

**BEING THE CHANGE: TOWARDS DIVERSITY INTELLIGENCE IN
THE AUSTRALIAN LEGAL PROFESSION**

INTRODUCTION

How can equal justice be achieved for diverse communities?

This is an ongoing question, and there is no more important time to discuss it than here and now, as Australia establishes its reputation as one of the most inclusive countries in the world,¹ and asserts its place in the global economy.

While Australia is richer, both figuratively and literally,² for its diversity, the Australian legal system now faces the challenge of adapting to the needs of diverse communities which make up a multifaceted and increasingly complex Australian society.

As Chief Justice Robert French has observed, this is a challenge which requires a ‘lengthy and contentious search for answers’.³ This essay sets out to tackle the challenge from a ‘human resources’ perspective – that is, by seeking opportunities for improvement in the legal profession, with a view to facilitating better outcomes in the day-to-day administration of justice.

Part I of the essay provides context for the discussion by charting developments in accommodating diversity within the legal system, and explores the need for greater representation of diverse communities in the legal profession.

Part II identifies the skills and attributes necessary for lawyers to succeed in a diverse and changing legal environment, and argues that these skills and attributes – collectively referred to as ‘diversity intelligence’ - are essential for the Australian legal profession.

Having established the importance of diversity intelligence in facilitating equal access to justice for diverse communities, Part III provides a practical solution to ensure regular and

¹ Esther Rajadurai, ‘Why Australia is the World’s Most Successful Multicultural Society’, *The McKell Institute* (Web Article, December 2018); Ipsos Public Affairs, ‘The Inclusiveness of Nationalities: A Global Advisor Survey’ (Report, 2018).

² In 2010-2011, skilled migrant taxpayers contributed \$32 billion to the Australian economy. See Australian Bureau of Statistics, ‘Skilled Migrant Income \$32 billion in 2010-2011 (Media Release 138/2015, Australian Bureau of Statistics, 3 December 2015).

³ Chief Justice Robert French AC, ‘Equal Justice and Cultural Diversity - the General Meets the Particular’ (Speech, Cultural Diversity and the Law Conference, 14 March 2015).

high-quality training on the subject, by suggesting it is included as part of mandatory continuing professional development ('CPD') requirements.

It is noted that this essay only deals with a limited part of a broader framework towards equal access to justice, which will include consideration of substantive and procedural laws and also efforts to make the legal system more accessible to members of diverse communities. It is beyond the scope of this essay to address those challenges, except to note that the process of change is long and fraught with debate.⁴ For present purposes, the focus is not on changing the legal system itself, but helping lawyers to be the change they want to see in the legal system.

⁴ French CJ (n 3), 9.

I. DIVERSITY AND THE AUSTRALIAN LEGAL PROFESSION

A. Definitions

This essay is about diversity, which has multiple, often contradictory definitions depending on who's putting forward the definition and why.⁵ This essay will adopt the plain English meanings of the word, given by the Cambridge English Dictionary:⁶

Diversity [noun]

The fact of many different types of things or people being included in something; a range of different things or people

The fact that there are many different ideas or opinions about something

Therefore, 'diversity' in the context of a society refers to the plurality of social groups created by differences in age, profession, gender, marital status, socioeconomic status, ability, race, ethnicity, religion, and other traits. In this regard, it is noted that social groups and identities may overlap, and no one individual belongs only to one group or one identity.⁷

Diversity may also be defined in contrast to dominant culture standards.⁸ In this regard, a 'dominant culture' is not necessarily the most prevalent group in society; it is the values, beliefs and institutions of the group(s) which occupies (or occupy) a position of privilege,⁹ and which dictate the standards to be regarded as normal or relevant or acceptable.¹⁰ If, in Australia, the

⁵ Fred Pincus observes that definitions of diversity in academic literature vary depending whether the author is focusing on 'counting', 'culture', 'good-for-business' or 'conflict'. See Fred Pincus, *An Introduction to Class, Race, Gender, Sexual Orientation, and Disability* (Lynne Rienner Publishing, 1st ed, 2006), 3-4.

⁶ *Cambridge English Dictionary* (online at 9 August 2019) 'Diversity'.

⁷ Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics,' (1989) 140 *University of Chicago Legal Forum* 139; Darren Rosenblum, 'Queer Intersectionality and the Failure of Recent Lesbian and Gay 'Victories',' (1994) 4 *Law and Sexuality* 83.

⁸ See e.g. Janet Helms, *Black and White Racial Identity: Theory, Research and Practice* (Greenwood Press, 1990).

⁹ *Ibid*; Brianne Hastie and David Rimmington, '200 Years of White Affirmative Action': White Privilege Discourse in Discussions of Racial Inequality' (2014) 25(2) *Discourse and Society* 186; see also Kathryn Berg, 'Cultural Factors in the Treatment of Battered Women With Privilege: Domestic Violence in the Lives of White European-American, Middle-Class, Heterosexual Women' (2013) 29(2) *Journal of Women and Social Work* 142.

¹⁰ Mary Kalantzis, 'Ethnicity Meets Gender Meets Class in Australia' (Occasional Paper No 13, Centre of Multicultural Studies, University of Wollongong 1988).

dominant culture is that of a white,¹¹ able-bodied,¹² Standard-Australian-English-speaking,¹³ middle-class, straight male,¹⁴ and a person or community would be ‘diverse’ if they do not match this description in one or more ways.¹⁵

This essay also refers to the Australian legal profession. In this context, the ‘legal profession’ is a reference to the whole of the professional body with legal qualifications and undertaking roles oriented towards the administration and maintenance of the legal system, and includes judges, solicitors and barristers.¹⁶ It is to be contrasted with ‘legal practitioners’, who are solicitors or barristers practising under the Australian Legal Profession Uniform Law Framework (which is further detailed below).

B. *The Impact of Diversity and Globalisation on the Australian Legal System*

Australia is a diverse country in every sense of the word. Of the 25.5 million people who call Australia home,¹⁷ 26% were born overseas, 2.8% identify as Aboriginal or Torres Strait Islander people, and more than 21% speak a language other than English at home.¹⁸ More than half a million people identify as non-heterosexual,¹⁹ and over a thousand reported diverse sex or gender

¹¹ James Forrest and Kevin Dunn, ‘“Core” Culture Hegemony and Multiculturalism’ (2006) 6(2) *Ethnicities* 203; Eugenia Flynn, ‘In The Face of a Hostile Dominant Culture We Will Continue to Share Our Art, and It Will Be Deadly’ (*The Guardian*, Sydney, 29 November 2016) <<https://www.theguardian.com/commentisfree/2016/nov/29/in-the-face-of-a-hostile-dominant-culture-we-will-continue-to-share-our-art-and-it-will-be-deadly>>; Alice Aslan, *Islamophobia in Australia* (Agora Press, 2009), 21;

¹² Hannah Derwent, ‘Able-Bodied? Yes, You Are Privileged’ (*The Sydney Morning Herald*, Sydney, 31 December 2018) <<https://www.smh.com.au/national/able-bodied-yes-you-are-privileged-20181229-p50oq6.html>>..

¹³ Virginia Phillips, ‘Language, Cultural Identity and Empowerment in the Dominant Culture’ (1992) 20(2) *The Australian Journal of Indigenous Education* 25.

¹⁴ Joshua Collins, ‘Characteristics of “Masculinised” Industries: Gay Men as a Provocative Exception to Male Privilege and Gendered Rules’ (2015) 14(4) *Human Resource Development Review* 415

¹⁵ See e.g. John Lawson, ‘Disability as a Cultural Identity’ (2001) 11(3) *International Studies in Sociology of Education*, 203. Elizabeth Holman, ‘Role-Taking vs Cultural Identity: Defining Disability in an Able-Bodied Environment’ (Honours Thesis, Illinois Wesleyan University, 2005); Mary Kalantzis et al, *Minority Languages and Dominant Culture* (The Palmer Press, 1989).

¹⁶ Justice Michael Kirby AC, ‘Independence of the Legal Profession: Global and Regional Challenges’ (Speech, Presidents of Law Associations in Asia Conference, 20 March 2015).

¹⁷ The last Australian census was completed in 2016. This number reflects the projected Australian population at the date of writing. See ‘Population Clock’, *Australian Bureau of Statistics* (Web Page, 6 August 2019) <www.abs.gov.au>.

¹⁸ Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Catalogue No 2071.0, 28 June 2017).

¹⁹ Australian Bureau of Statistics, *General Social Survey: Summary Results, Australia, 2014* (Catalogue No 4159.0, 29 June 2015).

identities.²⁰ One of five live with some form of disability.²¹ These characteristics (and others) overlap and intersect to form complex social identities and communities.

Australia is also part of a global economy, both making and attracting significant foreign investments.²² In the 2014-2015 financial year, foreign-owned businesses in Australia contributed over 20% in industry value added to the Australian economy, and supported the employment of nearly 1.2 million people (or 1 in 10 Australian jobs).²³

The changing face of the population, and the increase in international transactions, present challenges for the Australian legal system. Lawyers and courts are required to consider issues which have not previously been raised in the Australian context: for example, accounting for harm caused by loss of ‘face’ when assessing damages in commercial disputes involving Asian litigants,²⁴ or navigating the requirements of Islamic banking law when advising on banking and financial transactions.²⁵ For legislators and administrators of the justice system, there are challenges in identifying and responding to different legal needs and vulnerabilities to facilitate equitable outcomes.²⁶

In this regard, it is acknowledged that the Australian legal system has taken great strides to improve access to justice for different groups in the community. One significant achievement is the recognition that in a diverse society, the foundational principle of equal justice not only

²⁰ Australian Bureau of Statistics (n 18).

²¹ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (Catalogue No 4430.0, 18 October 2016).

²² Australia is one of the top 20 countries in the world for both inward and outward foreign direct investment. See further ‘Foreign Investment Statistics’, *Department of Foreign Affairs and Trade* (Web Page) <<https://dfat.gov.au/trade/resources/investment-statistics/Pages/foreign-investment-statistics.aspx>>.

²³ Department of Foreign Affairs and Trade, *Economic Activity Of Foreign- Owned Businesses In Australia 2014-15* (Article, November 2018)

²⁴ See *The Korean Times Pty Ltd v Un Dok Pak* [2011] NSWCA 365; *Peter Tao Zhu v Sydney Organising Committee for the Olympic Games & Ors* [2001] NSWSC 989. For a summary of these cases, and commentary on the concept of ‘face’ in Asian culture, see Cam Truong and William Lye, ‘The Rise of Asian Litigants in Commercial Disputes’ (Speech, Foley’s List Commercial CPD Series, 15 March 2017).

²⁵ See further Abu Umar Faruq Ahmad, *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia* (BrownWalker Press, 2010) 98; Salim Farrar, ‘Accommodating Islamic Banking and Finance in Australia’ (2011) 34(1) *UNSW Law Journal* 413. For an overview of selected cases relating to Islamic banking and finance, see The Hon M J Beazley, ‘The intersection of Australian law and the Islamic faith: a selection of cases’ (Speech, Affinity Intercultural Foundation, 27 August 2014).

²⁶ See Victorian Multicultural Commission, *Submission to the Access to Justice Review* (Submission, March 2016)

allows, but indeed requires, the consideration of individual differences.²⁷ As an example, judges' bench books now contain guidance for responding to the needs of culturally and linguistically diverse ('CALD') communities, rural or regional communities and lesbian, gay, bisexual, transexual, queer and intersex ('LGBTQI') communities.

A further achievement is that these differences are now considered in a more nuanced manner. This is illustrated by the approach taken by courts in criminal law cases involving defendants from ethnic and religious minorities. Earlier cases²⁸ were often decided on the basis of 'profoundly racist'²⁹ and sexist stereotypes. A common result was the defendant being excused from serious offences on the basis that they had been 'driven to violence'³⁰ as a result of being a man and belonging to a non-Anglosaxon ethnicity or religion. By contrast, more recent cases³¹ have held that an individual's race is not in itself a mitigating factor for criminal behaviour, but individual circumstances related to their race may be taken into account. Such circumstances may include substance abuse, exposure to violence and lack of formal education as a result of institutional disadvantage experienced by Aboriginal Australians.

However, much remains to be done. Despite best endeavours, sexism, racism and other forms of discrimination remain alive and well. As recently as 2019, a judge in the Northern Territory said, in relation to a young Indigenous mother, that she had probably received government money on pension day and, 'in that great Indigenous fashion of abrogating [her] parental responsibility', abandoned her children to get drunk'.³²

²⁷ See e.g. Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992), [8.20]. For a discussion of equality before the law and individual differences (including references to relevant case law), see Justice Virginia Bell, 'Equality, Proportionality and Dignity: the Guiding Principles for a Just Legal System' (2017) 42(1) *Alternative Law Journal* 4; French CJ (n 3).

²⁸ See e.g. *Moffa v the Queen* (1997) 138 CLR 601; *R v Dincer* (1983) VR 460.

²⁹ Greta Bird, 'Power Politics and the Location of the 'Other' in Multicultural Australia' in *Multiculturalism and the Law* (Australian Institute of Criminology, 1995) 5, quoted in Greta Bird and Mark McDonnell, 'Muslims in the Dock: A Transgressive Narrative of Law and Life' (1997) 3(2) *Australian Journal of Human Rights* 111, 118.

³⁰ Bird and McDonnell (n 13), 118.

³¹ *Bugmy v the Queen* (2013) 249 CLR 571; *Munda v Western Australia* (2013) 249 CLR 600, 618.

³² Christopher Knaus, 'NT Judge Compares Indigenous Offender to Primitive Person' (*The Guardian*, Northern Territory, 18 July 2019) <<https://www.theguardian.com/australia-news/2019/jul/18/nt-judge-compares-indigenous-offender-to-primitive-person>>.

Even putting aside individual instances of unacceptable behaviour, there remain institutional disadvantages for diverse communities. Australian laws are still introduced, debated and passed by politicians who are able-bodied, predominantly male³³ and overwhelmingly white,³⁴ and adverse impacts of those laws disproportionately affect members of the community who do not fit that description. One example of this is the Northern Territory Intervention, which was intended to ‘close the gap’ for Indigenous Australians but in practice resulted in a 41% increase in Indigenous incarceration.³⁵ Information about the law is largely published online and in English, creating communication and knowledge barriers for people who live with disabilities, speak English as a second language, and/or simply have limited access to technology.³⁶

Further, for migrant communities unfamiliar with Australian laws and processes, the justice system is seen as intimidating, unresponsive to their needs, and available only to those with the financial and other resources to enforce their legal rights in court.³⁷ This perception is not helped by the traditions of the court system and the legal profession, such as formal court processes, the use of legal jargon, and time billing practices. As a result, many individuals from diverse communities either take no action in response to a legal problem, or take action based on inappropriate advice,³⁸ resulting in poorer outcomes.³⁹ This in turn perpetuates further distrust of the law and the legal system.

³³ Jane Norman, ‘Women Still Underrepresented in Parliament after the 2019 Federal Election’, *ABC News* (Web Page, 27 May 2019) <<https://www.abc.net.au/news/2019-05-27/women-still-underrepresented-in-parliament/11148020>>.

³⁴ Damien Cave, ‘In a Proudly Diverse Australia, White People Still Run Almost Everything’ (*The New York Times*, Sydney, 10 April 2018) <<https://www.nytimes.com/2018/04/10/world/australia/study-diversity-multicultural.htm>>.

³⁵ Stephen Gray, ‘Scoring the Intervention: Fail Grades on Closing the Gap, Human Rights’ (2016) 8(23) *Indigenous Law Bulletin*, 10; Castan Centre for Human Rights Law, *The Northern Territory Intervention: An Evaluation* (Report, July 2015).

³⁶ Louis Schetzer et al, *Access to Justice and Legal Needs: A Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW* (Background Paper, March 2002), 17-28; Victorian Multicultural Commission, *Submission to the Access to Justice Review* (Submission, March 2016), 11-12.

³⁷ *Ibid.*

³⁸ Victorian Multicultural Commission (n 36).

³⁹ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72).

C. Representation in the Legal Profession

One solution to the challenges outlined above is to have greater representation in the legal profession.

Representation is important for many reasons. Firstly, the inclusion of different faces and voices sends a strong message of inclusion and equal opportunity to members of diverse communities: *you are represented, you are heard, your concerns are valid,⁴⁰ and you have the right to be here.⁴¹* When strong, intelligent members of diverse communities have a seat at the table, they are in a position to question existing biases and call out unacceptable behaviour, fostering a culture of greater respect in the legal system.⁴²

Secondly, and from a more practical point of view, greater representation will allow for different perspectives to be considered, and different approaches taken, when developing and/or applying the law. For example, it has been observed that women judges bring a ‘gendered sensibility’ to the process of decision-making because they have life experiences which are inherently very different to those of men, such as pregnancy and childbirth.⁴³ It has also been argued that women are more likely to apply an ethic of care which acknowledges and preserves social relationships, rather than an ethic of justice which makes judgments on the basis of individual interests in a hierarchy of rights.⁴⁴

To be clear, these arguments are not put forward as an assertion that all women have the same experiences, or that there is a single ‘feminine’ approach to lawyering. On the contrary, they illustrate that there are many different perspectives and approaches, which necessarily result in different arguments being made and different steps taken to resolve legal issues. It is submitted

⁴⁰ Yolanda Young, ‘Why the US Needs More Black Lawyers’ (*The Guardian*, New York, 12 March 2015) <<https://www.theguardian.com/world/2015/may/11/why-the-us-needs-black-lawyers>>

⁴¹ Rosemary Hunter, ‘More than Just a Different Face? Judicial Diversity and Decision-making’ (2015) 68(1) *Current Legal Problems* 119, 122; Brenda Hale, ‘Equality and the Judiciary: Why Should We Want More Women Judges?’ (2001) *Public Law*, 489.

⁴² Jason Schultz, ‘Can Women Judges Help Make Civil Sexual Assault Trials More Therapeutic?’ (2001) 16 *Wisconsin Women’s Law Journal* 53; Justice Louise Arbor, quoted in Justice Michael Kirby, ‘Women Lawyers: Making a Difference’ (Speech, Women Lawyers Association of New South Wales, 18 June 1997).

⁴³ Shirley Abrahamson, ‘Do Women Judges Really Make a Difference? The American Experience’ in Shimon Shetreet (ed), *Women in Law* (Kluwer 1998) 195.

⁴⁴ Carol Gilligan, *In A Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982).

that lawmakers, decision-makers and practitioners with different life experiences and values make the law more representative of the variety of human experience, and therefore more responsive to community needs.⁴⁵

Therefore, on both a symbolic and pragmatic level, the inclusion and representation of diverse communities will strengthen public confidence in the legal system and facilitate better access to justice. However, the Australian legal profession remains largely monolithic, consisting largely of individuals from the dominant culture.⁴⁶

This is reflected in the numbers: Although more than 50% of lawyers are women, less than 20% are in principal positions in law firms,⁴⁷ and there remains a gender pay gap of about 10%.⁴⁸ To the extent that there has been an increase in gender representation, the shift largely favours white women.⁴⁹ Asian lawyers make up 8% of partners in leading Australian law firms,⁵⁰ 1.6% of the bar, and 0.8 of the judiciary,⁵¹ and there is even less representation for other ethnic minorities.⁵² There are no statistics available on lawyers with disabilities in Australia.

More instructive, however, are the anecdotal experiences of lawyers and law students. Consider, for example, the results of the Lawyers Weekly LGBTQI Survey, in which 21% of legal professionals who identified as LGBTQI reported witnessing or experiencing discriminatory or

⁴⁵ Hunter (n 41), 122.

⁴⁶ Sana Qadar, 'Why Culturally Diverse Workers Can Struggle to Advance to Management Positions', *ABC Life* (Web Article, 10 July 2019).

⁴⁷ Scarlet Reid, 'What Next for Women in Law?', *LSJ Online* (Web Article, 10 May 2019)

<<https://lsj.com.au/articles/year-101-what-next-for-women-in-law/>>

⁴⁸ Sam McKeith, 'Building Diversity in the Legal Profession', *LSJ Online* (Web Article, 4 May 2019)

<<https://lsj.com.au/articles/building-diversity-in-the-legal-profession/>>

⁴⁹ Sally Kohn, 'Affirmative Action Has Helped White Women More than Anyone', *Time* (Web Page, 17 June 2013)

<<http://ideas.time.com/2013/06/17/affirmative-action-has-helped-white-women-more-than-anyone/>>.

⁵⁰ Michael Pelly, 'Asian Lawyers Hit Bamboo Ceiling' (*Financial Review*, 26 August 2019). Note that a separate survey by the Asian Australian Lawyers Association found that only 3.1% of partners were of Asian background (see Australian Lawyers Association ('AALA'), *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015* (Report, 2015), 4.

⁵¹ AALA (n 50).

⁵² Law Society of New South Wales, *National Profile of Solicitors 2016* (Report, 24 August 2017); see also Alexander Ward, 'Indigenous Australians and the Legal Profession' (2011) 7(26) *Indigenous Law Bulletin* 1; Kathy Mack and Sharyn Roach Anleu, 'The National Survey of Australian Judges: An Overview of Findings' (2008) 18(5) *Journal of Judicial Administration* 11.

offensive behaviour ‘often or very often’.⁵³ Consider, also, the following account of a first year law lecture at the University of Queensland, written in 2019 by a law student of Asian Australian background:

*Quite noticeably, there was not much cultural diversity in the room. Only then was I able to make a trip down memory lane, to when one of my high school teachers told me to reconsider my career decisions because realistically, it was going to be almost impossible to be successful in the legal field as someone of an Asian Australian background.*⁵⁴

As is the case in the broader legal system, the Australian legal profession is taking steps towards inclusion and recognition of differences as a strength rather than a weakness. Junior lawyers are significantly more representative of the wider Australian population,⁵⁵ and law firms and institutions are actively considering diversity and inclusion both as part of their organisational values and in their talent attraction and retention strategies.⁵⁶ However, this work is only in its infancy - law firms are only now commencing an enquiry into the extent of the problem⁵⁷ - and it will be some time before parity in the legal profession can be achieved.

Further, representation is only part of the solution. Even if the legal profession were to mirror the Australian population, it would be unrealistic to expect all lawyers to work only with people who share the same characteristics as them. Further, effective lawyering is not just about representing a particular client’s interests, but also working collaboratively with others to achieve a mutually beneficial outcome. Therefore, Part II of this essay will argue that an equally important task is to build capacity in legal professionals, so that they are better equipped to work with different

⁵³ Tom Lodewyke, ‘Report Sheds Light on LGBTQI Inclusion in Law Firms’, *Lawyers Weekly* (Web Article, 12 December 2017).

⁵⁴ Sian Hur, ‘Experience at Law School as a Student of an Asian Australian Background’, *Lawyers Weekly* (Web Article, 29 March 2019) <<https://www.lawyersweekly.com.au/careers/25352-experience-at-law-school-as-a-student-of-an-asian-australian-background>>.

⁵⁵ Pelly (n 50); Law Society of New South Wales (n 52).

⁵⁶ See e.g. Law Council of Australia, ‘Diversity and Equality Charter’ ; Katie Walsh, ‘Law Firms Unite to Shake Up Appearance: Cultural Diversity Pledge’ (*Australian Financial Review*, Sydney, 22 March 2017).

⁵⁷ Michael Pelly, ‘Law Firms Test Their Cultural Diversity in Landmark Survey’ (*Australian Financial Review*, Sydney, 16 April 2018).

people, and to respond effectively to any issues or challenges which may arise in diverse settings.

II. DIVERSITY INTELLIGENCE AS AN ESSENTIAL LEGAL SKILL

Different terms have been used to describe the skills and attributes necessary to succeed in a diverse environment, including cultural sensibility,⁵⁸ cultural intelligence⁵⁹ and cultural competence,⁶⁰ with the last being the most common. Each incorporates a combination of interlinking competencies, as set out below:

- (a) an awareness of others and knowledge about how they are similar or different to oneself;⁶¹
- (b) practical skills necessary to function appropriately and effectively in unfamiliar situations, or in encounters with individuals who may be different to oneself, such as the ability to adapt one's own behaviour or style as required when communicating with others;⁶²
- (c) an awareness of one's own influences, biases and prejudices;⁶³ and
- (d) a commitment to reflection, self-evaluation, and self-critique, while admitting limits to one's knowledge and being teachable.⁶⁴

It is submitted that the use of the word 'culture' in the above context is problematic because of the difficulty in defining 'culture'.⁶⁵ Recent literature tends to use a broad, and often vague,

⁵⁸ Andrea Curcio et al, 'Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process' (2012) 16 *University of Western Sydney Law Review* 100.

⁵⁹ Truong and Lye (n 24); Peter Earley and Soon Ang, *Cultural Intelligence: Individual Interactions Across Cultures*, (Stanford University Press, 2003).

⁶⁰ Travis Adams, 'Cultural Competency: A Necessary Skill for the 21st Century Attorney' (2012) 4(1) *Law Raza* Article 2; Susan Bryant, 'The Five Habits: Building Cross-Cultural Competence in Lawyers' (2001) 8(33) *Clinical Law Review* 22; Serena Patel, 'Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World' (2014) 62 *University of California, Los Angeles Law Review Discourse* 140; Tom Calma, 'What Does Australia Need to Do for Cultural Competence to Flourish' (Speech, Cultural Competencies Conference, 8 September 2006); Alison Gerard et al, 'Embedding Indigenous Cultural Competence in a Bachelor of Laws at the Centre for Law and Justice, Charles Stuart University: A Case Study' in Kevin Lindgren, Francis Kunc, Michael Coper (eds) *The Future of Australian Legal Education: a Collection* (Thomson Reuters, 2018) 323.

⁶¹ Felicity Deane et al, 'Chinese Cultural Competency and Australian Law Students: Reflections on the Design of Short Term Mobility Programs' (2015) 40(4) *Alternative Law Journal* 271, 271.

⁶² Ang et al, 'Cultural Intelligence: Its Measurement and Effects on Cultural Judgment and Decision Making, Cultural Adaptation and Task Performance' (2007) 3(3) *Management and Organization Review* 335.

⁶³ Deane et al (n 61);

⁶⁴ Li-Rong Lilly Cheng, 'Cultural Intelligence (CQ): A Quest for Cultural Competence' (2007) 29(1) *Communication Disorders Quarterly* 36,

definition of culture, such as ‘a pattern of beliefs, customs and values shared by a particular group or society’,⁶⁶ or ‘a fluid, ever-changing set of values, knowledge and beliefs’.⁶⁷ The word has even been defined in the negative: ‘not a static set of attributes ... not definitive of a person’s identity or conduct.’⁶⁸ However, the word is commonly used and understood in relation to racial, ethnic or religious customs, beliefs, values and institutions,⁶⁹ which does not cover the full spectrum of diversity. This lack of clarity may result in confusion as to the scope of the skill set required. The use of the word ‘competence’ is also problematic in this context, because it assumes that it is possible to become competent in, or ‘master’, another person’s culture.⁷⁰

Therefore, this essay uses an alternative term - ‘diversity intelligence’. The concept of ‘diversity intelligence’ is relatively new, and has so far only been applied in the context of organisational behaviour and people management issues.⁷¹ It is defined as ‘the capability of individuals to recognise the value of diversity and to use this information to guide thinking and behaviour’.⁷²

It is submitted that ‘diversity intelligence’ is a preferable term for two reasons. From a linguistics perspective, the use of the word ‘diversity’ allows for recognition of the myriad of differences which make up an individual’s identity, and the use of the word ‘intelligence’ is consistent with descriptors for other, commonly accepted capabilities, such as emotional intelligence. On a more philosophical level, the concept of ‘diversity intelligence’ adds a fifth, important element to the set of skills and attributes required, which is not expressly articulated in the other descriptors

⁶⁵ Evan Hamman, ‘Culture, Humility and the Law: Towards a More Transformative Teaching Framework’ (2017) 42(4) *Alternative Law Journal*, 156.

⁶⁶ Marcie Fisher-Borne et al, ‘From Mastery to Accountability: Cultural Humility as an Alternative to Cultural Competence’ (2015) 34(2) *Social Work Education* 165; Deane et al (n 61).

⁶⁷ Helen Spencer-Oatey, *Culturally Speaking: Culture, Communication and Politeness Theory* (Continuum, 2008), 3.

⁶⁸ French CJ (n 3), 11; see also Susan Armstrong, ‘Accommodating Culture in Family Dispute Resolution: What, Why, and How?’ (2011) 20 *Journal of Judicial Administration* 167.

⁶⁹ See e.g. ‘Face the facts: Cultural Diversity’, *Australian Human Rights Commission* (Web Page, 25 February 2015).

⁷⁰ Curcio et al (n 58); Hamman (n 65); Fisher-Borne et al (n 66).

⁷¹ Claretha Hughes, *Diversity Intelligence: Integrating Diversity Intelligence Alongside Intellectual, Emotional and Cultural Intelligence for Leadership and Career Development* (Palgrave Macmillan, 2016); Cynthia M. Sim, ‘The Diversity Intelligent Servant Leader: Developing Leaders to Meet the Needs of a Diverse Workforce’ (2018) 20(3) *Advances in Developing Human Resources* 313; Jenell Wittmer and Margaret Hopkins, ‘Exploring the Relationship Between Diversity Intelligence, Emotional Intelligence, and Executive Coaching to Enhance Leader Development Practices’ (2018) 20(3) *Advances in Developing Human Resources* 285.

⁷² Claretha Hughes, ‘The Role of HRD in Using Diversity Intelligence to Enhance Leadership Skill Development and Talent Management Strategy’ (2018) 20(3) *Advances in Developing Human Resources* 259, 260.

above: an appreciation for the importance of diversity and the value of differences, without trying to make everyone alike.⁷³

Having established the above, this essay turns now to the reasons why diversity intelligence is a necessary skill for the Australian legal profession.

Lawyers have ethical and professional duties, both under common law and statute. Solicitors and barristers are required under relevant rules of professional conduct to act competently with reasonable care and skill, and in the best interests of their client.⁷⁴ Federal judges take an oath (or affirmation) upon appointment to 'do right to all manner of people according to law without fear or favour, affection or ill-will'.⁷⁵ The wording in Victorian courts is slightly different: judges and magistrates are not required to do right to all manner of people, but are required to discharge their duties to the best of their knowledge and ability.⁷⁶ In order to discharge these duties, lawyers are required not only to demonstrate strong technical skills, but also an ability to understand the context surrounding a particular dispute and identify the interests of the parties involved, both of which are furthered by diversity intelligence.⁷⁷

Issues affecting diverse communities often have implications for how the law is applied, and therefore a mastery of the law necessarily includes a solid understanding of these issues. For example, assessment of a child's best interests in family law requires consideration of the child's lifestyle, culture and traditions (especially if the child is from an Aboriginal or Torres Strait Islander background).⁷⁸ It follows that a lawyer with a nuanced understanding of different cultures and traditions would be in a better position to consider the impact of proposed arrangements on a child. Where a lawyer with a limited understanding of cultural differences may rely on their stereotypes to make broad inferences, a lawyer with diversity intelligence

⁷³ Hughes (n 71), 76.

⁷⁴ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* ('Solicitors' Conduct Rules'), r 4.1.1; 4.1.3; *Legal Profession Uniform Law Conduct (Barristers) Rules 2015* ('Barristers' Conduct Rules'), r 4(c), 35. For a discussion of lawyers' duties under common law, see Christine Parker, Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness" [2002] (2002) 25(3) *University of New South Wales Law Journal* 676, 688.

⁷⁵ *High Court Act of Australia 1979* (Cth), s 11; *Federal Court Act of Australia 1976* (Cth) s 18Y.

⁷⁶ *Supreme Court (Oath and Affirmation of Office) Regulations 2014* (Vic); *Magistrates' Court General Regulations 2014* (Vic).

⁷⁷ Adams (n 60).

⁷⁸ *Family Law Act 1975* (Cth), ss 60CC(g) - (h).

would also be better equipped to recognise deeper cultural differences, and identify how clients may have different interests, even if they are of a similar background.⁷⁹

Even if it is not expressly required under law, diversity intelligence can still be crucial in achieving an equitable outcome in a legal dispute. In this regard, identifying the interests of the parties requires deep listening skills,⁸⁰ an ability to ask difficult questions in a respectful manner,⁸¹ the ability to see things from a different perspective,⁸² and the discipline to avoid imposing one's own expectations of what the client's interests should be.⁸³ As Cam Truong and William Lye point out, Australian lawyers who understand different business styles in Asia could achieve timely and cost-effective resolution of legal disputes, while protecting the reputation ('face') of their clients.⁸⁴

Further, a lack of diversity intelligence leaves lawyers vulnerable to unconscious bias. 'Unconscious bias' refers to unconscious, instinctive negative judgment about others,⁸⁵ resulting from cognitive reasoning embedded through an individual's background, culture and personal life experiences (often at a young age).⁸⁶ It exists in every person, informing their judgment and decision-making, especially in time-sensitive, high-pressure situations such as the resolution of a legal dispute.⁸⁷ Given the high stakes involved in many legal disputes, unconscious bias could have serious adverse consequences for the administration of justice.

In order to overcome unconscious bias, one must first recognise the problem, then be motivated to overcome it.⁸⁸ Diversity intelligence provides a two-pronged approach to overcoming

⁷⁹ Adams (n 60).

⁸⁰ Bryant (n 60).

⁸¹ Liz Margolies and Carlton Brown, 'Increasing Cultural Competence with LGBTQ Patients' (2019) 49(6) *Nursing* 2019 34.

⁸² Sue Bryant and Jean Koh-Peters, 'Five Habits for Cross-Cultural Lawyering' in Kimberly Holt Barrett and William H George (eds) *Race, Culture, Psychology and the Law* (Sage Publications, 2005) 47, 47.

⁸³ Bryant (n 60); Rose Voyvodic, 'Lawyers Meet the Social Context: Understanding Cultural Competence' (2006) 84(3) *Canadian Bar Review* 563.

⁸⁴ Truong and Lye (n 24).

⁸⁵ Debra Chopp, 'Addressing Cultural Bias in the Legal Profession'; Jeffrey Rachlinski and Sherri Johnson, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84(3) *Notre Dame Law Review* 1195.

⁸⁶ Norma Garcicella Cuellar, 'Unconscious Bias: What is Yours?' (2017) 28(4) *Journal of Transcultural Nursing* 333.

⁸⁷ Mark Bennett, 'The Implicit Bias in Sentencing: the Next Frontier' (2017) 126 *Yale Law Journal* 391.

⁸⁸ Jerry Kang, 'Trojan Horses of Race' (2005) 118 *Harvard Law Review*.

unconscious bias. It first encourages individuals to identify and critically reflect on their own biases. It then invites individuals to consider, learn more about and recognise the value of different perspectives and realities, which humanises the other person and provides motivation for the individual to overcome their initial bias.

In light of the above, it is encouraging that the Judicial College of Victoria has, for 10 years, had a Framework for Judicial Skills and Qualities, which includes 'sensitivity to difference and particular needs' as a key personal quality for Victorian Judicial Officers.⁸⁹ This is supported by a CPD Scheme which includes awareness of social context and how to respond to changes in society, particularly cultural awareness.⁹⁰ This position reflects an understanding that diversity intelligence is a necessary skill in the administration of the court system, and like all skills, must be regularly practised and honed. Part III of this essay will advocate for similar steps to be taken to include diversity intelligence training in CPD requirements for legal practitioners (i.e. solicitors and barristers).

⁸⁹ Judicial College of Victoria, *Framework of Judicial Abilities and Qualities for Victorian Judicial Officers* (Policy, September 2008).

⁹⁰ 'Continuing Professional Development', *Judicial College of Victoria* (Web Page, 7 September 2017) <<https://www.judicialcollege.vic.edu.au/judicial-education/continuing-professional-development>>.

III. PROPOSAL FOR MANDATORY DIVERSITY INTELLIGENCE TRAINING AS PART OF CPD REQUIREMENTS FOR LEGAL PRACTITIONERS

A. *CPD under the Legal Professional Uniform Law*

The Australian Legal Profession is regulated by state law. However, the profession is moving towards a single regulatory framework across Australia, consisting of the Legal Profession Uniform Law (‘Uniform Law’) and Rules made under the Uniform Law. So far, this framework has only been implemented in Victoria⁹¹ and the New South Wales,⁹² although Western Australia is expected to adopt the Uniform Law by 2020.⁹³

The objective of the Uniform Law is to “promote the administration of justice and an efficient and effective Australian legal profession”,⁹⁴ including (*inter alia*) by “ensuring that lawyers are competent and maintain high ethical and professional standards in the provision of legal services”.⁹⁵ Section 44 requires legal practitioners to maintain a practising certificate, to be renewed annually by application. It is a statutory condition of every practising certificate issued under the Uniform Law that the holder comply with applicable CPD requirements.⁹⁶

The applicable CPD requirements are set out in Continuing Professional Development Rules (‘CPD Rules’), which are identical across all jurisdictions under the Uniform Law. There are separate CPD Rules for solicitors⁹⁷ and barristers,⁹⁸ reflecting different skills and attributes required for competent practice in each profession. Generally speaking, both solicitors and

⁹¹ *Legal Profession Uniform Law Application Act 2014* (Vic).

⁹² *Legal Profession Uniform Law Application Act 2014* (NSW).

⁹³ New South Wales Department of Justice, New South Wales Department of Justice, ‘Western Australia to adopt Uniform Law’ (Media Release, 28 February 2019) <<https://www.justice.nsw.gov.au/Pages/media-news/media-releases/2019/western-australia-to-adopt-uniform-law.aspx>>.

⁹⁴ *Legal Profession Uniform Law Application Act 2014* (Vic), sch 1, s 3.

⁹⁵ *Ibid*, sch 1, s 3(b).

⁹⁶ *Ibid*, sch 1, s 52.

⁹⁷ *Legal Profession Continuing Professional Development (Solicitors) Uniform Rules 2015* (Vic) (‘Solicitors’ CPD Rules’).

⁹⁸ *Legal Profession Continuing Professional Development (Barristers) Uniform Rules 2015* (Vic) (‘Barristers’ CPD Rules’).

barristers are required to undertake 10 hours' worth of CPD activities per year, including at least one hour in each of the following prescribed fields ('CPD Categories'):

- (a) ethics and professional responsibility;
- (b) practice management and business skills;
- (c) professional skills (for solicitors), or barristers' skills (for barristers); and
- (d) substantive law (for solicitors), or substantive law, practice and procedure, and evidence (for barristers).⁹⁹

CPD activities must be of significant practical or intellectual content relevant to the practice of law, conducted by a person qualified by practical or academic experience in the subject covered, and relevant to the practice needs and professional development of the individual undertaking the CPD activity.¹⁰⁰

Compliance with CPD requirements is expressed to be closely tied to an individual's right to engage in legal practice.¹⁰¹ An ongoing failure to comply with CPD requirements can result in conditions being imposed on an individual's practising certificate or consideration as to whether the individual is fit and proper to hold a practicing certificate.¹⁰²

B. *Proposal*

It is proposed that 'diversity intelligence' be included as a separate CPD Category, in relevant CPD Rules for both solicitors and barristers. The effect of this proposal is that the total time required to undertake CPD activities (10 hours per annum) remains unchanged, but at least one of the 10 hours must be spent undertaking an activity to develop the skills and attributes for diversity intelligence, as described in Part II above.

⁹⁹ Solicitors' CPD Rules (n 97), r 6; Barristers' CPD Rules (n 98), r 9. Note that the CPD Categories are not defined in either the Solicitors' CPD Rules or Barristers' CPD Rules, but examples of topics falling within each category are provided by the relevant institutions. See e.g. The Law Society of New South Wales, *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* (Fact Sheet, 31 March 2018) 2; The Law Society of New South Wales, *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015* (Fact Sheet, 31 March 2018) 2; Law Institute Victoria, 'CPD Compulsory Fields', *Legal Compliance* (Web Page) <<https://www.liv.asn.au/Professional-Practice/Compliance/CPD-Compliance/CPD-requirements---FAQs/CPD-compulsory-fields>>.

¹⁰⁰ Solicitors' CPD Rules (n 97), r 7; Barristers' CPD Rules (n 98), r 6.

¹⁰¹ Victorian Legal Services Board, *Continuing Professional Development Policy* (at 2016) ('CPD Policy'), s 3.3.1.

¹⁰² *Ibid.*

As is the case with other CPD Categories, the CPD Rules should not be prescriptive about the contents of diversity intelligence training, although examples can be provided to assist legal practitioners. This allows flexibility for legal practitioners to identify diversity-related skills and knowledge necessary to support and enhance their practice. It is submitted that this proposal will achieve the desired outcome of regular training in relation to diversity issues, and better capability in responding to the needs of diverse communities, without creating an additional burden on legal practitioners.

C. Other Jurisdictions

The New York Bar, which has comparable registration and continuing legal education ('CLE') requirements to the Uniform Law, has recently adopted a similar proposal. As of 1 January 2018, all attorneys must complete at least one credit hour on 'diversity, inclusion and the elimination of bias' every two years.¹⁰³ Courses offered under this category cover topics such as cultural diversity in the American military, the gender gap in litigation and compliance, social security benefits for people with mental illness, and effective representation of people with disabilities,¹⁰⁴ reflecting the full spectrum of legal issues in a complex and diverse society.

This change was the result of a report and recommendation by the American Bar Association, which identified increased training as a tangible way to move the needle on diversity and inclusion within the legal profession and the judicial system.¹⁰⁵ While it is difficult to tell, at this time, whether or not it will result in real change, it is clear that it has already sparked awareness among legal professionals in New York, and the feedback so far has been largely positive.¹⁰⁶

¹⁰³ *New York State CLE Board CLE Program Rules*, 22 NYCRR §1500.22.

¹⁰⁴ See e.g. Lawline, 'New York Diversity, Inclusion and Elimination of Bias CLE courses', *LawLine Courses New York* (Catalogue) <<https://www.lawline.com/cle/new-york/courses/credit-diversity-inclusion-and-elimination-of-bias>>; New York State Bar Association, 'Diversity, Inclusion and Elimination of Bias Curriculum', *Continuing Legal Education* (Web Page) <<http://www.nysba.org/DiversityCLE/>>.

¹⁰⁵ *Diversity and Inclusion 360 Commission Executive Summary* (Report, August 2016); American Bar Association, *Diversity and Inclusion 360 Committee Report to the House of Delegates* (Resolution No 107, February 2016) 1.

¹⁰⁶ See letters of support from members of the New York legal profession, available on: Association of the Bar of the City of New York, 'Support Proposed CLE Rule on Diversity, Inclusion and the Elimination of Bias', (Web Page, 18 January 2017) <<https://www.nycbar.org/media-listing/media/detail/support-proposed-cle-rule-on-diversity-inclusion-and-the-elimination-of-bias-new-york>>.

D. *Potential issues*

One possible objection is that diversity intelligence is already covered by other CPD Categories, and therefore the change is unnecessary. However, it is submitted that while there may be an overlap, diversity intelligence should stand as an independent CPD Category for a number of reasons.

Under the status quo, lawyers can choose to do training relating to diversity intelligence, and only if they feel that it is relevant to their work. This leaves skill development to chance, or at the very least, to the initiative and goodwill of the individual practitioner,¹⁰⁷ making it difficult to enforce or even report on a common standard of diversity intelligence across the sector. Further, under the status quo lawyers may receive information about diverse communities without gaining any insight about members of that community.¹⁰⁸ For example, a substantive environmental law lecture about may include a discussion about the Aboriginal land affected, but need not be taught by an Aboriginal person or involve any discussion of Aboriginal beliefs, culture or relationship with land. However, if the same subject were discussed with a diversity intelligence lens, it would be appropriate for lawyers to hear from an Aboriginal elder with lived experience of environmental impacts on their land, allowing them to gain a different perspective that informs their practice.

Perhaps more importantly, including diversity intelligence as a separate CPD requirement promotes awareness that it is an essential skill for lawyers. This is important not only for legal practitioners, but also for members of the community, because it reflects a commitment by the legal profession to address its own biases and shortfalls, in order to better serve the needs of a diverse community. While public trust in the legal system cannot be built overnight, this is one step in the right direction.

¹⁰⁷ Andrew King-Ries, 'Just What the Doctor Ordered: The Need for Cross-Cultural Education in Law School' (2009), 5 *Tennessee Law Journal and Policy* 27.

¹⁰⁸ Gerard et al (n 60).

CONCLUSION

In 2004, Justice Michael Kirby observed as follows:

I dream that Australia's law, in keeping with the times, will be truly committed to equal justice for claims that are equal. Most particularly, it is my dream that young lawyers, who will soon take their place in the Australian legal profession, will have a real commitment to the principle of 'equal protection under the law'. That their eyes will be freed from the prejudices and attitudes of the past and vigilant to wrongs, wherever they appear in law's discipline.

Such freedoms do not come from hoping for them. They do not arise solely from dreams and aspirations. They come about through growing social awareness and action.¹⁰⁹

Australia is one of the most diverse and inclusive countries in the world, and it is richer for its diversity. At the same time, it is asserting its role in the global economy.

Buoyed by the forces of globalisation and social change, the Australian legal system now operates on a more sophisticated understanding of 'equal justice', which takes into account the diverse needs and interests of the Australian community. However, there remain barriers preventing diverse communities from actually attaining equal justice. This is obviously not an ideal state of affairs.

With the above in mind, this essay explores solutions to facilitate equal access to justice, with a particular focus on improvements for the legal profession. In this regard, it is acknowledged that the legal profession should be more representative of the diverse communities it serves. However, it is equally important to equip legal professionals with the skills and attributes required to work effectively with diversity. This includes substantive knowledge of relevant issues and practical skills, combined with an ability to critically evaluate one's own biases and prejudices, and recognition of different perspectives and realities as valuable to achieve a common goal. These skills and attributes are collectively referred to as 'diversity intelligence'.

¹⁰⁹ Justice Michael Kirby, 'Law and Justice in Australia: Room for Improvement' (2004) 4(2) *Queensland University of Technology Law and Justice Journal* 289.

Efforts for law reform and greater representation do not happen in a short amount of time. In the meantime, this essay proposes a simple and practical action to facilitate better outcomes for diverse communities in the day-to-day administration of justice: providing regular training to increase lawyers' diversity intelligence. Noting that mandatory 'social context' training is already provided to Victorian judges, it is submitted that similar steps should be taken for legal practitioners by including 'diversity intelligence' as a separate CPD requirement under the Uniform Law.