹²⁰ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹²¹ *ILO Convention CO98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (entered into force 18 July 1951).

¹²² *ILO Convention CO87 concerning Freedom of Association and Protection of the Right to Organise* (entered into force 4 July 1950).

¹²³ See, for example, *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017) [60].

¹²⁴ Thomas, ‘2014 UK Judicial Attitude Survey’ (n 34) 7.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* 25.

earnings in the last two years, and 74 per cent felt that their pay and pension entitlements did not adequately reflect the work they did.¹²⁷ This was having a significant and deleterious effect on judicial morale: 63 per cent of respondents said judicial salaries were affecting their morale, and 82 per cent said it was affecting the morale of judges they worked with.¹²⁸ Similar results were found for salaried judges in Scotland and Northern Ireland in 2016. In relation to working conditions, the 2016 survey found that a substantial majority (76 per cent) of judges in England and Wales and UK tribunal members felt they had experienced a deterioration in their working conditions since 2014, and 33 per cent felt conditions were significantly worse.¹²⁹ Many judges were also concerned for their physical safety in court (51 per cent) or outside of court (37 per cent).¹³⁰

By contrast, Australian judges appear more satisfied with their terms and conditions of work. In the 2007 National Survey of Australian Judges, 76.3 per cent of judges were satisfied with their benefits, and 69.4 per cent were satisfied with their salary.¹³¹ However, this was much lower satisfaction than with overall work (at 92 per cent).¹³² It is also debatable whether these results would still hold more than a decade later. In Appleby and others' 2016 survey of Australian judges, 49 per cent agreed or strongly agreed that judicial pensions and remuneration were a challenge for their jurisdiction.¹³³

In Australia, remuneration for federal judges (and other public officers) is set by the Remuneration Tribunal. The Tribunal 'takes a conservative approach to annual adjustments to remuneration', and provided only one pay increase – of 2 per cent from 1 January 2016 – for judges from July 2013 to October 2016. In effect, this meant that judicial remuneration, on average, was falling behind other sectors and professions: over that same period, the Wage Price Index increased by over 7 per cent, public sector wages by over 8 per cent, and wage increases for public sector bodies covered by federal agreements (on average) by over 10 per cent. A further increase to remuneration for federal judges – of 4.8 per cent from 1 January 2017 – was awarded in November 2016, recognising the 'increased complexities faced by judges' and aimed at 'restoring relativities [with state and territory pay], in an environment of continued economic and wages restraint'.¹³⁴ This 'conservative' approach to remuneration ignores judges' financial needs as individuals, and expressly acknowledges that judicial income is falling behind inflation and other sectors. Thus, in Appleby and others' survey, respondents expressed concern with the process of setting judicial remuneration (whether by government or tribunal), that remuneration is not linked to CPI, and that entitlements are rarely reviewed.¹³⁵

¹²⁷ Thomas, '2016 UK Judicial Attitude Survey' (n 33) 37–41, 47.

¹²⁸ *Ibid.* 37.

¹²⁹ *Ibid.* 13.

¹³⁰ *Ibid.* 22. This question was not asked in 2014.

¹³¹ Mack and Anleu (n 8) 17.

¹³² *Ibid.*

¹³³ Appleby et al (n 10). On the sustainability of judicial pensions in Australia, see Opekin, 'The High Cost of Judges' (n 119).

¹³⁴ Remuneration Tribunal, '2016 Review of Remuneration for Judicial and Related Offices - Statement' (28 November 2016) 2 <<https://www.remtribunal.gov.au/media/documents/2017/2016-statements/2016-judicial-and-related-offices-review-november-2016-statement/JRO-Review-final-statement-28-November-2016.pdf>> ('2016 Review of Remuneration for Judicial and Related Offices').

¹³⁵ Appleby et al (n 10).

Reforms have also been introduced to make judicial pensions more ‘[s]ustainable and affordable’,¹³⁶ and therefore less generous for individual judges. In the UK, for example, the Judicial Pension Scheme 1993 (‘JUPRA’) has been replaced with the New Judicial Pension Scheme 2015. This imposes higher individual contributions on judges, and reverts to a career-average defined benefit pension, rather than a final salary pension under JUPRA.¹³⁷ The transitional provisions in the pension changes were successfully challenged in the Employment Tribunal and, on appeal, in the Employment Appeal Tribunal, as a form of age discrimination which was not justified as a proportionate means of achieving a legitimate aim.¹³⁸ This challenge related to the transitional provisions only: the Tribunal did not need to consider the broader constitutional validity of the pension changes in reducing judges’ pay and conditions.¹³⁹

In the face of ongoing restrictions to judges’ pay and pensions, and deteriorating working conditions, collective action by judges might be particularly beneficial in securing better terms and conditions of work. It is not contentious that judges may be represented by some sort of professional association. Article 12 of the *Universal Charter of the Judge*, which represents minimum norms for judges, and was unanimously approved by delegates at the meeting of the Central Council of the International Association of Judges in Taipei in 1999, says:

The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests.¹⁴⁰

Similarly, *The Bangalore Principles of Judicial Conduct 2002* include principles relating to collective association for judges: principle 4.6 says,

A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.¹⁴¹

Principle 4.13 further reiterates:

A judge may form or join associations of judges or participate in other organisations representing the interests of judges.¹⁴²

¹³⁶ *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017) [78].

¹³⁷ See Ministry of Justice, ‘New Judicial Pension Scheme 2015: Policy Papers’ (‘New Judicial Pension Scheme 2015’).

¹³⁸ *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017); *McCloud v Ministry of Justice* [2018] UKEAT 0071/17/LA (29 January 2018). In the Employment Tribunal, the provisions were held to be both not pursuing a legitimate aim, and not proportionate. In the Employment Appeal Tribunal, it was held that there was a legitimate aim, but that the provisions were not proportionate.

¹³⁹ *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017) [73]–[77].

¹⁴⁰ International Association of Judges, ‘Universal Charter of the Judge’, *International Association of Judges* <<https://www.iaj-uim.org/universal-charter-of-the-judges/>>.

¹⁴¹ United Nations, ‘The Bangalore Principles of Judicial Conduct November 2002’ (2002) <https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf>

¹⁴² *Ibid.*

Thus, freedom of association also extends to the judiciary, though only to the extent it is consistent with judicial independence and integrity.

Collective action on the part of judges may be particularly concerning given the need to ensure internal and individual independence from judicial colleagues.¹⁴³ However, it is certainly arguable that collective action to secure terms and conditions of work is unrelated to judicial decision making: judicial independence can be maintained – and, indeed, enhanced – by improved conditions of work, which are better secured through collective negotiation. Thus, collective action does not innately jeopardise judicial independence and integrity, so long as it is limited to terms and conditions of work.

More challenging, though, is the potential for collective action on the part of judges to lead to judicial proceedings: either to adjudicate on the legality of collective action, or to rule on the application or interpretation of a collective agreement. Judges being asked to rule on the legality of their own actions and terms and conditions of work puts obvious pressure on the independence and impartiality of the judiciary. However, it is not unknown for judges to be asked to rule in this way: indeed, the UK cases on the status of judges (discussed in Part IIC) and Australian cases on judicial pensions (Part IIB) raise similar issues. In these cases, though, the issue in question generally related to a different jurisdiction or court, or did not directly affect the judges making the ruling. Thus, challenges to the independence and impartiality of the judiciary are put at arms' length. It is possible that similar separation could be achieved in relation to collective action; and, if judges were involved in negotiations that were under challenge, there is always the option of recusal.¹⁴⁴

Reflecting the importance of freedom of association to the judiciary, judges are already represented by a range of bodies. In the UK, for example, the UK Association of Fee Paid Judges was established in 2014 to represent the interests of part-time UK judges. Its aims include 'to promote greater understanding and better resolution of issues facing fee paid judges, and in particular: ... [c]ontribute to the understanding and resolution of legal issues and working practices facing fee paid judges; [and] promote and protect the rights of fee paid judges'.¹⁴⁵ Other associations include the United Kingdom Association of Women Judges, Association of High Court Masters, Magistrates' Association, Association of Her Majesty's District Judges, Council of Her Majesty's Circuit Judges (COCJ), The National Bench Chairmen's Forum, and Council of Her Majesty's District Judges (Magistrates' Courts).

In Australia, the Judicial Conference of Australia (JCA) is an incorporated association which includes judges and magistrates from all jurisdictions in Australia. It has over 700 members, representing over half the judicial officers in Australia.¹⁴⁶ The JCA provides a collective and representative voice for the judiciary, and has issued position

¹⁴³ See Lee and Campbell (n 46) 6; Malleon (n 48).

¹⁴⁴ Though see Gabrielle Appleby and Stephen McDonald, 'Pride and Prejudice: A Case for Reform of Judicial Recusal Procedure' (2017) 20(1) *Legal Ethics* 89 ('Pride and Prejudice').

¹⁴⁵ UK Association of Fee Paid Judges, 'Who We Are', *UKAFPJ* <<https://www.ukaptj.co.uk/who-we-are/>>.

¹⁴⁶ Judicial Conference of Australia, 'Judicial Conference of Australia', *Judicial Conference of Australia* (2018) <<http://www.jca.asn.au/>>.

papers on issues such as judicial pensions,¹⁴⁷ and submissions to Senate Standing Committee inquiries on topics like complaints regarding judicial behaviour.¹⁴⁸

Associations have a number of similarities to trade unions: they are groups of individuals with a common interest or purpose, and may consist of a group of individuals working in particular area (such as judges). However, associations lack the workplace rights of trade unions; they have no right to engage in collective bargaining or industrial action, and employers are not legally bound to negotiate with them.

That said, it is not unheard of for judges to act collectively, including through associations. The Association of Judges of Ireland (AJI), for example, was established in 2011 as a ‘representative body’ for the interests of its members, which include the ‘vast majority’ of judges in Ireland.¹⁴⁹ While it ‘does not represent the judiciary as such’, and is not a trade union, the breadth and coverage of the AJI’s membership (with coverage of over 90 per cent of serving judges)¹⁵⁰ means it can play a significant role in advancing the judiciary’s collective interests, and has higher coverage than unions in most other industries. The Constitution of the AJI includes among its aims ‘To promote the interests of its members in their professional capacity’ and ‘To promote the general interests of its members, including those interests arising upon retirement from the Bench.’¹⁵¹ The AJI has advocated for judicial interests in relation to pay¹⁵² and pensions,¹⁵³ though this has taken the form of letters and meetings with members of the executive, rather than industrial action. Thus, it is a more ad hoc form of collective action than would typically be undertaken by trade unions.

In other common law jurisdictions, judges are represented by formalised unions. In the USA, the Association of Administrative Law Judges (AALJ) is a federal employees’ union, which represents the interests of federal administrative law judges and collectively bargains with the Social Security Administration. It has lobbied in Congress for increases to judicial wages, improvements to pensions and increases to annual leave; and has undertaken collective bargaining in relation to workplace safety and working conditions.¹⁵⁴ Collective bargaining is now undertaken when any change is made to the security or safety conditions that affect federal administrative law

¹⁴⁷ Judicial Conference of Australia, *Position Paper: Judicial Officers’ Retirement Benefits* (July 2012) <<http://jca.asn.au/wp-content/uploads/2013/10/Judicial-Officers-Retirement-Benefits.pdf>> (accessed 21 June 2018).

¹⁴⁸ Judicial Conference of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Courts Legislation Amendment (Judicial Complaints) Bill 2012 and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* (2012) <http://jca.asn.au/wp-content/uploads/2013/10/JCA_Senate_Submission2.pdf> (accessed 21 June 2018).

¹⁴⁹ Association of Judges of Ireland, ‘Foundation’, *Association of Judges of Ireland* <<https://aji.ie/about-us/foundation/>>.

¹⁵⁰ Ibid.

¹⁵¹ Association of Judges of Ireland, ‘Our Aims and Objectives’, *Association of Judges of Ireland* <<https://aji.ie/about-us/our-aims-objectives/>>.

¹⁵² Ken Foxe, ‘Some Judges “Struggling to Get by” on Six-Figure Salaries’, *Irish Examiner* (online at 26 September 2017) <<http://www.irishexaminer.com/ireland/some-judges-struggling-to-get-by-on-six-figure-salaries-459722.html>>.

¹⁵³ Shane Phelan, ‘Talk of Gold-Plated Pensions Are Wide of Mark - Top Judge’, *Independent* (online at 28 December 2017) <<https://www.independent.ie/irish-news/talk-of-goldplated-pensions-are-wide-of-mark-top-judge-36440977.html>> (‘Talk of Gold-Plated Pensions Are Wide of Mark’).

¹⁵⁴ Association of Administrative Law Judges, ‘Why Should You Join the AALJ?’, *Association of Administrative Law Judges* (2009) <<https://aalj.org/wp-content/uploads/2017/11/07g.pdf>>.

judges.¹⁵⁵ Like representative bodies in other jurisdictions, the AALJ was originally established as a professional association: however, increasing incursions on judicial independence in the 1990s, and a move to a corporatist management structure, meant

The AALJ leadership realized the judges needed the legal protection which could only be achieved by forming a collective bargaining unit, a union. There was of course a good deal of resistance to the notion of judges, skilled professionals, forming a union. There was much debate, an election was held and the majority of judges voted for the protection of a union.¹⁵⁶

Following the AALJ's lead, administrative judges in the District of Columbia are now also unionised,¹⁵⁷ with the Federation of Administrative Law Judges (DC) having concluded an extensive collective agreement with the government regarding their terms of employment.¹⁵⁸ The agreement covers areas such as safety and health, flexible work, training, discrimination, sabbatical leave, and wages.¹⁵⁹

Even industrial action by judges is not unheard of – though not in the UK or Australia, and generally in response to sustained or calamitous attacks on the rule of law. Judicial strikes have occurred in countries such as Egypt, Spain, Italy, Greece, Tunisia, and Uganda.¹⁶⁰

Thus, there are examples of collective action and trade union representation for the judiciary in other countries. Applying this to Australia, formalised collective structures would give judges a voice and opportunity to negotiate with the executive on issues such as pay, pensions, safety and working conditions. It is questionable, though, whether this would be any more effective in practice than existing collective structures, such as the 'associations' currently in place in the UK and Australia. A labour law lens does, however, draw attention to the need for formalised and clear processes for consultation and negotiation with judges, which are currently lacking in both jurisdictions. Ad hoc processes for expressing concern to the executive lack the predictability and certainty of labour law mechanisms.

B Discrimination Law

¹⁵⁵ Ibid. See also the discussion of French judicial trade unions, and their potential to enhance judicial ethics: Gabrielle Fauconnier, Alexandra Husson and Camille Roux d'Anzi, 'Collective Organisations of Judges and Professional Conduct: A Revived Approach to Judicial Ethics' (European Judicial Training Network, 30 June 2016) <http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20D/Written_paper_France_1.pdf> ('Collective Organisations of Judges and Professional Conduct').

¹⁵⁶ Association of Administrative Law Judges, 'What Is the AALJ?', *Association of Administrative Law Judges* (2009) <<https://aalj.org/wp-content/uploads/2017/11/07f.pdf>>.

¹⁵⁷ See Jamie Horwitz, 'DC Judges Vote for a Union with IFPTE', *International Federation of Professional & Technical Engineers* (31 July 2014) <<http://www.ifpte.org/news/details/DC-Judges-Vote-for-a-Union-with-IFPTE>>.

¹⁵⁸ *Collective Bargaining Agreement between Federation of Administrative Law Judges – DC and the District of Columbia and the Office of Administrative Hearings, The Government of the District of Columbia* (1 October 2015 to 30 September 2019) <<https://oca.dc.gov/sites/default/files/dc/sites/oca/publication/attachments/CollectiveBargainingAgreementBetweenFALJ-DCOCA.pdf>> (accessed 21 June 2018).

¹⁵⁹ Ibid.

¹⁶⁰ Paul Magrath, 'Judges on Strike: Could It Happen Here?', *ICLR* (27 November 2012) <<https://www.iclr.co.uk/legal-profession/judges-on-strike-could-it-happen-here/>> ('Judges on Strike').

As discussed in Part IIC above, judges in the UK are increasingly using discrimination law to advance their individual and collective interests. However, discrimination law is not often thought of in relation to the judiciary. While *The Bangalore Principles of Judicial Conduct 2002* include a section on ‘Equality’, this is confined to the treatment of parties before the court, not judges themselves.¹⁶¹

For the general workforce, however, there is a growing body of individual anti-discrimination rights, which cover areas such as direct and indirect discrimination, harassment and victimisation. While the specific provisions of these laws vary from jurisdiction to jurisdiction, there is a clear prohibition of discrimination in employment on the basis of protected grounds, such as gender, race and ethnicity, caring responsibilities, sexuality, age, and disability.

Discrimination law has a growing relevance for the judiciary. First, as demonstrated by the emerging UK case law, discrimination law may assist in ensuring equality of judicial terms and conditions of work, including in areas like pensions¹⁶² and pay.¹⁶³ This is particularly relevant for those who work part-time in the judiciary¹⁶⁴ and who are ‘non-traditional’ judges.¹⁶⁵

The consequences of applying discrimination law to the judiciary could be wide-ranging. For example, Hunter has mapped the ongoing exclusion of women from senior judicial positions in the UK, perhaps due to greater emphasis being placed on ‘old’ (masculine) judicial qualities in promotion processes, a narrowing eligibility pool and the process of statutory consultation for senior appointments.¹⁶⁶ Similar trends are evident in Australia.¹⁶⁷ As illustrated by the UK Supreme Court case of *Essop v Home Office (UK Border Agency)*,¹⁶⁸ promotion processes can be indirectly discriminatory, even if it is unclear how or why they disadvantage certain applicants. The ongoing exclusion of women and non-white judges from senior judicial positions is an area that would benefit from scrutiny through a discrimination law lens. Further, the exclusion of less senior judges from certain employment benefits, as was explored in *Baker v Commonwealth*,¹⁶⁹ would also benefit from review, particularly if women and non-white judges are largely confined to these positions.

Thus, discrimination law may be one tool for supporting female and non-white judges. This is particularly important given the challenge of retaining non-traditional judicial officers: in the 2016 UK Judicial Attitude Survey, the results for England and Wales and UK tribunals indicated that 144 of 472 female judicial respondents (31 per cent)

¹⁶¹ United Nations, above n 141.

¹⁶² *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017).

¹⁶³ *Perceval-Price v Department of Economic Development* [2000] IRLR 380, [2000] NICA 9.

¹⁶⁴ C-393/10 *O’Brien v Ministry of Justice* [2012] 2 CMLR 25; *O’Brien v Ministry of Justice* [2013] UKSC 6.

¹⁶⁵ See further Hunter (n 74) 95.

¹⁶⁶ *Ibid.*

¹⁶⁷ Rachel Davis and George Williams, ‘Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia’ (2003) 27 *Melbourne University Law Review* 819 (‘Reform of the Judicial Appointments Process’). For updated statistics, see Australasian Institute of Judicial Administration, ‘Judicial Gender Statistics’, *Australasian Institute of Judicial Administration* (7 March 2018) <<https://aija.org.au/research/judicial-gender-statistics/>>.

¹⁶⁸ [2017] UKSC 27 (5 April 2017), [2017] WLR(D) 244.

¹⁶⁹ (2012) 206 FCR 229.

were currently considering leaving the judiciary early (that is, in the next 5 years, when they were not scheduled to retire).¹⁷⁰ Similarly, 30 of the 77 Black and Minority Ethnic (BAME) judicial respondents (39 per cent) were considering leaving in the next 5 years. This runs directly counter to efforts to increase female and BAME participation in judicial institutions. While discrimination law is not the only tool that might assist judicial retention, it has particular importance for non-majoritarian groups.

Second, for judges generally, discrimination law may offer a new lens to review existing terms of judicial appointment. This is particularly pertinent in relation to judicial retirement ages: unlike other workers, all Australian judges and magistrates are subject to mandatory retirement ages, ranging from ages 65 to 72,¹⁷¹ and judges in the UK are subject to a mandatory retirement age of 70.¹⁷² I have previously criticised Australian judicial retirement ages on two grounds: first, that they no longer reflect contemporary conditions; and, second, that they are unnecessary in practice.¹⁷³ A discrimination law lens further bolsters these criticisms of judicial retirement ages.¹⁷⁴ Fixed retirement ages are not generally acceptable in the modern Australian or UK employment context: for other occupations, the legislature has decided that mandatory retirement is no longer suitable,¹⁷⁵ and compulsory retirement is now generally prohibited.¹⁷⁶ Judges are one of the few groups that may still be subjected to compulsory retirement.¹⁷⁷ Judicial retirement ages, then, are better seen as ‘a prime example of arbitrary age discrimination’¹⁷⁸ and a form of ‘constitutionally required ageist discrimination.’¹⁷⁹ A labour law lens would likely support calls for the abolition of judicial retirement ages.

That said, judicial retirement ages may fulfil a specific constitutional role, over and above their usefulness in relation to the general workforce, limiting the applicability of a labour law lens to the judicial context. Judges themselves support the retention of

¹⁷⁰ Thomas, ‘2016 UK Judicial Attitude Survey’ (n 33) 78.

¹⁷¹ Alysia Blackham, ‘Judges and Retirement Ages’ (2016) 39(3) *Melbourne University Law Review* 738.

¹⁷² *Judicial Pensions and Retirement Act 1993* (UK) c 8. See Alysia Blackham, ‘Judicial Retirement Ages in the UK: Legitimate Aims and Proportionate Means?’ [2017] *Public Law* 196 (‘Judicial Retirement Ages in the UK’).

¹⁷³ Blackham, ‘Judges and Retirement Ages’ (n 171); Blackham, ‘Judicial Retirement Ages in the UK’ (n 172).

¹⁷⁴ Indeed, in applying UK equality law to judicial retirement ages, I have questioned whether they are valid at all: Blackham, ‘Judicial Retirement Ages in the UK’ (n 172).

¹⁷⁵ See, for example, *Industrial Relations Reform Act 1993* (Cth), *Anti-Discrimination (Amendment) Act 1994* (NSW), *Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001* (Cth), *Age Discrimination Act 2004* (Cth), *The Employment Equality (Repeal of Retirement Age Provisions) Regulations* (UK) SI 2011/1069.

¹⁷⁶ In the UK, employers may still adopt an ‘employer-justified retirement age’ where this can be objectively justified as a proportionate means of achieving a legitimate aim. Few employers have chosen to adopt a retirement age since the law was changed in 2011. See further Lucy Vickers and Simonetta Manfredi, ‘Age Equality and Retirement: Squaring the Circle’ (2013) 42(1) *Industrial Law Journal* 61 (‘Age Equality and Retirement’).

¹⁷⁷ See Australian Law Reform Commission, *Grey Areas - Age Barriers to Work in Commonwealth Laws* (Discussion Paper No 78, 2012) 2.105-2.116 (‘Grey Areas’).

¹⁷⁸ Leslie L Anderson, ‘Age Discrimination: Mandatory Retirement from the Bench’ (1973–Issued on 1974) 20 *Loyola Law Review* 153, 153 (‘Age Discrimination’).

¹⁷⁹ Michael Barker, ‘On Being a Chapter III Judge’ (at the Sir Ronald Wilson Lecture 2010, Perth, 29 May 2010) <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/2010/14.html?stem=0&synonyms=0&query=cth%20consol_act%20Ocoaca430%20s72%20and%20retirement>.

mandatory retirement: in Appleby and others' 2016 survey of Australian judges, only 9 per cent of respondents thought that there should not be a mandatory retirement age for judicial officers.¹⁸⁰ Judicial retirement ages arguably help to contemporise the courts and open up opportunities for younger appointees by increasing judicial turnover; and prevent capacity issues from impeding the judicial function.¹⁸¹ Instead of removing retirement ages, Opeskin therefore argues for a hybrid model of judicial tenure, that adopts both age limits and term limits, to both '[control] for the risk of decrepitude among elderly judges' and '[ensure] there are "regular and seemly exits" that generate change and renewal on the court'.¹⁸² For Opeskin, this is the most reliable means of securing judicial independence and the integrity of the court. However, Opeskin also advocates for increasing judicial retirement ages to address the cost of judicial pensions and judicial attrition,¹⁸³ revealing some of the practical challenges occasioned by retirement ages.

I have criticised these arguments in favour of judicial retirement ages for embodying and perpetuating age stereotypes, and ignoring the need for some process of capability assessment for *all* judges.¹⁸⁴ This is also consistent with the findings from Appleby and others' survey, where 77 per cent of respondents agreed that 'it would be appropriate for judicial officers to be asked to undergo capacity checks at the request of a Head of Jurisdiction or a relevant body constituted by judges', and only 12 per cent expressed any disagreement.¹⁸⁵ Capacity issues are a problem for the judiciary, even with retirement ages in place. While effectively addressing these issues raises complex tensions between judicial independence and accountability,¹⁸⁶ relying on judicial retirement ages to address the problem is not a workable solution. While a labour and discrimination law lens may not resolve these tensions and issues, it offers a new way of describing and conceiving of judicial retirement ages, which may challenge the prevailing orthodoxy and acceptance of mandatory retirement.

Of course, as for the general workforce, there are fundamental limitations in using discrimination law as a tool for protecting individual rights.¹⁸⁷ Even where judges are entitled to protection under discrimination law, they may struggle to prove their claim. In *McGrath v Ministry of Justice*,¹⁸⁸ for example, the Employment Appeal Tribunal upheld the Employment Tribunal's rejection of a comparator for an Employment Tribunal lay member of a full-time salaried Employment Judge. This meant the claim was doomed to fail. Despite these practical limitations, a discrimination law lens still

¹⁸⁰ Appleby et al (n 10).

¹⁸¹ Blackham, 'Judges and Retirement Ages' (n 171). See also Brian Opeskin, 'Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges' (2015) 35(4) *Oxford Journal of Legal Studies* 627 ('Models of Judicial Tenure').

¹⁸² Opeskin, 'Models of Judicial Tenure' (n 181) 663.

¹⁸³ Opeskin, 'The High Cost of Judges' (n 119) 64–66; Opeskin, 'The Supply of Judicial Labour' (n 27) 861–2.

¹⁸⁴ Blackham, 'Judges and Retirement Ages' (n 171). On systems for managing judicial incapacity and complaints, see Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 1 ('Judicial Conduct').

¹⁸⁵ Appleby et al (n 10).

¹⁸⁶ See Appleby and Le Mire (n 184); Opeskin, 'Models of Judicial Tenure' (n 181).

¹⁸⁷ See, for example, Susan Sturm, 'Second Generation Employment Discrimination: A Structural Approach' (2001) 101(3) *Columbia Law Review* 458 ('Second Generation Employment Discrimination').

¹⁸⁸ [2015] UKEAT/0247/14/LA.

offers new perspectives and insights that might assist non-traditional judges in particular.

C Workplace Flexibility and Working Time

Workplace flexibility is important for recruiting and retaining a diverse pool of candidates for judicial office, and can help judges to manage health issues¹⁸⁹ and caring responsibilities,¹⁹⁰ particularly into older age.¹⁹¹ In the 2014 UK Judicial Attitude Survey, results from England and Wales and UK tribunals found the inability to work flexible hours was a factor that would prompt early retirement for 17 per cent of respondents,¹⁹² conversely, the opportunity to work part-time would make 34 per cent of respondents more likely to remain in the judiciary until the retirement age,¹⁹³ and increased flexibility in working hours would influence 25 per cent to remain.¹⁹⁴

In the 2016 survey, respondents were asked how important opportunities for flexible working were to them: in the results for England and Wales judges and UK tribunals, 44 per cent of respondents thought flexible work was important.¹⁹⁵ Despite this, only 13 per cent rated opportunities for flexible working as good or excellent; 54 per cent said they were non-existent.¹⁹⁶ That said, flexible working was found to be most important to tribunal judges, and tribunal judges also had the best access to flexible working.¹⁹⁷ An absence of flexible working in the higher judiciary might impede judicial progression and advancement, particularly for those with caring responsibilities (often women). In the National Survey of Australian Judges, 48.4 per cent of respondents identified compatibility with family responsibilities as an important or very important factor in their decision to become a judge.¹⁹⁸ Thus, a focus on workplace flexibility may enhance the judiciary as an institution, by promoting judicial recruitment, satisfaction and retention.¹⁹⁹

Promoting workplace flexibility is consistent with a labour law lens and trends for the general workforce, with the introduction of a statutory right to request flexible working in both the UK²⁰⁰ and Australia.²⁰¹ However, unlike for the general workforce, flexible working is fairly uncommon for the judiciary. In England and Wales, part-time work

¹⁸⁹ Nathalie Burnay, 'Ageing at Work: Between Changing Social Policy Patterns and Reorganization of Working Times' (2011) 50(2) *Population Review* 150, 161 ('Ageing at Work').

¹⁹⁰ Tony Maltby, 'The Employability of Older Workers: What Works?' in Wendy Loretto, Sarah Vickerstaff and Phil White (eds), *The Future for Older Workers: New Perspectives* (Policy Press, 2009) 161, 170–1 ('The Employability of Older Workers').

¹⁹¹ Alysia Blackham, 'Rethinking Working Time to Support Older Workers' (2015) 31(2) *International Journal of Comparative Labour Law and Industrial Relations* 119 ('Rethinking Working Time').

¹⁹² Thomas, '2014 UK Judicial Attitude Survey' (n 34) 46.

¹⁹³ *Ibid* 51.

¹⁹⁴ *Ibid*.

¹⁹⁵ Thomas, '2016 UK Judicial Attitude Survey' (n 33) 52.

¹⁹⁶ *Ibid*.

¹⁹⁷ *Ibid* 57.

¹⁹⁸ Mack and Anleu (n 8) 15.

¹⁹⁹ In relation to the general workforce, and older workers in particular, see Miriam Hartlapp and Günther Schmid, 'Labour Market Policy for "Active Ageing" in Europe: Expanding the Options for Retirement Transitions' (2008) 37(3) *Journal of Social Policy* 409, 417 ('Labour Market Policy for "Active Ageing" in Europe').

²⁰⁰ *Employment Rights Act 1996* (UK) c 18 s 80F.

²⁰¹ *Fair Work Act 2009* (Cth) s 65. Note, however, that the right only applies to employees in certain circumstances in Australia.

has been available for some salaried (permanent) judicial roles up to and including at the High Court level since 2001. Part-time work was extended to all salaried posts in 2005, so long as it had ‘no material adverse impact on the business needs of the court/tribunal or the services to users.’²⁰² Thus, judges have ‘[no] absolute right to sit part-time nor is the opportunity to sit part-time reserved for discrete sections of the judiciary, such as those with caring responsibilities.’²⁰³ Part-time sitting is seen as a ‘flexible concept’, and sitting patterns can take a ‘number of forms’ across days, weeks and months.²⁰⁴ However, the minimum sitting requirement is normally at least 50 per cent of the full-time equivalent.²⁰⁵ The *Crime and Courts Act 2013* (UK) c 22 also amended s 23 of the CRA to provide that the Supreme Court must be composed of a maximum number of 12 *full time equivalent* judges, rather than a maximum number of 12 individual judges. This has the potential to facilitate part-time judicial appointments to the Supreme Court, potentially allowing for more diverse appointments.

While it is desirable to facilitate part-time and flexible working for judges, it remains to be seen how many judges actually make use of these provisions and, indeed, whether part-time working becomes an acceptable option for the judiciary in practice. As noted above, few respondents in the 2016 UK Judicial Attitude Survey felt they had good access to flexible work: only 13 per cent rated opportunities as ‘good’.²⁰⁶ Thus, it appears that take-up of flexible work is limited in practice, possibly due to institutional constraints.

Flexible work arrangements for judicial officers have also been implemented in some Australian states and territories. Victorian magistrates and judges, for example, may work part-time under a part-time service agreement, so long as they perform a minimum proportion of 0.4 full-time duties.²⁰⁷ In considering whether to enter into a part-time service arrangement, the Chief Justice or Chief Magistrate may have regard to the operational needs of the court; the personal and professional circumstances of the judge or magistrate; parity and equity with other judges or magistrates; and any other relevant considerations.²⁰⁸ Under these provisions, part-time judges and magistrates must not engage in legal practice; must not undertake paid employment or conduct a business, trade or profession of any kind except with the approval of the Chief Justice or Chief Magistrate; and must not hold a remunerative office in any company, trustee company, incorporated association or other entity, except with the approval of the Chief Justice or Chief Magistrate.²⁰⁹

In the National Survey of Australian Judges, most judges were satisfied with the compatibility of their role with family responsibilities (74.6 per cent), compatibility with lifestyle (75.4 per cent) and hours (70.8 per cent).²¹⁰ At the same time, 73.8 per cent of judges regarded the volume of work as unrelenting.²¹¹ Forty-seven per cent of

²⁰² Ministry of Justice, *Judicial Salaried Part-Time Working: A Practical Guide 7* (‘*Judicial Salaried Part-Time Working*’).

²⁰³ *Ibid* 8.

²⁰⁴ *Ibid* 7.

²⁰⁵ *Ibid* 11.

²⁰⁶ Thomas, ‘2016 UK Judicial Attitude Survey’ (n 33) 52.

²⁰⁷ *Constitution Act 1975* (Vic) s 75C(1)–(2); *Magistrates Court Act 1989* (Vic) s 7A(1)–(2).

²⁰⁸ *Constitution Act 1975* (Vic) s 75C(3); *Magistrates Court Act 1989* (Vic) s 7A(3).

²⁰⁹ *Constitution Act 1975* (Vic) s 84A; *Magistrates Court Act 1989* (Vic) ss 7(9)–7(9B).

²¹⁰ Mack and Anleu (n 8) 17.

²¹¹ *Ibid* 18.

women respondents always felt rushed, compared with only 17 per cent of male respondents. This difference was statistically significant.²¹² Further, women judges are more likely to feel that work intrudes on family time and home life, with over half of women judges saying that this happens always or often.²¹³ In Appleby and others' 2016 survey of Australian judges, 77 per cent of respondents agreed or strongly agreed that workload was a challenge in their jurisdiction.²¹⁴

This may indicate that, while part-time work is at least notionally available in some courts, a broader cultural shift in favour of part-time and flexible working is required in Australia: as Opeskin notes, few Australian judges take up part-time roles,²¹⁵ let alone other forms of flexibility, meaning the potential of part-time work is 'under-realised'.²¹⁶ Indeed, in Appleby and others' survey, many of those same judges who saw workload as an issue also saw part-time judicial roles as a challenge for their jurisdiction: 33 per cent saw it as a challenge for the judiciary, and female judges were slightly more likely to perceive the use of part-time judges to be a challenge than their male counterparts.²¹⁷ Most of the concerns expressed by judges related to the administrative burden of facilitating part-time appointments.²¹⁸ The authors concluded that the high number of neutral responses to this question might

reflect the underdeveloped use of part-time judges even in those jurisdictions that permit them, and the prohibition on part-time appointments at the higher levels, so that judicial officers have not had sufficient experience of these appointments to have formed a view [on the issue.]²¹⁹

A focus on part-time working alone adopts a limited view of what constitutes flexible work, and is unlikely to address broader concerns about workload and work intensity. Other options to promote flexibility include shorter working hours, job sharing, gradual retirement or 'bridge' jobs for older judges, sabbaticals, increased unpaid or paid leave and leave for carer or family responsibilities.²²⁰ There is limited indication that these more creative options are being adopted by courts. While flexible work arrangements pose institutional complexities for the judiciary, as court hearings are generally scheduled during fixed hours, these difficulties reflect those faced by other employers in the general workforce. A labour law lens would draw attention to existing guidance available to employers,²²¹ which would help the judiciary navigate the potential tensions between individual needs and institutional constraints in relation to flexible working.

²¹² Pearson Chi-Square: 58.962, $p \leq 0.005$: Sharyn Roach Anleu and Kathy Mack, 'Job Satisfaction in the Judiciary' (2014) 28(5) *Work, Employment & Society* 683, 690.

²¹³ Sharyn Roach Anleu and Kathy Mack, 'Judicial Performance and Experiences of Judicial Work: Findings from Socio-Legal Research' (2014) 4(5) *Onati Socio-Legal Studies* 1015, 1034 ('Judicial Performance and Experiences of Judicial Work').

²¹⁴ Appleby et al (n 10).

²¹⁵ Opeskin, 'The Supply of Judicial Labour' (n 27) 859–860.

²¹⁶ Ibid 860.

²¹⁷ Appleby et al (n 10).

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Sarah Fogg, *Counting on Experience: A Review of Good Practice in the Employment of Mature Workers* (December 2001) 34 ('Counting on Experience').

²²¹ See, for example, Acas, 'The Right to Request Flexible Working', Acas <<http://www.acas.org.uk/index.aspx?articleid=1616>>; Acas, *Flexible Working and Work-Life Balance* (March 2013).

IV CONCLUSION

Viewing the judiciary through a labour law lens starts down a contentious path: judges are loath to be seen as ‘employees’,²²² or to see the state as their ‘employer’, and concerns regarding judicial independence and the integrity of the judiciary must remain paramount in any discussion. That said, judges in the UK are increasingly finding (EU) labour law and collective action to be instrumentally useful in securing their position as workers, particularly in the face of government austerity measures. These actions have not been attempted (or, perhaps, even contemplated) in Australia. This may both reflect higher levels of contentment among Australian judicial officers, and a written constitutional framework that is far more sceptical of treating judges as workers.

The examples of judicial pay and pensions, which occur repeatedly in the sections above, provide a case study of the fundamental differences in how judges are viewed in Australia and the UK: in Australia, judges are treated differently to workers, and have therefore received lower pay increases than the general working population; in the UK, the structuring of judicial pension reforms (at least in relation to transitional provisions) appears to have been driven by a desire to treat judges in the same way as other public servants, including by introducing transitional provisions that were not tailored to the judiciary’s particular circumstances.²²³ While the UK approach is more consistent with a labour law lens, it fails to acknowledge the existing differences between public service pensions and judicial pensions.²²⁴

Reforms to judicial pensions in the UK therefore sound a note of caution in unreflexively applying a labour law lens in a way that does not accommodate the distinctive needs and institutional structures of the judiciary. However, potential barriers to the use of a labour law lens are not always fatal: it is possible to respect the needs of the judiciary as the third arm of government, while still adopting reforms to court processes. Indeed, a labour law lens is consistent with current trends in judicial and court reform, which have seen a renewed appreciation for the importance of court processes relating to appointment and recruitment and workplace flexibility. A labour law perspective offers a means of critiquing these developments, which are still limited in their scope and impact, and offers ideas for how they could be improved or extended, using insights from the general workforce. Further, some of the institutional constraints encountered by the judiciary could be addressed using guidance applicable to the general workforce, as in the case of flexible working.

More generally, though, these examples illustrate the difficulty of ensuring adequate working conditions for the judiciary, particularly in relation to pay and pensions, in times of government austerity. While these are issues that affect all workers in periods of stagnating pay, a labour law lens reveals the risks to judicial retention and satisfaction that emerge from ignoring the personal and financial needs of the judiciary.

²²² McMurdo (n 40).

²²³ See *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017) [53]–[56], [90]–[92], [113]–[117]; *McCloud v Ministry of Justice* [2018] UKEAT 0071/17/LA (29 January 2018) [166]–[167].

²²⁴ *McCloud v Ministry of Justice* [2017] UKET 2201483/2015 (16 January 2017) [92], [113]–[117]; *McCloud v Ministry of Justice* [2018] UKEAT 0071/17/LA (29 January 2018) [166]–[167]. Though this approach was rejected by the Employment Tribunal and the Employment Appeal Tribunal.

As the judiciary faces an ever-challenging context – with the politicisation of judicial decision-making,²²⁵ difficulties in recruitment in the UK²²⁶ and declining resources for the courts²²⁷ – it is imperative that court processes be reconsidered, to emphasise how judges are supported and developed throughout their career.

Despite these benefits, resorting to legal action to secure better terms of work for the judiciary (including through the use of discrimination law) could be a problematic path: legal action to vindicate a workplace right might escalate tensions between the government and the judiciary, and could prevent considered and calm negotiation between the parties. That said, having a formalised structure for negotiation and consultation, like established labour law procedures for collective action, might actually help to defuse tension, and provide a (more) predictable course of discussion. Thus, a labour law lens might both create and resolve tension in this area. This emphasises the importance of an integrated approach to a labour law lens, and the potential complementarity of individual and collective rights.

Overall, then, a labour law lens offers a means of scrutinising court practices, to improve judicial recruitment, performance, satisfaction and retention. This will not only help judges as individuals and as a collective, but will also support the public function and constitutional role of the courts. Employment rights could actually strengthen the economic and practical independence of the judiciary.²²⁸ Thus, a labour law lens could help to *ensure* the institutional integrity and quality of the judiciary, rather than running contrary to it. It therefore offers a useful complement to existing public law scholarship.

²²⁵ Brian Galligan and Peter Russell, 'The Politicisation of the Judiciary in Australia and Canada' (1995) 67(2) *The Australian Quarterly* 85.

²²⁶ Joshua Rozenberg, 'Senior Judges Are Hanging up Their Wigs. Replacing Them Won't Be Cheap', *The Guardian* (online at London, 4 April 2016) <<http://www.theguardian.com/commentisfree/2016/apr/04/judiciary-recruitment-crisis-judicial-appointments-commission>> ('Senior Judges Are Hanging up Their Wigs').

²²⁷ Lara Bullock, 'Budget Cuts to Courts and Legal Services', *Lawyers Weekly* (online at 5 May 2016) <<http://www.lawyersweekly.com.au/news/18509-budget-cuts-to-courts-and-legal-services>>; 'The Guardian View on Cuts to the Justice Budget: Eroding the Rule of Law', *The Guardian* (online at 31 July 2015) <<https://www.theguardian.com/commentisfree/2015/jul/30/the-guardian-view-on-cuts-to-the-justice-budget-eroding-the-rule-of-law>> ('The Guardian View on Cuts to the Justice Budget').

²²⁸ C-393/10 *O'Brien v Ministry of Justice* [2012] 2 CMLR 25 para 50.