

# Population Challenges for the Australian Judiciary: The Next 40 Years

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## 1 Introduction

Ten years ago, at the fifth colloquium of the Judicial Conference of Australia, Chief Justice Murray Gleeson gave an address entitled 'A Changing Judiciary'.<sup>1</sup> He reflected on the changes that had occurred in Australian courts since he first entered the legal profession in 1963—a period of nearly 40 years. His central message was that the judiciary *had* undergone significant transformation and that lawyers should have a keener sense of those changes as part of their corporate memory.

The Chief Justice identified several demographic pressures that provided momentum for change. One of these was the great increase in the size of the judiciary, which is partly a response to population growth. A second was increasing longevity, which meant that many judges were 'reluctant to accept that their working lives would come to an end at 65 or 70' years of age.<sup>2</sup> In his Honour's view, there was now an expectation that judges might have an active professional life after the Bench. A third change was the introduction of a maximum retirement age of 70 years for federal judges. If life tenure were still in place, he doubted there would have been the great expansion in federal courts that we see today.

The Chief Justice Gleeson's address was a retrospective assessment of observed events. It is harder to forecast what might lie ahead because there are 'no future facts'.<sup>3</sup> How successful we are in looking into the future rests on the quality of information we have about the past; the type of vision we have for the future; and the time horizon in question. We can have a good guess about what courts will look like next year, but what about 2050 or 2100?

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<sup>1</sup> Murray Gleeson, 'A Changing Judiciary' (2001) 75 *Australian Law Journal* 547.

<sup>2</sup> Gleeson, n 1, 550.

<sup>3</sup> Richard Magnus, 'Futures Planning of the Courts for the 21st Century: The Envisioning Process' (1995) 5 *Journal of Judicial Administration* 94, 96.

While it is interesting to speculate about far distant futures, this paper does not travel down that path. Instead, it focuses on the forces that are likely to influence how courts develop over the medium term—to year 2050—on the assumption that the courts of the future will be related to the courts of today through a process of incremental adaptation or evolution. This ‘steady growth’ scenario is not the only vision one might have about the courts of the future. One futurologist who has been influential in American court planning, James Dator, has suggested other scenarios.<sup>4</sup> These include the complete transformation of the court system through technologies that enable humans to transcend their biological limitations.<sup>5</sup> In a world of artificial intelligence, the process of legal reasoning might be automated, making judges and courts redundant.<sup>6</sup>

The 40-year timeframe adopted by Chief Justice Gleeson is a useful one for present purposes because it corresponds roughly with a person’s working life; it reflects the time horizon for projections by statistical agencies like the Australian Bureau of Statistics (ABS); and it takes us conveniently to the mid-point of the 21st century.

To make some inroad on the very large question of how courts are likely to develop in the medium term, it is useful to consider the different forces that bear upon courts and the ways in which their operations might be affected. **Figure 1** visualises these connections by showing the forces on the left side and the attributes or domains of the court system that might potentially be affected on the right side. Without seeking to be exhaustive, the diagram shows six of the most important forces, namely, technological, demographic, economic, social, political and legal policy forces. The five domains most affected are court structures, processes, personnel, subject matter jurisdiction, and facilities.

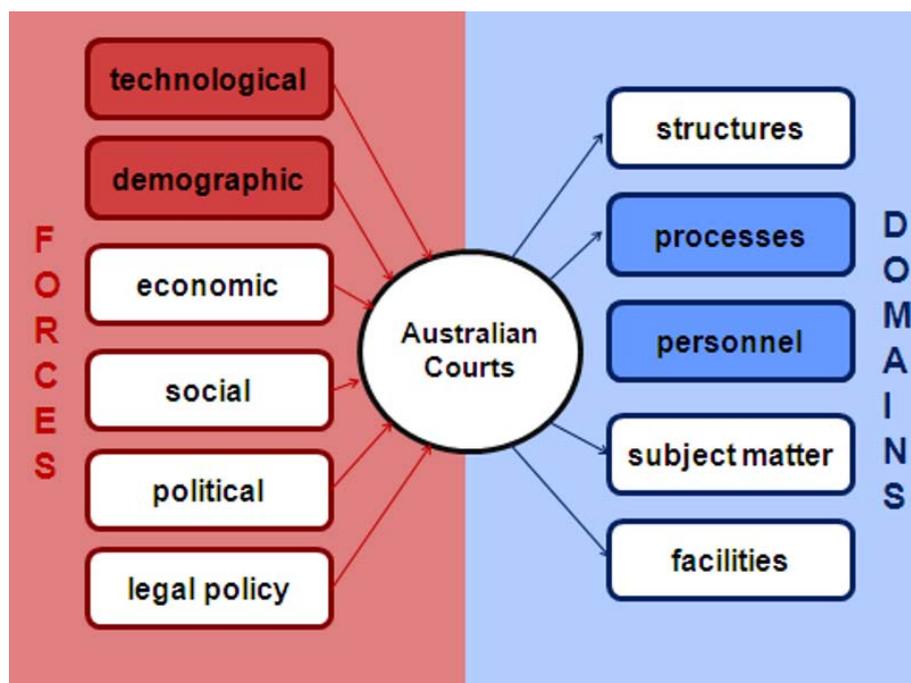
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<sup>4</sup> James Dator, 'Futures and Trial Courts' (2009) 18 *Widener Law Journal* 517, 518. Other future-oriented works on the legal profession include: Richard Susskind, *The Future of Law: The Challenges of Information Technology* (Clarendon Press, revised ed, 1998); and Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2008).

<sup>5</sup> One advocate of this view is Ray Kurzweil, *The Singularity Is Near: When Humans Transcend Biology* (Viking, 2005).

<sup>6</sup> Michael Kirby, 'The Future of Courts: Do They Have One?' (1999) 8 *Journal of Judicial Administration* 185, 190-192.

Figure 1: Forces Affecting Australian Courts



While a great deal has already been said on the courts of the future, the focus of scholarly attention has been overwhelmingly about the impact of one force (technology) on one domain (court processes). Judges are increasingly familiar with the technologies that are transforming the way in which courts do business—case management systems; courtroom transcription; electronic filing; high speed imaging; video-conferencing; and court presentation technology.<sup>7</sup> Without diminishing the importance of these developments, this paper focuses instead on the impact of demographic change on the domains identified above. It is useful, therefore, to begin with a brief description of the discipline of demography.

## 2 Demography

Demography is the scientific study of human populations. Its origins lie in the seminal work of John Graunt (1629–1674)—an English cloth merchant with no scientific training, who in 1662 published a detailed study of mortality in 17th Century London. His treatise discussed many important population issues that remain central to demographic analysis today, leading one scholar to describe Graunt as ranking ‘among the great natural scientists of the early years of the Royal Society’, and his treatise as a universally recognised ‘work of genius’.<sup>8</sup> Developments in demography came haltingly in the centuries that followed. Modern

<sup>7</sup> Arthur Hoyle, 'The Court of the Future and Its Lessons' (2004) 12(4) *Australian Law Librarian* 45.

<sup>8</sup> Peter Laslett (ed), *The Earliest Classics: John Graunt and Gregory King*, Pioneers of Demography Series (Gregg, 1973)1, cited in Donald Rowland, *Demographic Methods and Concepts* (Oxford University Press, 2003), 15.

demographic analysis had to ‘wait for large-scale datasets, scientific interest in their analysis, and sufficient developments in mathematics to allow that analysis’.<sup>9</sup> Yet developments did come, and today the discipline offers many useful tools for analysing population change.

Modern day demographers are interested in five key attributes of human populations.<sup>10</sup>

- (1) population size and growth—how many people are there in a particular place and how does that number change over time?
- (2) population processes—how do the three demographic events (births, deaths and migration) affect population dynamics?
- (3) population composition: what is the structure of a population with respect to key attributes such as age, sex and ethnicity?
- (4) population distribution: how is the population distributed spatially?
- (5) population data and statistics: how can we acquire relevant, timely and accurate data to allow population parameters to be measured and analysed?

Demography is relevant to Australian courts in two distinct ways, which are explored in successive sections of this paper. First, long-term shifts in the Australian population impact *on the courts* and affect each of the domains identified in Figure 1. Secondly, because courts are themselves small populations, it is possible to study demographic change *within courts*—for example, how they change in size and composition, and how this effects the functioning of the organisation.

### 3 Demographic Impacts on Australian Courts

The question of how demographic trends will affect the courts of the future sits within a broader framework of inquiry that is called ‘Futures Planning’. Futures Planning is a process by which an organisation develops a vision of itself in the future and decides on long-term strategies for achieving that future. It goes beyond a reactive risk-management approach to forward planning but seeks to take ownership of the future by advancing desired outcomes.

Futures Planning has gained considerable adherents within court systems around the world. The process started in the United States with the judiciary of Hawaii in the 1970s, before migrating to Virginia in the late 1980s, and then to other states in the 1990s, with the support

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<sup>9</sup> John Caldwell, ‘History of Demography’ in Paul Demeny and Geoffrey McNicoll (eds), *Encyclopedia of Population* (Macmillan Reference, 2003) 216, 218.

<sup>10</sup> The list is adapted from John Weeks, *Population: An Introduction to Concepts and Issues* (Wadsworth, 9th ed, 2005), 5.

of the State Justice Institute and the National Centre for State Courts.<sup>11</sup> Closer to home, Singapore instituted a similar process in 1993, which has been well documented,<sup>12</sup> while Australian jurisdictions such as Queensland have adopted programs with similar titles.<sup>13</sup>

Futures Planning typically involves four stages: (1) analysing past patterns of change that affect the courts; (2) developing alternative scenarios about what might actually happen in the future, whether positive, negative, or neutral; (3) agreeing to a vision about a desired future for the courts; and (4) developing strategies to implement the agreed vision.<sup>14</sup>

Demographic considerations are central to the first and second stages of the Futures Planning process. This raises the question of how key demographic attributes (population size, population processes, population composition, and population distribution) are likely to impact on courts of the future. Using the schema identified above, **Figure 2** illustrates a matrix of potential interactions between demographic attributes and court domains. However, for simplicity, this paper examines only the five scenarios identified in Figure 2.

*Figure 2: Potential Impacts of Population Change on Australian Courts*

FUTURES PLANNING		Population Attributes			
		Population size	Population processes	Population composition	Population distribution
C o u r t  D o m a i n s	Structures				
	Personnel	(a)	(b)		
	Processes		(c)		
	Subject matter			(d)	
	Facilities				(e)

<sup>11</sup> James Dator, 'Judicial Foresight: Then, Now, and Tomorrow for the Hawaii Judiciary' (Paper presented at Hawaii, 2007) <[http://www.futures.hawaii.edu/publication\\_archive.php](http://www.futures.hawaii.edu/publication_archive.php)>.

<sup>12</sup> Magnus, n 3; Waleed Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies and Lessons* (World Bank, 2007).

<sup>13</sup> See Queensland's 'Future Courts Program': <http://www.courts.qld.gov.au/4516.htm> (accessed 2 October 2010).

<sup>14</sup> Magnus, n 3, 97.

**(a) Population size and court personnel: judgeships**

The Australian population has grown dramatically since federation. In 1901 the population stood at just 3.8 million; today it is six times larger, at 22.5 million. There is a net increase in the population of one person every 1 minute and 18 seconds.<sup>15</sup>

The future size of the population has been the subject of intense public debate in Australia. The discussion has been shaped by concerns about the magnitude of Australia's immigration program and the environmental sustainability of a growing population in an arid continent. Any projection of future population depends on the population at the date of the projection and the assumptions made about fertility, mortality and net migration into the future. Depending on whether high or low growth assumptions are made, the ABS projects that Australia's resident population will increase to 30–40 million by 2051.<sup>16</sup>

What will this mean for the courts? Population size can clearly impact on *court structures*. It is no coincidence that the only three Australian jurisdictions that have a two-tier, rather than a three-tier, court system are the three least populous jurisdictions—Northern Territory, ACT and Tasmania.<sup>17</sup> Population size can also be expected to have an impact on *court personnel*. All other things being equal, one would expect a larger population to be reflected in a greater demand for judicial services; and greater demand for judicial services to be reflected in a larger number of judgeships. These relationships may not be exact, but one would at least expect them to be positive. However, these hypotheses are not necessarily borne out by the data because all other things are not equal.

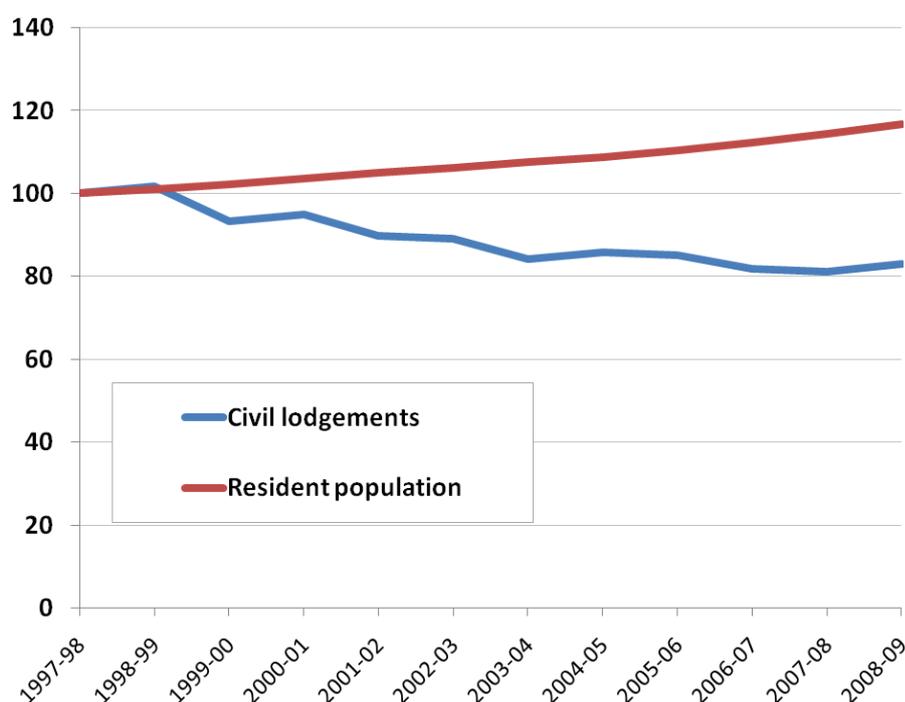
Figure 3 shows how Australia's population has changed over the past 12 years, and compares this with the total number of civil lodgements over the same period (excluding the Family Courts and the Federal Magistrates Court). To make the comparison easier, the lines are shown as indices, where the base year is given the value of 100. The Australian population increased steadily over the period; after 12 years it was 17 per cent higher than the base year. Yet national civil lodgements trended slowly downward over the period; after 12 years it was 17 per cent lower than the base year—leading to a 34 per cent gap between the two series.

<sup>15</sup> Australian Bureau of Statistics, Population Clock, [www.abs.gov.au](http://www.abs.gov.au) (accessed 14 December 2010).

<sup>16</sup> Australian Bureau of Statistics, 'Australian Demographic Statistics, Cat. No. 3101.0' (Australian Bureau of Statistics, 2009) Table 9.

<sup>17</sup> The Northern Territory (population 228,500), the Australian Capital Territory (population 357,700), and Tasmania (population 507,100) all lack a District Court or its equivalent. See Australian Bureau of Statistics, 'Australian Demographic Statistics, Cat. No. 3101.0' (Australian Bureau of Statistics, 2010). Lengthening the appellate chain is a recognised mechanism for addressing caseload pressures: Brian Opeskin, 'Appellate Courts and the Management of Appeals in Australia' (Australian Institute of Judicial Administration, 2001), 9.

Figure 3: Australian Population and National Civil Lodgements, 1997-98 to 2008-09



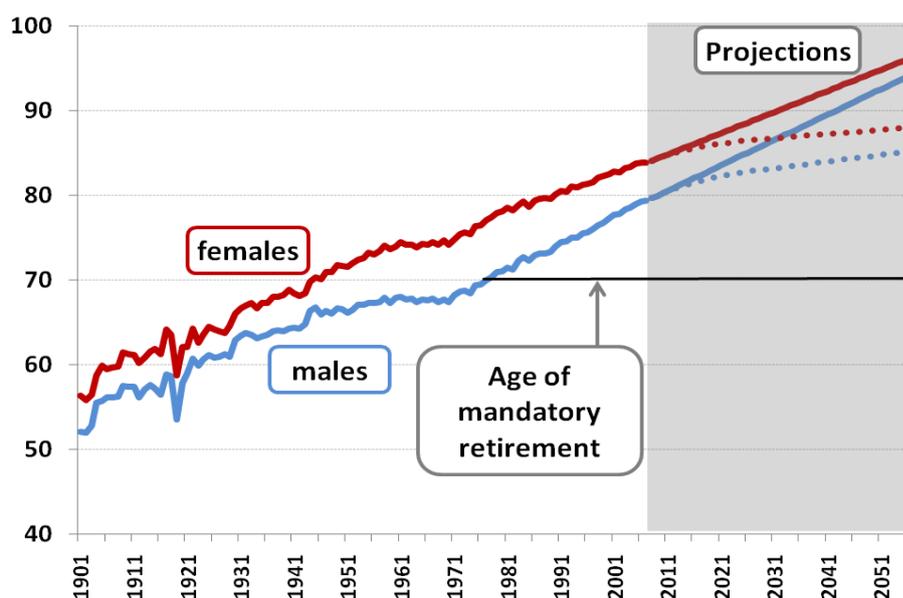
The trend in national civil lodgements confounds expectations, demonstrating the complexity of real world events and necessitating a search for real world explanations. There are three possible reasons for the widening gap between population growth and the commencement of civil proceedings: Australians may be getting less disputatious; Australians may be resolving their disputes outside the court system, such as through alternative dispute resolution processes; or Australians may not be resolving their disputes, for example because access to justice is limited by high legal costs or other barriers. Each of these hypotheses would require testing. Perhaps a positive correlation between population and court lodgements might be found by taking a longer time frame, or by examining different types of disputes such as criminal or family matters, or by accounting for corporate litigants. In the long run, it seems likely that population size does affect the size of the judiciary, operating through the intermediate variable of court caseloads. Nevertheless, the relationship is a complex one.

#### **(b) Population processes and court personnel: judicial retirement**

The second case study examines the way population processes can impact on court personnel. For all its complexity, population change is driven by just three demographic events—births, deaths and migration. This study focuses on deaths and the corresponding demographic process of mortality.

Life expectancy has improved dramatically over the past 100 years in Australia, as in all developed countries. This has been true for men and women, although women have always enjoyed greater longevity than men. Increases in longevity are expected to continue into the future as the population enjoys the ‘fourth stage’ of the epidemiological transition, characterised by high life expectancy and delayed degenerative diseases. The ABS produces two projections for future longevity, which are shown in **Figure 4**. In the ‘high’ series (solid lines), current mortality trends continue until 2056, by which time life expectancy at birth is projected to rise to 94 years for males and 96 years for females. In the ‘medium’ series (dotted lines), mortality continues to improve but at a slower rate. By 2056, life expectancy at birth is projected to rise to 85 years for males and 88 years for females. On either scenario, Australians can expect to live significantly longer than they do at present.

Figure 4: Life Expectancy at Birth, Australian Males and Females, 1901-2056



What impact will this have on the courts? In his speech on ‘A Changing Judiciary’, Chief Justice Gleeson commented that greater longevity has given rise to the view that judges can have an active professional life *after the Bench*.<sup>18</sup> For similar reasons, improving mortality is likely to create pressure to extend the life of judges *on the Bench*. In the years ahead, there will be a growing gap between life expectancy at birth and the mandatory retirement age (typically 70 or 72 years). Not only will some judges want to continue their judicial lives and be capable of doing so but there will be fiscal pressure to allow judges to work for longer

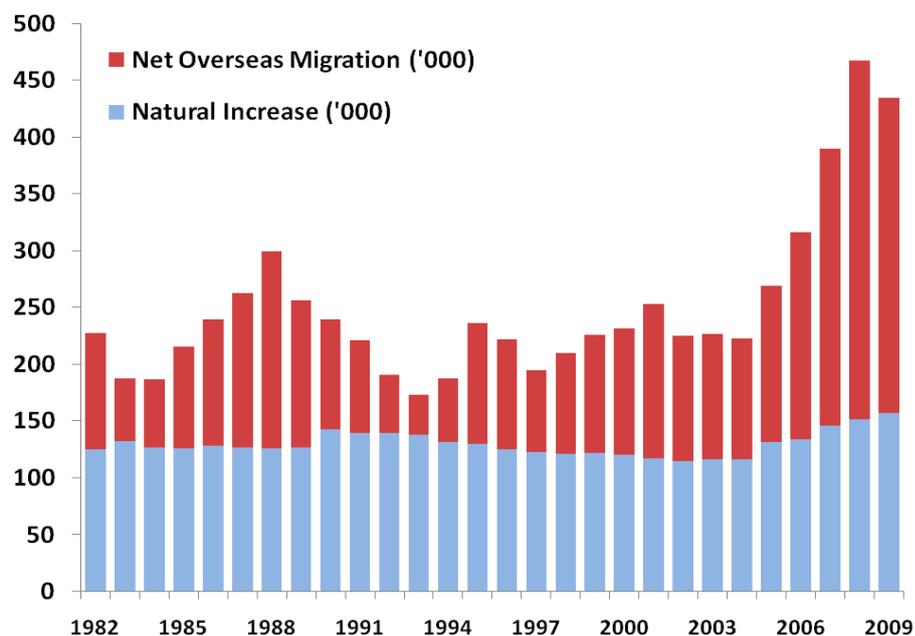
<sup>18</sup> Gleeson, n 1, 549.

periods and therefore spend less time on their judicial pensions. It would not be surprising to see the mandatory retirement age for judges being raised across Australia within a decade.

**(c) Population processes and court processes: ethnic diversity**

The third case study examines the way in which another population process—migration—impacts on *court processes*. Australian migration has made a significant contribution to Australia’s annual population growth in the post-war period. **Figure 5** shows the contribution to growth made each year by net natural increase (the excess of births over deaths) and net overseas migration (the excess of long-term arrivals over long-term departures). Net natural increase is fairly stable over time because it reflects the biological processes of fertility and mortality. Net overseas migration is volatile because it responds to changing migration policy and economic conditions, prompting one commentator to describe Australia’s immigration policy as a boa-constrictor, ‘taking great lumps of new settlers followed by periods of quiescence and digestion’.<sup>19</sup>

*Figure 5: Net Natural Increase and Net Overseas Migration, 1982-2009*



For the past decade, net overseas migration has accounted for half, or more than half, of Australia’s annual population growth. The cumulative effect of substantial annual migration is that the ethnic complexion of Australia is changing significantly. More than 25 per cent of Australia’s population was born overseas, which gives Australia one of the highest

<sup>19</sup> W. Borrie, *The European Peopling of Australasia: A Demographic History 1788-1988* (Australian National University, 1994), 181.

proportions of 'foreign-born' of any country in the world.<sup>20</sup> For a settled country like Australia, the proportion of foreign-born has always been high (at the 1891 census, 32 per cent were foreign-born), but in recent years there has been a marked increase in the diversity of national origins. At the 1971 census, the United Kingdom and Europe accounted for 85 per cent of Australia's foreign-born population, and Asia just 5 per cent. Thirty years later, at the 2001 census, the United Kingdom and Europe had declined to 51 per cent of foreign-born, and Asia had risen to 24 per cent.<sup>21</sup>

What does this mean for the courts of the future? It seems certain that Australia's immigration program will result in a population of increasing national, cultural and linguistic diversity. The ABS does not publish projections of these population parameters into the future—perhaps because they are too policy-dependent to be reliable or too politically charged to be acceptable. But some other settler societies, like the United States and New Zealand, do make long-term projections of ethnicity, and these show that sustained immigration does lead to significant changes in racial and ethnic composition over time.<sup>22</sup>

The increased ethnic diversity of the population is likely to have a number of impacts on the courts. Over time, immigrant groups will come to be represented in the judiciary itself, thereby affecting court personnel. In the shorter term, there is likely to be a need to adjust *court processes* through enhanced translation services, provision of information in multiple languages, and cross-cultural awareness training—all on a scale beyond current experience. At a deeper level, ethnic transformation may provide the impetus for the legal system to consider different approaches to conflict resolution, leading to structural changes that are more in tune with the attitudes and expectations of a changing population.<sup>23</sup>

This increased diversity will not be experienced uniformly across Australia, and this has important regional implications for courts. For example, at the 2006 Census the percentage of foreign-born ranged from 27 per cent in Western Australia to just 11 per cent in Tasmania (see **Figure 6**).<sup>24</sup> There are also large urban-rural differences because migrants settle mostly in cities where they are better connected to existing migrant networks. Thus, although 24 per cent of NSW residents in 2006 were foreign-born, the figure for Sydney was 32 per cent.

<sup>20</sup> Australian Bureau of Statistics, 'Migration, Cat. No. 3412.0' (Australian Bureau of Statistics, 2010), 45.

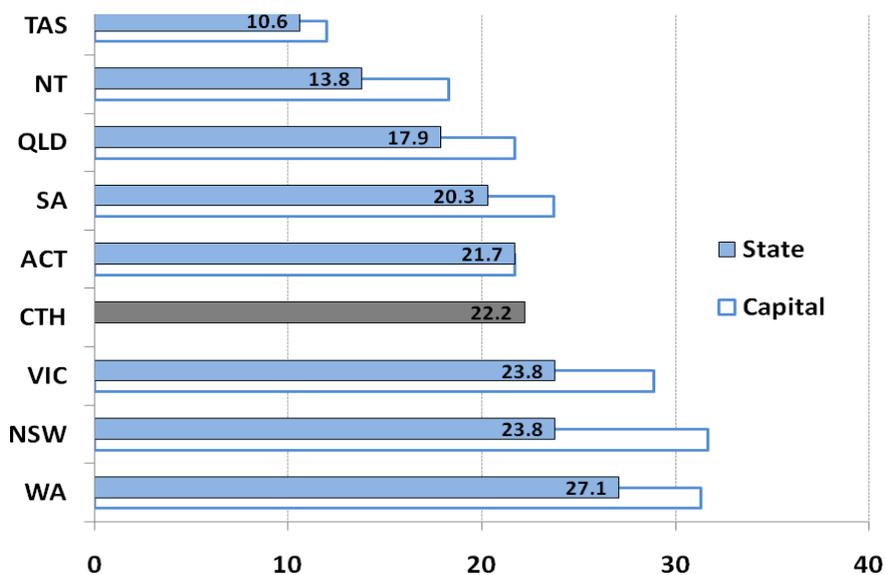
<sup>21</sup> Siew-Ean Khoo, 'A Greater Diversity of Origins' in S.-E. Khoo and P. McDonald (eds), *The Transformation of Australia's Population 1970-2030* (UNSW Press, 2003) 158, 162.

<sup>22</sup> Philip Martin and Elizabeth Midgley, 'Immigration: Shaping and Reshaping America' (2006) 61(4) *Population Bulletin* 1, 17.

<sup>23</sup> American Judicature Society, 'The Changing Face of America: How Will Demographic Trends Affect the Courts?' (1988) 72(2) *Judicature* 125, 127.

<sup>24</sup> Khoo n 21, 172.

Figure 6: Percentage Foreign-Born by Region, 2006



#### (d) Population composition and subject matter jurisdiction: population ageing

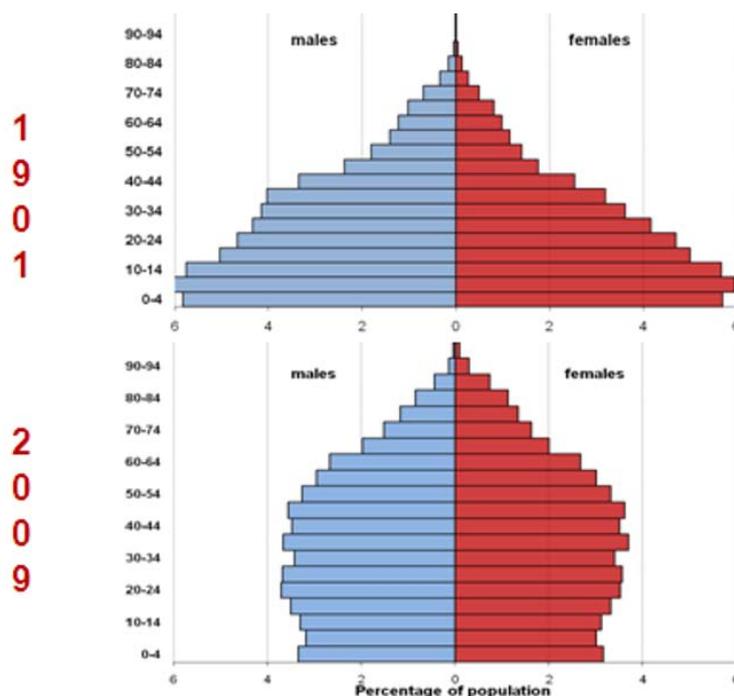
The fourth case study examines how changes in the age-sex composition of the population can impact on the *subject matter* of cases brought before the courts. In recent years there has been much discussion of the ageing of Australia's population, which formally refers to the increasing proportion of the population found in older age groups. Population ageing is the product of two forces: a declining birth rate (leading to relatively fewer people at younger ages) and a declining death rate (leading to relatively more people at older ages).<sup>25</sup>

Changes in the age-sex composition of Australia's population over the past century are shown in **Figure 7**. The population pyramids show the proportion of men and women in successive five-year age bands in 1901 and 2009. In 1901 the graph does indeed take the form of a pyramid, which is typical of young and growing populations. By 2009 the pyramid has been replaced by a 'beehive', where the youngest cohorts form progressively smaller percentages of the population and undercut the graph. The ageing process is projected to accelerate over the next 40 years. In 2010, the population aged 65 years and over comprised 13 per cent of the total population, but this is expected to rise to 23 per cent by 2050.<sup>26</sup>

<sup>25</sup> Donald Rowland, 'An Ageing Population: Emergence of a New Stage of Life?' in S.-E. Khoo and P. McDonald (eds), *The Transformation of Australia's Population 1970-2030* (UNSW Press, 2003) 238, 239; Rebecca Kippen and Peter McDonald, 'Australia's Population in 2000: The Way We Are and the Ways We Might have Been' (2000) 8(3) *People and Place* 10.

<sup>26</sup> Australian Treasury, 'Intergenerational Report 2010: Australia to 2050: Future Challenges' (Australian Government, 2010), Table 1.4.

Figure 7: Population Pyramids, 1901 and 2009



What impact will an ageing population have on the courts? In 2007, an Australian Parliamentary inquiry into older people and the law commented that that ‘there is no doubt that older Australians face a range of difficulties and challenges in their interactions with the legal system’.<sup>27</sup> It seems likely that there will be an increasing volume of age-related legal disputes, and growth in new areas of law that are of special significance to the elderly. Examples include age discrimination, disability discrimination, social security, superannuation, aged care, guardianship, succession, substitute decision making, and the law related to end-of-life decisions. Many of these areas are now being gathered under the rubric ‘elder law’, and there is growing interest in Australia in the legal issues arising from an ageing population.<sup>28</sup> The types of matters that come before the courts will not be untouched by these developments.

### (e) Population distribution and court facilities

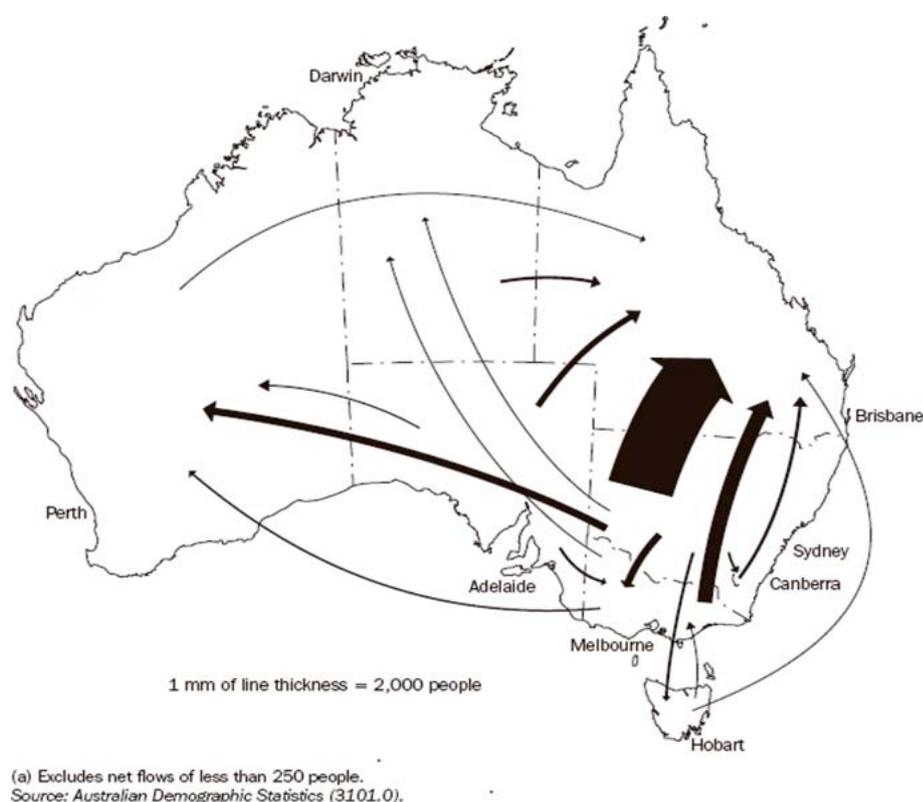
The final case study examines the way in which changes in the spatial distribution of the population can impact on court facilities. It is useful to start by recognising the fact that spatial patterns of population movement are very complicated. Graeme Hugo, an eminent

<sup>27</sup> Australian Parliament, 'Older People and the Law' (House of Representatives Standing Committee on Legal and Constitutional Affairs, 2007), vii.

<sup>28</sup> Sue Field, 'The Concept of Elder Law' (2002) 81 *Reform* 20. For example, a Centre for Elder Law has been established at the University of Western Sydney, and the New South Wales Government publishes a 'plain English' legal guide to older people and the law: NSW Attorney-General's Department, 'Older People and the Law' (NSW Attorney-General's Department, 2005).

human geographer, has commented that the spatial distribution of population is one of the ‘most dynamic and policy-relevant dimensions’ of Australia’s demography, but also one of the most neglected.<sup>29</sup> Although the overall structure of Australia’s population has been fairly stable, there have been important shifts at regional and local levels. Significant changes include the historic decline in rural populations in favour of cities; movements within metropolitan areas; the growth of populations in ‘sea-change’ and ‘tree-change’ destinations; and a decided shift away from the southwest corner of Australia towards Queensland and Western Australia. The latter movement can be seen vividly in **Figure 8**, where the thickness of the arrows indicates the volume of net migration between the Australian states. Residents of Victoria and New South Wales are moving north in large numbers.

*Figure 8: Net Interstate Migration*



Every court needs to take account of this dynamic, not only to accommodate movements in the past, but to plan for shifts in the future. The ABS publishes spatial projections of Australia’s population into the future, and some state governments do likewise. For example, the New South Wales Department of Planning has released detailed estimates of projected

<sup>29</sup> Graeme Hugo, 'Changing Patterns of Population Distribution in Australia' (2002) (September) *Journal of Population Research and New Zealand Population Review (Joint Special Issue)* 1, 1. See also Gary Ward and Ross Barker, 'Population Change between 1986 and 1996 in Australia: Population Numbers, Components of Change and Age Profiles' (1997) 5(3) *People and Place* 34.

population change across the State over a 15 year planning horizon from 2006–2021.<sup>30</sup> The Department's projections suggest that many rural areas will experience population decline of up to 5 per cent, while areas in outer Sydney, the Central Coast and around the ACT will experience population growth in excess of 33 per cent by 2021.

Changes in the distribution of population are an important input into future planning for Australian courts because access to justice includes the notion of physical access to courts. English courts have been travelling to the people since the 12th century, when 'justices in eyre' visited each county in the realm, bringing the King's justice with them.<sup>31</sup> Today, emerging Web 2.0 technologies open new possibilities for servicing regional, rural and remote communities.<sup>32</sup> Yet, for the foreseeable future, courts will still require a public presence in discharging their role as a venue for the public resolution of serious conflict.<sup>33</sup> Rational use of scarce resources suggests that courts should deploy personnel where the need is greatest, which may be where populations are growing fastest. Spatial redistribution of the population therefore requires continual re-evaluation of court facilities such as the location of registries where court process may be filed, court houses where judges sit regularly, and judicial circuits.

The United States offers an interesting example of the impact of demographic change on court facilities. In 1990, the federal courts initiated a long-range facility planning exercise, which ultimately resulted in the largest courthouse construction program in United States history.<sup>34</sup> The Government committed to constructing 157 new federal court facilities at a cost of US \$15 Billion to meet projected needs over the next 30 years. Population dynamics were not the only driver for change but they were a key part of a planning process. Planners also considered projected changes in population size and density, age cohorts, racial composition, interstate and intrastate migration, employment trends, and proximity to borders, facilities and public infrastructure.<sup>35</sup>

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<sup>30</sup> New South Wales Department of Planning, 'New South Wales Statistical Local Area Population Projections, 2006-2036' (Department of Planning, 2010).

<sup>31</sup> J.H. Baker, *An Introduction to English Legal History* (Butterworths, 2nd ed, 1979), 15-20.

<sup>32</sup> Government 2.0 Taskforce, 'Report' (Australian Government, 2009).

<sup>33</sup> Kirby, n 6, 188.

<sup>34</sup> Keith Fentress, 'Long-Range Facility Planning for Federal Courts' (2000) 9 *Journal of Judicial Administration* 134.

<sup>35</sup> Fentress, n 34, 141.

## 4 Demographic Attributes of Courts

To this point, the paper has addressed the potential impact of population changes *on the courts* over the next 40 years. This section considers a different issue, namely, the nature of demographic change *within courts*, viewed as small populations in their own right. Valuable insights into the internal workings of an organisation can be gleaned from an area of academic inquiry known as ‘organisational demography’, which applies the insights of demography to organisational behaviour.<sup>36</sup> In his seminal work in 1983, Jeffrey Pfeffer claimed that the demography of any social entity (such as a court) can be seen as the aggregation of the characteristics of the individual members of that entity.<sup>37</sup> Through aggregation, the organisation can be described in terms of its compositional characteristics of age, sex, race, educational levels, length of service, and so on.

There are several reasons for undertaking this type of inquiry. First, description of the demographic attributes of a court is instructive in its own right because it assists in understanding key features of the court and how it differs from others. Secondly, demographic analysis is a key ingredient in workforce planning, which is a process of evidence-based decision making about workforce supply and demand.<sup>38</sup> Thirdly, the demography of a court may have important consequences for organisational outcomes. Pfeffer claimed that the demographic composition of an organisation is a key determinant of its performance, capacity for innovation, power structures, internal conflict, career opportunities, and much more.<sup>39</sup> Empirical research has since validated many of his original hypotheses,<sup>40</sup> and the variable that has had most explanatory power is tenure, or length of service.

The organisations that have been examined by organisational demographers to date have been predominantly in the private sector, and to a lesser degree in the public service. However, there are major institutional differences between those environments and that inhabited by judges. The principal differences include the following.

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<sup>36</sup> Some have suggested that a better descriptor is ‘internal organizational demography’ in order to distinguish it from a related sub-specialty that examines the founding, growth and mortality of organisations at an industry level: Glenn Carroll and Michael Hannan, *The Demography of Corporations and Industries* (Princeton University Press, 2000) 31-34.

<sup>37</sup> Jeffrey Pfeffer, ‘Organizational Demography’ (1983) 4 *Research in Organizational Behaviour* 299, 303.

<sup>38</sup> Julie Sloan, *Introduction to Workforce Planning* (Julie Sloan Management, 2008).

<sup>39</sup> Pfeffer n 37, 320-348.

<sup>40</sup> See reviews in Anne Tsui, Terri Egan and Katherine Xin, ‘Diversity in Organizations: Lessons from Demography Research’ in Martin Chemers, Stuart Oskamp and Mark Costanzo (eds), *Diversity in Organizations: New Perspectives for a Changing Workforce* (Sage Publication, 1995) 191; Glenn Carroll and Richard Harrison, ‘Organizational Demography and Culture: Insights from a Formal Model and Simulation’ (1998) *Administrative Science Quarterly* 637.

- (1) Courts have very flat organisational structures. They are collegiate rather than hierarchical, and even the head of jurisdiction is merely *primus inter pares*. This may affect career paths and motivation.
- (2) It is not possible to terminate the commission of a judge because of changing ‘needs of the business’, or for lack of performance that falls short of proved misbehaviour or incapacity. Judicial independence demands that judges be entitled to hold office until they reach retirement age. On the other hand, unlike nearly all other workers, judges are *required* to retire when they reach 70 or 72 years of age, which affects turnover rates and length of service profiles.
- (3) Many key organisational attributes are determined exogenously by the Executive or the Parliament, rather than by the courts. This is true of the number and characteristics of new appointees. This places compositional attributes—such as age, sex and ethnicity—beyond the control of the courts.
- (4) There is far less mobility of judges between courts than there is of individuals between organisations within a sector of industry. A magistrate generally does not migrate up the judicial ladder to become a High Court justice. This is largely because the judicial job market is small, and it is highly stratified by geography, subject area and status.

Despite these special features, courts would benefit from closer attention to their demographic histories and current demographic profiles. Pfeffer’s work contained insights that remain relevant today. For example, he pointed out that the length of service profile of an organisation will be affected by how fast the organisation, and the industry, is growing. He also showed how selection, termination and remuneration policies can affect the length of service profile. That resonates in the Australian judicial system because States have different qualifying conditions for the judicial pension, and these parameters are likely to have considerable influence on a judge’s length of service and age at termination.

The remainder of this section uses three pilot studies to indicate how organisational demography can be used to examine the internal structure of courts and to plan for their future. The analysis is based on an examination of three superior courts, namely, the Federal Court of Australia, the Family Court of Australia (excluding the Family Court of Western Australia) and the Supreme Court of Queensland.<sup>41</sup> The data cover three demographic events

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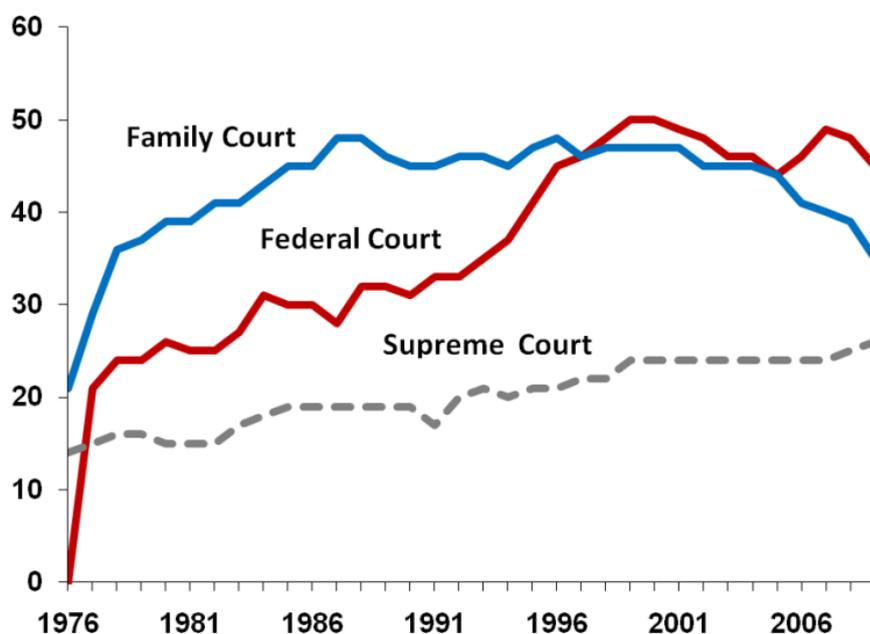
<sup>41</sup> I would like to extend my thanks to Chief Justice Black, Chief Justice Bryant and Chief Justice De Jersey for providing much of the data used here.

(births, judicial appointments, and judicial terminations) over a period of 33 years (1976–2009). This interval was chosen to cover the two federal courts from their establishment in the mid-1970s, and it required an examination of 292 current and former judges across the three jurisdictions.

**(a) Court size and growth**

The size of the Australian judiciary has increased by 70 per cent in the past 33 years. When Chief Justice Barwick delivered his first ‘State of the Australian Judicature’ address in 1977, there were 587 judicial officers.<sup>42</sup> Today there are approximately 1,000 judicial officers, 15 per cent of whom work in federal courts that did not exist in 1975.

*Figure 9: Growth in Judgeships, 1976-2009*



**Figure 9** shows the growth in the number of judgeships in each of the three courts, measured at 30 June each year from 1976 to the present. The Federal Court grew steadily for its first 20 years as its jurisdiction rapidly expanded. Its size has since plateaued—approximating what demographers call a stationary population where annual births (appointments) equals annual deaths (terminations), resulting in zero net growth. The Family Court also grew significantly in its early years, but since 2001 there has been a steady decline in the number of judges. This should be seen in the context of the establishment of the Federal Magistrates Court around that time, which resulted in a significant shift of less complex family law matters from the

<sup>42</sup> Garfield Barwick, 'State of the Australian Judicature' (1977) 51 *Australian Law Journal* 480, 495.

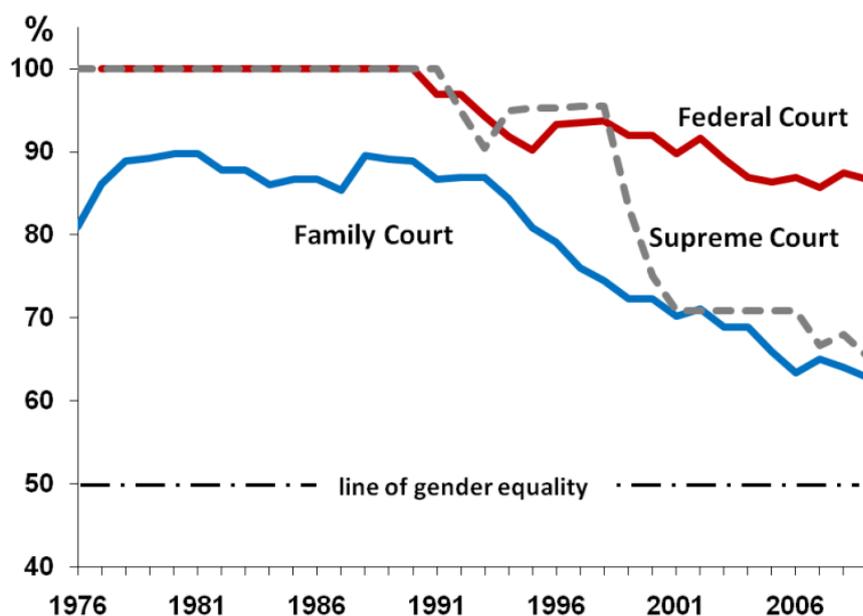
Family Court. By contrast, the Supreme Court of Queensland—in one of Australia’s fastest growing States—has been growing steadily.

### (b) Gender composition

The representation of women in the judiciary varies significantly by court and jurisdiction: generally, the higher up the court hierarchy, the lower the proportion of women. According to the Australasian Institute of Judicial Administration, as at 31 March 2010, 32 per cent of Australia’s judicial officers were women but only 24 per cent of judges in the State Supreme Courts or Courts of Appeal were women.<sup>43</sup> Judicial office remains a male dominated affair, although there are signs of change.

The three pilot studies show significant gender differences (see **Figure 10**). The Family Court included women judges from its inception—indeed its first Chief Justice was a woman—and since the early 1990s there has been a steady feminisation of its workforce. The Supreme Court of Queensland started that process 17 years after the Family Court but the process has been much more rapid and the Court’s gender profile is now similar to that of the Family Court. It is the Federal Court that appears to be the exception. Nearly 20 years after the first woman was appointed to Federal Court, only 16 per cent of its judges are women.

Figure 10: Percentage of Male Judges, 1976-2009



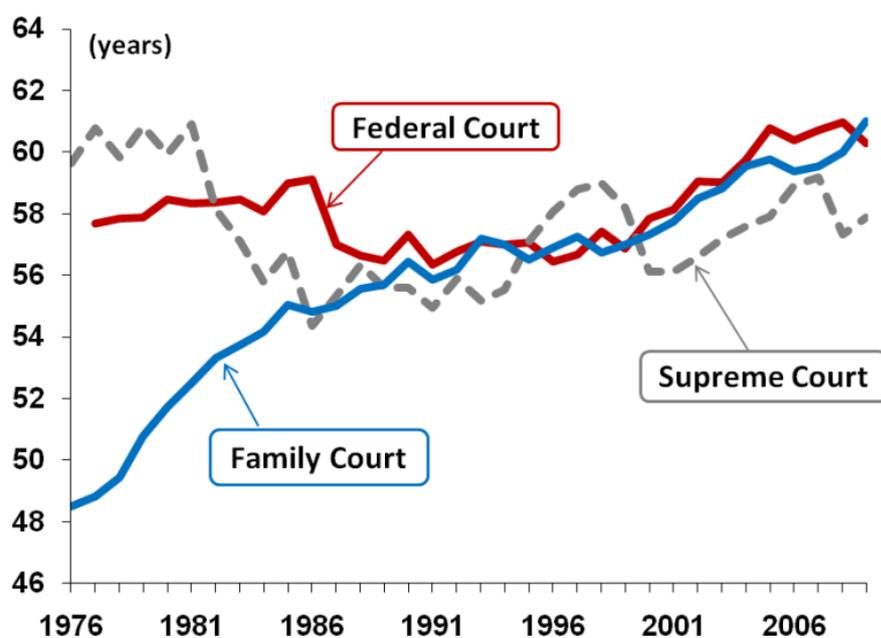
<sup>43</sup> Australasian Institute of Judicial Administration, *Judges and Magistrates (% of women)* (2010) <[www.aija.org.au/gender-statistics.html](http://www.aija.org.au/gender-statistics.html)>.

### (c) Age composition

The age structure of a court at a given point in time is the outcome of two forces—the age pattern of appointments and the age pattern of terminations. In this context, ‘terminations’ refers to all the decrements in a judicial population that result from compulsory retirement on reaching the maximum statutory age; voluntary resignation before reaching that age; removal from office; and death in office.

The age of a population can be measured in different ways. **Figure 11** uses a simple summary measure by showing the mean age of judges who held office on 30 June in each of the three courts under review. The Federal Court and the Supreme Court of Queensland show similar age patterns—their workforces have been ageing fairly steadily for the past 20 years.

*Figure 11: Mean Age of Judges, 1976-2009*



What is particularly interesting, however, is the Family Court. The first cohort of Family Court judges was on average nine years younger than the first cohort of Federal Court judges. This is consistent with the goal of the Government of the day to appoint Family Court judges who were younger and ‘more in touch with community values’. However, the mean age has since risen steadily, and today it is no different to that of the Federal Court. Surprisingly, this has little to do with the average age of new appointees, which actually fell steadily for the first 20 years of the Family Court’s history. The explanation is to be found in a combination of two other factors: (a) judges have tended to enjoy long periods of judicial service (aided by the life tenure of the initial cohort and then by the increase in the statutory retirement age from

65 years to 70 years); and (b) the declining size of the court has meant there have been few opportunities to replace old retirees with young appointees.

**(d) Length of service**

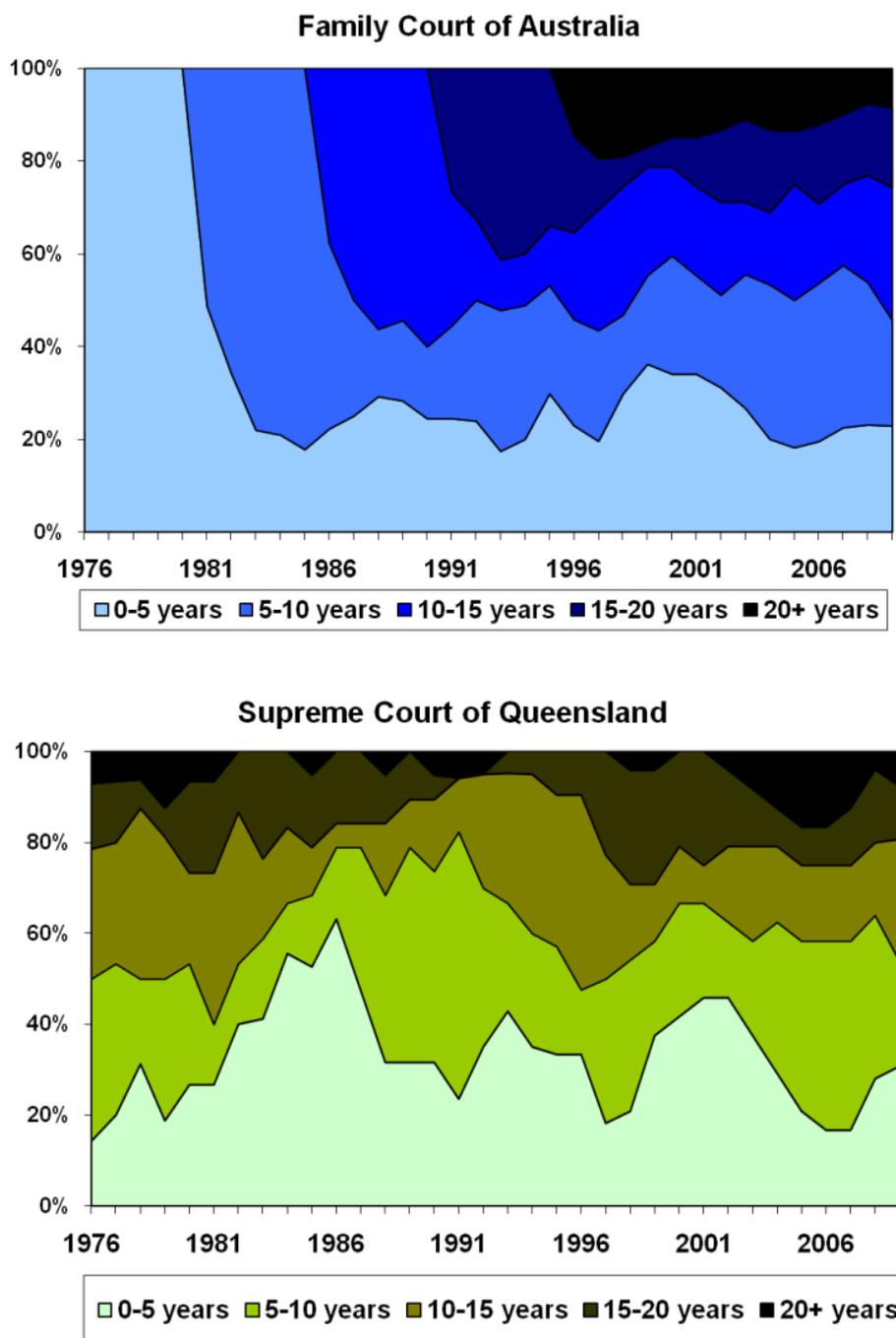
As mentioned above, the literature on organisational demography suggests that length of service is a key factor in organisational outcomes. This variable can be analysed in different ways: for present purposes, suppose a census was taken of all judges holding office on 30 June and that the population count was then classified according to the duration of service on the court, in five-year bands (0-5 years, 5-10 years, etc). **Figure 12** shows the outcome of that analysis, contrasting the length of service profile of the Family Court with that of the Supreme Court of Queensland.

The pattern in the early years of the Family Court is typical of any new court. At first everyone is inexperienced. But this changes over time, and after about 20 years a fairly stable length of service profile has been established, with a good distribution of judges across different levels of experience. This may be contrasted with the Supreme Court of Queensland. In 1976 the Supreme Court had already been in existence for 115 years,<sup>44</sup> with the result that there is no 'easing-in' period. In that year the Supreme Court had a mature age profile—50 per cent of judges had been on the court for more than ten years. This was followed by a period of flux in the 1980s and 1990s. At one point, in 1986, nearly two-thirds (63 per cent) of the bench had less than five years experience. In recent years, the Supreme Court has achieved greater stability in its length of service profile and today there is a high degree of similarity between the profiles of the two courts.

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<sup>44</sup> Alex Castles, *An Introduction to Australian Legal History* (Law Book Company, 1970), 103.

Figure 12: Percentage of Judges by Length of Service, 1976-2009

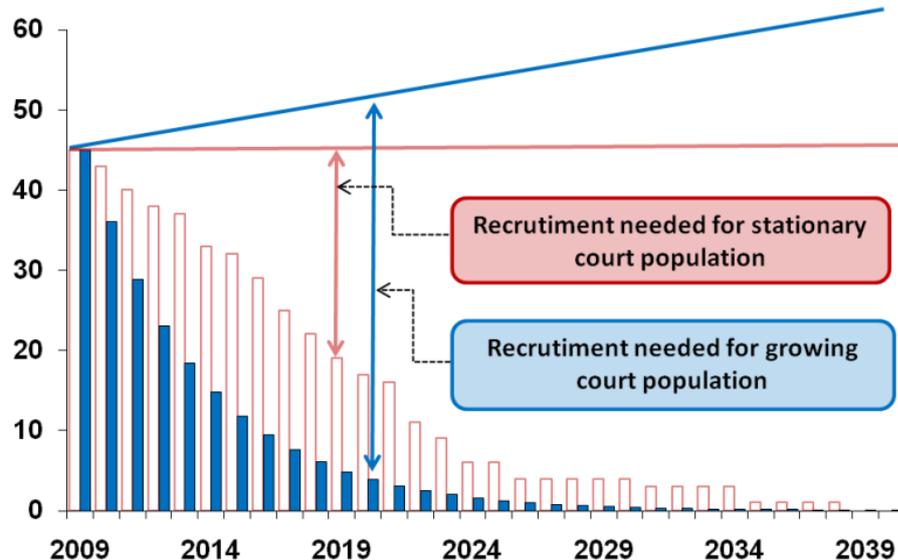


**(e) Projections**

This final section demonstrates how organisational demography can be used in workforce planning. It is possible to make projections about the size of a court in the future based on an understanding of the demand for judges, on the one hand, and the supply of judges, on the other. The gap between demand and supply represents the level of recruitment needed over time to maintain a specified level of service.

**Figure 13** shows a hypothetical projection of recruitment for the Federal Court based on the population of 45 judges that held office on 30 June 2009. The analysis proceeds in two stages. First, let us assume that the demand for judges is constant so that the Court only needs to maintain its current size into the future (horizontal red line). Let us also assume that the only reason judges leave the Court is because they reach the mandatory retirement age of 70 years. Using known birth dates of judges, it is possible to calculate the size of the Court year by year into the future. If the retirees are not replaced, the diminishing Court population would be represented by the red columns. If the size of the Court is to be maintained at 45, it is necessary to have a regular recruitment program to offset the annual decrements. Whether by good planning or good fortune, the Federal Court is in a good position. For the next 15 years only 2-3 judges must retire each year, with the consequence that there will be a steady replacement of older retirees by younger appointees. That regularity will contribute to a stable length of service profile, such as we saw for the Family Court.

Figure 13: Projected Recruitment of Federal Court Judges, 2009-2040



In the second stage of the analysis, the two assumptions need to be relaxed. First, the rate of attrition will be greater than indicated. The red columns represent the *minimum* rate of termination because judges also die in office or resign before reaching age 70. A more realistic rate of attrition might be something like the blue column. Given sufficient historical data, demographers can calculate these rates of attrition using multiple decrement life tables, which is the tool used by actuaries to calculate the risk of mortality. Furthermore, the assumption of a stationary population may not be reasonable in the long term. If the demand for the services of Federal Court judges increases over time, the number of judges will need to

be increased—at least to the extent that the extra demand cannot be met by higher productivity per judge. As discussed in Part 3(a) above, modelling the demand for judges is a complex exercise but it forms a key input into any assessment of the need for judicial recruitment.

## **5 Further Research**

This paper has sketched some of key population changes that Australia has experienced over the past few decades and it has identified some of the population transformations that are projected take place over the next 40 years. These changes will have profound effects on Australian courts, just as they will impact on many aspects of public and private life.

This paper has highlighted how demographic analysis can be useful in understanding the impact of population dynamics on the courts, and in understanding the internal characteristics of the courts. There is great potential for further research, not just to collect more data about more courts, but to interrogate that data to answer fundamental questions about the challenges that Australian courts are likely to face over the next 40 years.

Demographic change has become the focus of much recent public debate in Australia, reflecting the aphorism that ‘population is destiny’. There appears to be greater consciousness of population issues now than at any time in Australia’s recent history, and this has been reflected in a range of government initiatives such as the baby bonus, the Future Fund, and increasing the qualifying age for the age pension. As further evidence of this interest, in April 2010 the Australian Government created a new office of the Minister for Sustainable Population to guide the development of policies to meet the country’s future population needs. Similarly, Australian courts, and those responsible for governing them, need to develop policies to address the population challenges that lie ahead. The forces that shape populations are well known and relatively predictable. There is much that Australian courts can do today to choose their desired future in 2050.