TOWARDS GREATER CULTURAL DIVERSITY IN LAW: A SYSTEMIC, BIFURCATED LEGAL AND POLICY APPROACH

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I INTRODUCTION

Calls for greater cultural diversity in Australia's legal institutions are not new. Over a century ago, advocates like William Ah Ket (1876–1936), the first barrister of Chinese descent to join the Bar in Australia, were active in the fight against unfair discrimination, promoting a 'peaceful coexistence'.[1] Since then, scholarly interest in and social awareness of cultural diversity have grown with respect to its significance for those within the profession,[2] as well as for members of the wider community.[3]

This essay takes a two-pronged approach to examining the issue of racial discrimination; first, as a marginalising force against culturally diverse lawyers working in the industry; then, relatedly, as a barrier for those seeking justice from the legal system. Part II details the Australian legal landscape, assessing the ways through which measures to promote equality and diversity have changed over time. Building on this historical overview, Part III interrogates the progress made

[1] Toylaan Ah Ket, 'William Ah Ket — Building Bridges between Occident and Orient in Australia, 1900-1936' (Speech, Chinese Studies Association of Australia, Macquarie University, July 1995); the Hon Chief Justice Susan Kiefel AC, 'William Ah Ket's contribution to diversity in the legal profession' (Speech, William Ah Ket Scholarship Presentation Great Hall, High Court of Australia, 9 October 2019).

[2] See, e.g., Debra Chopp, 'Addressing Cultural Bias in the Legal Profession' (2017) 41(3) *NYU Review of Law and Social Change* 367; the Hon Melissa Perry, 'The Law, Equality and Inclusiveness in a Culturally and Linguistically Diverse Society' (2019) 40 *Adelaide Law Review* 273.

[3] See, e.g., Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women's Experience of the Courts* (Report, 20 March 2016); Chin Tan, 'Diversity in the Legal Profession - William Lee Address' (Speech, Australian Human Rights Commission, 5 June 2019); the Hon Justice Hament Dhanji, 'Cultural Diversity in the Law: It is Not Revolution – But We are Going to Occupy the Buildings' (Speech, The Law Society of New South Wales – Cultural Diversity Networking Event, 27 September 2022).

towards greater cultural diversity in the legal profession. Specific attention is paid to the efficacy of diversity- and inclusion-based initiatives in the workplace. Notably, a proposition is made in light of the innovation demonstrated during the COVID-19 pandemic, and this essay considers the merits of flexible work arrangements as a method of cultivating inclusivity. Part IV then advances the argument in favour of a more representative judicial body and, in doing so, pays close attention to judicial treatment of the *Racial Discrimination Act 1975* (Cth) ('RDA'). Here, analysis builds on cases involving section 10 of the RDA, which concerns the validity of racially discriminatory laws. At its core, this essay advocates for an approach to cultural diversity that better integrates legislative and policy-based action, as implemented by and for a truly representative institution.

Before turning to the analysis, this essay offers some conceptual clarifications. Broadly, 'culturally diverse individuals' and 'people of colour' are used interchangeably in reference to those that are marginalised on the basis of their departure from white, Anglo-Saxon norms in Australia. Indeed, on the historical homogeneity of the Australian judiciary in particular, Professor Brian Opeskin reports a composition of 'largely of white, middle-aged, Christian males from privileged socio-economic backgrounds, following similar career trajectories'.[4] Appreciating the myriad of ways through which racism manifests — especially when compounded by settler colonialism in the case for First Nations peoples[5] — this essay will specify racial and cultural groups in place of umbrella terms where appropriate.

Greater cultural diversity is instrumental in combating structural racism. Beyond physical abuse and threats of violence, racism permeates through our systems via laws and policies, and through entrenched practices and beliefs that condone if not

[4] Brian Opeskin, 'Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary' in Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, forthcoming) 1.

[5] See, generally, Eddie Cubillo, '30th Anniversary of the RCIADIC and the "white noise" of the justice system is loud and clear' (2021) 46(3) *Alternative Law Journal* 185.

actively contribute to the oppression of people of colour.[6] In his speech on multiculturalism, then-Race Discrimination Commissioner Dr Tim Soutphommasane sheds light on the prejudice, ignorance, and indifference that sustains structural racism: 'the silently raised eyebrows, the implicit biases, snap judgments made on assumptions of competency'.[7] Greater cultural diversity helps disrupt many of the unconscious or implicit biases that otherwise go unchallenged. Put simply, a person of colour's position of power in a white-dominated environment demonstrates a counter-stereotypical example that confronts existing biases.[8] Relatedly, increased interactions with and empathy for culturally diverse individuals contribute to what Professor Patricia Devine and her colleagues call 'prejudice habit-breaking'.[9] Reductions in unconscious biases — as distinct from overt, deliberate forms of discrimination — are possible through intervention strategies that combine motivation, awareness, and effort.[10]

II HISTORY OF CULTURAL DIVERSITY

The historical efforts to counter the 'culturally and racially homogenous enterprise' that is our legal system merit discussion;[11] the current landscape is shaped in part by the ways through which advocacy has moved from predominantly legislative action to now incorporating more policy-based

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[6] Paula A Braveman et al, 'Systemic and Structural Racism: Definitions, Examples, Health Damages, and Approaches to Dismantling' (2022) 41(2) *Health Affairs* 171, 172; see, also, the discussion on levels of racism and how institutionalised racism manifests in Camara Phyllis Jones, 'Levels of Racism: A Theoretic Framework and a Gardener's Tale' (2000) 90(8) *American Journal of Public Health* 1212.

[7] Tim Soutphommasane, 'Multiculturalism, mental health and the psychology of racism' (Speech, Western Australian Multicultural Mental Health Forum, 7 July 2017), quoting Reni Eddo-Lodge, *Why I'm No Longer Talking to White People About Race* (Bloomsbury Publishing, 2017) 64.

[8] Francesca Gino and Katherine Coffman, 'Unconscious Bias Training That Works' (2021) *Harvard Business Review* 114, 117-118.

[9] Patricia G Devine et al, 'Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention' (2012) 48(6) *Journal of Experimental Social Psychology* 1267; Patrick S Forscher et al, 'Breaking the Prejudice Habit: Mechanisms, Timecourse, and Longevity' (2017) 72(1) J*ournal of Experimental Social Psychology* 133.

[10] Patrick S Forscher et al, 'Breaking the Prejudice Habit: Mechanisms, Timecourse, and Longevity' (2017) 72(1) J*ournal of Experimental Social Psychology* 133, 134.

[11] Sara Dehm, 'Legal Exclusions: Emigre Lawyers, Admission to Legal Practice and the Cultural Transformation of the Australian Legal Profession' (2021) 49(3) *Federal Law Review* 327, 330.

approaches. To this end, Part II begins with a closer look at anti-discrimination laws in Australia, and then delves into the corporate and organisational policies that have since emerged.

A *Anti-Discrimination Laws in Australia*

The enactment of anti-discrimination laws represents a 'critical juncture' in Australia's evolution into a culturally diverse society.[12] A decade after the United Nations adopted globally accepted minimum standards for discrimination prevention,[13] the RDA was established. Promoting 'new attitudes of tolerance and understanding',[14] the RDA filled an important legal gap by developing a general right to be free from racial based discrimination.[15] It also deviated from law's past function as a facilitator, rather than inhibitor, of racism.[16] Further, its educational purpose was front of mind as Parliament aimed to increase awareness of 'the undesirable and unsociable consequences' of discrimination.[17] Following the formal abandonment of the White Australia policy,[18] the RDA represented a legislative 'commitment to multiculturalism'.[19]

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[12] Perry (n 2) 278.

[13] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

[14] Gough Whitlam, 'Proclamation of *Racial Discrimination Act:* Speech by the Prime Minister at a Ceremony Proclaiming the *Racial Discrimination Act 1975*' (Speech, Canberra, 31 October 1975) [3].

[15] Tim Soutphommasane, 'Forty Years of the Racial Discrimination Act' (2015) 40(3) *Alternative Law Journal* 153, 153; see also James Spigelman, 'The Common Law Bill of Rights' (Statutory Interpretation and Human Rights: McPherson Lecture Series No 3, University of Queensland Press, 2008).

[16] Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Law Book Co, 2003) 417; Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-04' (2005) 11(1) *Australian Journal of Human Rights* 171, 172.

[17] Kep Enderby, 'Second reading speech: Racial Discrimination Bill 1975' (Speech, House of Representatives, 13 February 1975) 1.

[18] See, generally, Gwenda Tavan, *The Long, Slow Death of White Australia* (Scribe, 2005); 'White Australia policy', *National Museum Australia* (Web Page, 16 May 2023) <https://www.nma.gov.au/defining-moments/resources/white-australia-policy>.

[19] Soutphommasane (n 15) 153.

Despite the RDA's 'historic' nature as the first federal law on human rights and discrimination,[20] its efficacy has been questioned since its implementation.[21] Writing in 1975, critic Brian Kelsey described racial discrimination as 'a symptom of an ill that is within [the body politic]';[22] the legislation, he argued, was an inadequate solution to an issue requiring 'wholesale [societal] transformations'.[23] Relatedly, socio-legal scholar Professor Margaret Thornton drew attention to the RDA's limitation as an 'individual complaint-based model'.[24] The emphasis on individual actions failed to address the institutional oppression 'buried deep within the social psyche'.[25]

Conducting a review on the legislation's 30th anniversary, Professor Beth Gaze cited the small number of cases litigated in federal courts as evidence of the RDA's failure to keep pace with progress made in other jurisdictions.[26] The onus and standard of proof required of complainants made the RDA a 'paper tiger' in terms of its remedial capacity.[27] In contrast, the United Kingdom's *Race Relations Act 1976* empowers courts to infer from proven facts that racial discrimination has occurred.[28] Notably, the respondent bears the onus of disproving their racial motivations.[29]

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[20] Whitlam (n 14) [3].

[21] Perry (n 2) 279.

[22] Brian Kelsey, 'A Radical Approach to the Elimination of Racial Discrimination' (1975) 1(1) *University of New South Wales Law Journal* 56, 62.

[23] Ibid.

[24] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 84.

[25] Ibid.

[26] Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000-04' (2005) 11(1) *Australian Journal of Human Rights* 171, 171-172.

[27] Ibid 195.

[28] *Race Relations Act 1976* (UK) s 54A(2).

[29] Ibid.

B *Insufficiency of a Siloed Legal Approach*

In response to the criticisms above, Soutphommasane reiterated the RDA's educative and conciliatory objectives.[30] Although necessary, laws proscribing discrimination are insufficient in the absence of broader education and research.[31] This sentiment is captured by the Australian Human Rights Commission in its *Leading for Change* report.[32] Instead of sole reliance on legislation, advocates for cultural diversity are also pushing for initiatives at the organisational and business level.[33] This strategic evolution is most aptly captured by the 'business case' for cultural diversity, and the economic justifications put forward for greater workplace inclusivity. McKinsey & Company reported in 2018 that culturally diverse executive teams were 33% more likely to outperform their peers by way of profitability.[34] In promoting diverse and inclusive work cultures, the Law Society of New South Wales highlighted improvements in employee productivity, as well as reputational benefits and a 'competitive edge' for organisations.[35]

This trend has also garnered scrutiny. On the rationale for change in the workplace, the Honourable Justice Hament Dhanji reflected that 'diversity is not, at least not fundamentally, a means to a pragmatic end'.[36] The importance of cultural diversity stems far beyond the business dimension.[37] At the same time, these calls for organisational action are also indicative of cultural awareness becoming more widespread. In parallel with shifting public discourse,[38] the Australian Human

[30] Soutphommasane (n 15) 154; see, also, the Hon Paul Keating, 'Speech by the Prime Minister, the Hon PJ Keating MP, 20th Anniversary of the Racial Discrimination Act' (Speech, Melbourne, 9 June 1995).

[31] Soutphommasane (n 15) 154; Enderby (n 17) 2.

[32] Australian Human Rights Commission, *Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership Revisited* (Report, April 2018).

[33] Ibid 15-16.

[34] McKinsey & Company, *Delivering Through Diversity* (Report, January 2018) 8.

[35] The Law Society of New South Wales, *Diversity and Inclusion in the Legal Profession: The Business Case* (Report, October 2021) 5-6.

[36] Dhanji (n 3) [32].

[37] Ibid [33].

[38] To illustrate, the American-based Black Lives Matter movement gained momentum both in Australia and internationally in 2020 following the murder of George Floyd, a Black man, by white police officer Derek Chauvin. Peaceful protests and rallies in Australia drew attention to the continuing oppression of and police brutality against First Nations peoples; Lorena Allam et al, 'The 474 Deaths Inside: Tragic Toll of Indigenous Deaths in Custody Revealed', *The Guardian*

Rights Commission relaunched in 2022 the 'Racism. It Stops With Me' initiative that was initially created in 2012.[39] Beyond mere acknowledgement that racism exists, the campaign focused on institutional and interpersonal racism, providing tools and resources to engage in active anti-racism work.[40] As will be evident in the Part III discussion on the impact that structural racism has on culturally diverse lawyers, the nuances and often covert nature of discrimination requires advocacy work that builds on and extends beyond legislation. To this end, workplace policies and attitudinal changes are integral to the full realisation of cultural diversity.

III INSTITUTIONAL HARMS TO LAWYERS

A *Significance*

For legal professionals from culturally marginalised backgrounds, lack of diversity — and the biases that proliferate in its absence — detriments career progression and increases rates of attrition.[41] Even with the same levels of expertise and hard work, culturally marginalised lawyers are disproportionately excluded from the 'critical career-enhancing opportunities' that lead to workplace advancement.[42] Here, the affinity bias explains why people in senior positions tend to gravitate towards and trust those who are more like themselves.[43] Less representation at the management level means less access to networking opportunities, both formal and

(Web Page, 9 April 2021) <https://www.theguardian.com/australia-news/2021/apr/09/the-474-deaths-inside-rising-number-of-indigenous-deaths-in-custody-revealed>; Keira Jenkins, 'Black Lives Matter Movement Has Raised Awareness & Understanding of Racism in Australia', *SBS News* (Web Page, 30 November 2020) <https://www.sbs.com.au/nitv/article/black-lives-matter-movement-has-raised-awareness-understanding-of-racism-in-australia/cqn6utqfr>.

[39] 'New Racism. It Stops With Me campaign', *Australian Human Rights Commission* (Web Page, 12 July 2022) <https://humanrights.gov.au/our-work/race-discrimination/projects/new-racism-it-stops-me-campaign>.

[40] 'Racism. It Stops With Me', *Australian Human Rights Commission* (Web Page, 2023) <https://itstopswithme.humanrights.gov.au/>.

[41] The Law Society of New South Wales (n 35) 5, 7.

[42] Kathleen Nalty, 'Strategies for Confronting Unconscious Bias' (2016) 45 *The Colorado Lawyer* 45, 46-47.

[43] Ibid.

casual;[44] meaningful work assignments;[45] honest and frequent feedback;[46] mentorship;[47] and client contact.[48]

Lack of cultural diversity also impacts the well-being of lawyers. For example, a high-stress, competitive environment like the legal profession predictably triggers feelings of self-doubt and reports of the imposter syndrome.[49] Yet, for women of colour, the combined exclusionary force of racism and sexism can exacerbate those feelings of inadequacy.[50] As authors Ruchika Tulshyan and Jodi-Ann Burey put it, 'feeling like an outsider isn't an illusion' if you are 'implicitly, if not explicitly, told [you] don't belong'.[51]

On this sense of belonging, Diversity Council Australia reported that over two thirds of the 230 culturally diverse women in its study felt pressured to conform to the existing leadership styles in their organisations.[52] Specific reference was made to the 'extroversion, self-promotion and assertive[ness]' exemplified by white male leaders.[53] In response to this report, Justice Dhanji warned against the

[44] Ibid; Diversity Council Australia, *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century* (Synopsis Report, 7 September 2017) 14.

[45] Veronica Root, 'Retaining Color' (2014) 47 *University of Michigan Journal of Law Reform* 575, 595-6.

[46] Nalty (n 46) 46-47.

[47] Diversity Council Australia (n 44) 14-15; Sam McKeith, 'Building diversity in the legal profession', *Law Society of NSW Journal* (Web Page, 4 May 2019) <https://lsj.com.au/articles/building-diversity-in-the-legal-profession/>.

[48] Nicole E Negowetti, 'Implicit Bias and the Legal Profession's Diversity Crisis: A Call for Self-Reflection' (2015) 15(2) *Nevada Law Journal* 930, 946; Luis J Diaz and Patrick C Dunican, 'Ending the Revolving Door Syndrome in Law' (2011) 41 *Seton Hall Law Review* 947, 976.

[49] Described as the internalised fear of being exposed as a fraud despite external evidence of one's success or merit, the imposter syndrome was first coined by Pauline R Clance and Suzanne A Imes in 'The imposter phenomenon in high achieving women: Dynamics and therapeutic intervention' (1978) 15(3) *Psychotherapy: Theory, Research & Practice* 241.

[50] Ruchika Tulshyan and Jodi-Ann Burey, 'Stop Telling Women They Have Imposter Syndrome' *Harvard Business Review* (Web Page, 11 February 2021) <https://hbr.org/2021/02/stop-telling-women-they-have-imposter-syndrome>.

[51] Ibid. The strong relationship between race-related stress and imposter feelings was recently corroborated by an empirical study into Black lawyers' experiences in the United States; see Kevin Cokley et al, 'Lawyering While Black: Perceived Stress as a Mediator of Imposter Feelings, Race-Related Stress and Mental Health Among Black Attorneys' (2022) 48(2) *Journal of Black Psychology* 206.

[52] Diversity Council Australia (n 44) 16.

[53] Ibid.

burnout resulting from such conformity.[54] The consequences of an exclusionary workplace are especially severe when considered in light of research into burnout — the exhaustion of one's psychological resources — as 'one of the most important psychosocial occupational hazards in today's society'.[55]

B *Where Diversity & Inclusion Initiatives Fall Short*

Scepticism about the sincerity and efficacy of corporate initiatives — captured in articles like the New York Times' *Has 'Diversity' Lost Its Meaning?*[56] — is strengthened by reports of the harms that persist.[57] In some instances, diversity and inclusion have been filtered down to 'tick and flick' exercises,[58] its power diluted through 'overuse, imprecision, inertia and self-serving intentions'.[59] In fact, failure to fully embed diversity- and inclusion-based initiatives into a business' core strategy does the business more damage than good.[60]

On this point, the common initiative of unconscious bias training was revealed through meta-analysis to have little impact on behavioural change.[61] In training sessions where biases were described to attendees as involuntary and widespread — i.e., unavoidable and beyond control — the prevalence of discriminatory

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[54] Dhanji (n 3) [61].

[55] Sergio Edú-Valsania, Ana Laguía, and Juan A Moriano, 'Burnout: A Review of Theory and Measurement' (2022) 19(3) *International Journal of Environmental Research and Public Health* 1780, 1781.

[56] Anna Holmes, 'Has "diversity" lost its meaning?', *New York Times* (Web Page, 27 October 2015) <https://www.nytimes.com/2015/11/01/magazine/has-diversity-lost-its-meaning.html>.

[57] Christopher Niesche, 'Australia's Law Firms Focus on Diversity, Ethnicity and Inclusion', *Law.com* (Web Page, 12 September 2022) <https://www.law.com/international-edition/2022/09/12/australias-law-firms-focus-on-diversity-ethnicity-and-inclusion/?slreturn=20230401010032>; the Hon Associate Mary-Jane Ierodiaconou, 'Ethics and Cultural Diversity in the Legal Profession' (Speech, Victorian Bar, Supreme Court of Victoria, 29 August 2016).

[58] Diversity Council Australia (n 44) 20.

[59] Holmes (n 56); Joelle Emerson, 'Don't Give Up on Unconscious Bias Training – Make it Better' (2017) *Harvard Business Review*.

[60] Chang-kyu Kwon and Aliki Nicolaides, 'Managing diversity through triple-loop learning: A call for paradigm shift' (2017) 16(1) *Human Resource Development Review* 85, 87-89; Ernst & Young, *Harnessing the power of diversity* (Report, 22 February 2022), 2-3, 8; Frank Dobbin and Alexandra Kalev, 'Why Diversity Programs Fail' (2016) *Harvard Business Review*.

[61] Patrick S Forscher et al, 'A Meta-Analysis of Procedures to Change Implicit Measures' (2019) 117(3) *Journal of Personality and Social Psychology* 522.

attitudes heightened.[62] Here, researchers Francesca Gino and Katherin Coffman identified three key flaws in conventional approaches to unconscious bias training, and diversity and inclusion initiatives more generally.[63] First, much of unconscious bias training only covers the scientific explanation of biases and the costs of discrimination.[64] Returning to the 'prejudice habit-breaking' research mentioned in Part I, awareness of the issue forms but one component of successful intervention. The motivation to undergo behavioural modification, as well as an understanding of appropriate alternative responses, are equally integral to reductions in unconscious biases.[65]

Separately, fear of backlash results in many organisations making unconscious bias training voluntary; this arrangement skews the demographic of attendees towards those already familiar with or interested in the concept of anti-racism.[66] Arguably, such training does not reach its target audience. Moreover, such training misses the opportunity to encourage those in more senior positions to 'set the right example'.[67] Underrepresentation in executive roles necessitates that white leaders share the responsibility of advocating for change.[68] Yet, in spite of evidence substantiating the influence that managers have in shaping the workplace,[69] a large portion of those in power feel they have higher priorities than diversity- and inclusion-based initiatives.[70] In essence, efforts to counteract discrimination are 'pushed to the backburner'.[71]

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[62] Alexandra Kalev, Frank Dobbin and Erin Kelly, 'Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies' (2006) 61(4) *American Sociological Review* 589.

[63] Gino and Coffman (n 6).

[64] Gino and Coffman (n 6) 117.

[65] Patrick S Forscher et al, 'Breaking the Prejudice Habit: Mechanisms, Timecourse, and Longevity' (2017) 72(1) J*ournal of Experimental Social Psychology* 133, 134-135.

[66] Gino and Coffman (n 6) 117.

[67] Australian Human Rights Commission (n 32) 16-17.

[68] Ibid 16.

[69] Yves R Guillaume et al, 'Harnessing Demographic Differences in Organisations: What Moderates the Effects of Workplace Diversity?' (2017) 38(2) *Journal of Organisational Behaviour* 276; Ernst & Young (n 60) 4.

[70] Ernst & Young (n 60) 4.

[71] Jerome Doraisamy, 'Cultural diversity cannot be pushed to backburner', *Lawyers Weekly* (Web Page, 25 September 2020) <https://www.lawyersweekly.com.au/biglaw/29530-cultural-diversity-cannot-be-pushed-to-backburner>.

Finally, lack of accountability mechanisms also undermines the efficacy of traditional training.[72] Respondents to Gino and Coffman's research reported that employers rarely collected information on the metrics they purported to care about.[73] Diversity Council Australia echoed this sentiment; without investment in workforce analytics to track the initiatives and the progress made, senior leadership had no incentive to challenge their mindset or change the status quo.[74] To this end, organisations can take inspiration from improvements made in other areas of diversity — specifically, gender. Targets and quotas not only encourage a sense of 'ownership' that helps an organisation achieve its goals, but also promotes transparency through mandatory disclosures.[75] To illustrate, annual assessments of measurable gender-based objectives are made possible through the ASX Corporate Governance Council's Diversity Recommendations.[76] Hence, in combination with better understandings of prejudice habit-breaking and enhanced support from white leaders, accountability measures such as cultural diversity targets can help remedy the limitations of current initiatives.

C *Flexible Work Policies: The Way Forward?*

In addition to strengthening unconscious bias training in the workplace and implementing targets, cultural diversity in the workplace could also be enhanced through flexible work arrangements. Indeed, lockdown restrictions during the COVID-19 pandemic meant that many employees were required to work from

[72] Gino and Coffman (n 8) 117.
[73] Ibid.
[74] Diversity Council Australia (n 44) 20-21.
[75] Australian Human Rights Commission (n 32) 21-22.
[76] ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (Report, February 2019).

home.[77] Despite the return to 'Covid-normal',[78] proponents of flexible work cite inclusivity as a fundamental argument in favour of retaining the arrangements.[79]

Consider, for instance, those for whom flexible work arrangements are most beneficial. According to the Victorian Public Sector Commission, flexible work arrangements help support First Nations peoples with the 'cultural load' they carry,[80] and acknowledge the importance of living and working off Country.[81] Further, female workers with caring responsibilities are most likely to access flexible working arrangements.[82] While it is established that motherhood gives rise to caregiving responsibilities, what remains less explored are other non-filial forms of caregiving that are uncovered once we recognise the significance of conceptualising family care as a transnational, collective effort.[83] A pertinent example is parental caregiving, and the nexus between filial piety and caregiver burden among adult children of Asian descent.[84] This perspective counters the stereotypical gerontology approach of focusing on a local primary caregiver, usually a woman, with limited family assistance. An expanded view of family care

[77] 'Coronavirus disease (COVID-19)', *World Health Organisation* (Web Page, 2023) <https://www.who.int/health-topics/coronavirus#tab=tab_1>.

[78] See, e.g., Tegan Taylor, 'What it might mean to be COVID-normal', *ABC News* (Web Page, 24 January 2022) <https://www.abc.net.au/listen/programs/healthreport/what-it-might-mean-to-be-covid-normal/13723886>.

[79] Diversity Council Australia (n 44) 18.

[80] I.e., responsibilities and cultural and/or community obligations outside of work that non-Indigenous workers do not have; 'Supporting Aboriginal Staff', *Victorian Public Sector Commission* (Web Page, 28 June 2022) <https://vpsc.vic.gov.au/workforce-programs/aboriginal-cultural-capability-toolkit/supporting-aboriginal-staff/>.

[81] Ibid.

[82] Diversity Council Australia, *The State of Flex 2020* (Report, 2020). See also, Dominique Allen and Adriana Orifici, 'Home Truths: What Did COVID-19 Reveal about Workplace Flexibility?' (2021) 34 *Australian Journal of Labour Law* 77; Patricia Easteal et al, 'Flexible Work Practices and Private Law Firm Culture: A Complex Quagmire for Australian Women Lawyers' (2015) 15(1) *QUT Law Review* 30, 35.

[83] Shanika Yoshini Koreshi and Fiona Alpass, 'Understanding the Use of Flexible Work Arrangements Among Older New Zealand Caregivers' (2023) 42(5) *Journal of Applied Gerontology* 1045, 1045-1047.

[84] Yuqin Pan, Ruyi Chen and Dongliang, 'The Relationship between Filial Piety and Caregiver Burden Among Adult Children: A Systematic Review and Meta-Analysis' (2022) 43 (January to February) *Geriatric Nursing* 113, 113–123.

as inclusive of parental care supports the adoption of a feminist ethics of care standpoint, and holds significant policy implications.[85]

The *Fair Work Act 2009* (Cth) aims to assist employees in balancing work and caregiving responsibilities.[86] Section 65 grants eligible employees[87] the right to request flexible work arrangements under certain circumstances.[88] Employers can deny requests on 'reasonable business grounds', and the employer's decisions to refuse requests are not reviewable.[89] Relevantly, one circumstance that enlivens an eligible employee's right to request changes in working arrangements is where the employee is a carer within the meaning of the *Carer Recognition Act 2010* (Cth) ('CRA').[90] Section 5 of the CRA defines a carer as an 'individual who provides personal care, support and assistance to another individual who needs it because that other individual is frail and aged.[91] This definition only recognises a person caring for a parent as a 'carer' where the parent is both frail and aged, and is inconsistent with the parental care instilled in Asian adult children through normative filial piety. Chinese filial piety, for instance, is a Confucian concept that is concerned with a sincere affection toward one's parents,[92] and commands obedience to social obligations (such as caring obligations)[93] to one's elders, sometimes by sacrificing one's own wishes.[94] Evidently, Chinese filial piety requires caring for parents beyond the narrow circumstances where the parent is both frail and aged. This means that a Chinese adult worker who provides care for

[85] Cynthia Lee Andruske and Deborah O'Connor, 'Family Care Across Diverse Cultures: *Re*-envisioning Using a Transnational Lens' (2020) 55 *Journal of Aging Studies* 1.

[86] *Fair Work Act 2009* (Cth) s 3(d).

[87] The eligible employee is one that (a) has completed at least 12 months of continuous service with the employer; or for a casual employee who (i) is a regular casual employee who has been employed for a sequence of periods for at least one month, and (ii) has a reasonable expectation of continuing employment by the employer on a regular and systematic basis: Ibid s 65(2).

[88] Ibid s 65(1A).

[89] Ibid ss 44(2), 739(2).

[90] *Carer Recognition Act 2010* (Cth) ('CRA'); *Fair Work Act 2009* (Cth) s 65(1A)(b).

[91] CRA s 5(1)(d).

[92] This is known as 'reciprocal filial piety'.

[93] This is known as 'authoritarian filial piety'.

[94] See generally, Wendy Wen Li, Smita Singh and C Keerthigha, 'A Cross-Cultural Study of Filial Piety and Palliative Care Knowledge: Moderating Effect of Culture and Universality of Filial Piety' (2021) 12 *Frontiers in Psychology* 1.

their parents in a manner that is aligned with their cultural norms runs the risk of not being legally recognised as a carer. Without being recognised as a carer, one has no grounds to request changes in standard working arrangements. Further exacerbating this is that the CRA stipulates that an individual is not a carer merely because they are the child of an individual, or lives with an individual requiring care.[95]

The lack of legal recognition of caregiving obligations arising from normative filial piety restricts culturally diverse people from attaining a work-life balance that is culturally satisfactory to them. This is only one example of how a specific subgroup of Asian lawyers may be impacted by the legal framework of inflexible working arrangements.

In contrast, Europe's 2019 Work-Life Balance Directive[96] created a new right for parents and carers to request flexible working arrangements for caring purposes.[97] While Australia may implement similar legal reforms to recognise flexible working necessities beyond parental caregiving, progress will likely be gradual. Further, legislative reform using 'rights-based' language is inconsistent with the broader Australian legal landscape: Australia does not have a Bill of Rights, and human rights are instead given effect by State- and Territory-specific charters.[98] Given the current statutory scheme, which grants the employer the imperative to rein in employee working arrangements, employers are well-positioned to overcome the shortcomings of the *Fair Work Act* by implementing culturally-informed and responsive policies.[99]

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[95] CRA ss 5(3)(a)-(b).

[96] *European Union and Council Directive 2018/1158 of 20 June 2019 on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU* [2019] OJ L 188/79.

[97] Lisa Waddington and Mark Bell, 'The Right to Request Flexible Working Arrangements under the Work-Life Balance Directive: A Comparative Perspective' (2021) 12(4) *European Labour Law Journal* 508, 508.

[98] For an in-depth discussion of Australia's approach to establishing a human rights framework, see Hilary Charlesworth, 'The Australian Reluctance About Rights' (1993) 31(1) *Osgoode Hall Law Journal* 195.

[99] By way of example, commercial law firm Maddocks has had a three-day minimum requirement of office attendance for full time staff from 14 March 2022, but recently opted for an empirical approach of testing office versus home working; Michael Pelly, 'Top Law Firm to Test Office Versus Home Working', *Australian Financial Review* (online, 30 March 2023)

To summarise, the immense impact that structural racism has on culturally diverse lawyers warrants reinforced support by organisations and businesses. Here, support includes strengthening and reassessing current diversity and inclusion-based initiatives, as well as responding creatively and strategically to legislative shortcomings.

IV INSTITUTIONAL HARMS TO THE COMMUNITY

A *Significance*

Turning now to the broader community, lack of cultural diversity also forms a barrier to access to justice. On this point, the Honourable Justice Melissa Perry advocated for the 'increasingly culturally diverse nature of society find[ing] reflection in the composition of the legal profession'.[100] Such parity is instrumental to maintaining and promoting public confidence in the legal system.[101] For justice to not only be done, but 'manifestly and undoubtedly' be seen to be done,[102] the impartiality of the Australian judiciary should not be impugned by its lack of representation.[103] Beyond the appearance of justice, diversity in the judiciary also ensures that decisions reflect the 'diversity of values and the experience of backgrounds' in the wider community.[104] Thus, to fully explain the institutional harms that lack of cultural diversity presents to our society, Part IV places Australian courts and their cognisance of systemic racism under scrutiny.

<https://www.afr.com/companies/professional-services/top-law-firm-to-test-office-versus-home-working-20230330-p5cwpl>.

[100] The Hon Justice Melissa Perry, 'The Law, Equality and Inclusiveness in a Culturally and Linguistically Diverse Society' (2019) 40(1) *Adelaide Law Review* 273, 281-2.

[101] Ibid 282; The Hon Justice Melissa Perry, 'There Should Be More Women in the Courtroom' (2015) 37(7) *Law Society of South Australia* 12, 13.

[102] Lord Chief Justice Hewart in *R v Sussex Justices*; *Ex parte McCarthy* [1923] EWHC KB 1; [1924] 1 KB 256.

[103] Dhanji (n 3) [29], [34]-[37].

[104] The Hon Michael Kirby AC CMG, 'Asian Australian Lawyers Association NSW Launch Part IIA' (Speech, Launch of Asian Australian Lawyers Association, 2 November 2015).

B *The* Racial Discrimination Act: *A Broad Net that Catches Nothing*

The institutional harms that preclude cultural diverse lawyers in the workplace also inhibit racially informed decision-making. This has cemented discriminatory executive and judicial decision-making, notwithstanding the enactment of the RDA as a symbolic piece of legislation that has been classified as 'special' or 'having constitutional force'.[105] Section 10 of the RDA proscribes discriminatory laws on the basis of race via the following terms:

> '*If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin*'.[106]

The efficacy of section 10 of the RDA is considered because of its 'special'[107] quasi-constitutional status in the discrimination law landscape. There are no other provisions in any other Commonwealth discrimination legislations that proscribe discriminatory laws rather than conduct.[108] Thus, the operation of this provision best highlights how, without systemic changes, even a quasi-constitutional act that purports to legally eradicate racial discrimination will invariably fall short of fulfilling its legislative purpose. This remains the case even after the High Court's

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[105] *Racial Discrimination Act 1975* (Cth) ('RDA'). See also Alice Taylor, 'The "Constitutional" Value of the *Racial Discrimination Act 1975* (Cth)' (2021) 43(4) *Sydney Law Review* 519.

[106] RDA s 10(1).

[107] Whitlam (n 14) [5].

[108] See, e.g., the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Sex Discrimination Act 1985* (Cth).

holding that, in construing human rights legislation, the courts are responsible for considering and giving effect to the statutory purpose.[109]

Despite judicial emphasis on the special nature of the RDA, this constitutional status has had limited impact on how willing the High Court has construed section 10 to invalidate racially discriminatory legislations. Particularly, the interpretation of the words 'distinction on the basis of race' has been divorced from the lived experiences of racial inequities that the RDA was created to address.[110] This is because the bench[111] is not diverse and lacks the lived experiences central to understanding racial inequities.[112] A key inquiry when ascertaining whether a law is inconsistent with section 10 of the RDA is whether it creates a 'distinction on the basis of race' or leads to racial inequality. The interpretation of this has been notably general, shying away from establishing a nexus between distinction or disadvantage and discrimination or notions of equality.

C *Section 10 and the Reality of Discrimination*

In *Western Australia v Ward*,[113] the majority accepted that section 10 was not concerned about discrimination, but rather on any distinctions based on race that could undermine fundamental rights and freedoms. In arriving at this conclusion, the bench held that section 10 does not use the express word 'discriminatory' or any equivalent expression. On a similar vein, in *Maloney*,[114] Hayne J reiterated that the subsection of section 10 is not centred around 'discrimination'. His Honour expressed concern that associating the statutory wording with anti-

[109] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 372 (Brennan J), 394 (Dawson and Toohey JJ) and 407 (McHugh J).

[110] Taylor (n 104).

[111] The High Court of Australia, the State Supreme Courts and the Federal Courts that have jurisdiction to interpret the RDA. As such, diversity of bench in higher courts matter. It is not sufficient to point at culturally diverse judges in lower State courts and Magistrates courts.

[112] Andrew Leigh, 'Why Has No Person of Colour Ever Served on the High Court?', *Australian Financial Review* (Web Page, 4 October 2022) <https://www.afr.com/politics/federal/why-has-no-person-of-colour-ever-served-on-the-high-court-20211221-p59j8x#:~:text=In%20120%20years%2C%20no%20judge,Australian%20judges%20are%20Asian%2DAustralian.>. Cf Rachel Cahill-O'Callaghan, 'Hidden Depths: Diversity, Difference and the High Court of Australia' (2021) 17 *International Journal of Law in Context* 4941, 494-511.

[113] *Western Australia v Ward* (2002) 213 CLR 1, 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[114] *Maloney v The Queen* [2013] 252 CLR 168, [68] (Hayne J).

discrimination would 'inadvertently narrow or confine the operation of section 10'.[115] Hayne J's observation was built upon the presumption that laws can only be discriminatory where the distinction the law purports to make is 'disproportional' or 'unjustifiable', leaving a range of laws that differentiate by race, in non-discriminatory way, untouched. Contradicting this viewpoint, the Full Court of the Supreme Court of Queensland has suggested that the role of the courts in enforcing section 10 is limited to instances of *manifest unreasonableness*, and that there is no authority of the application of a reasonable proportionality test in deciding whether a law contravenes section 10.[116] This leaves a high-water mark on the requisite disproportionality demanded by section 10, begging the question of the utility of its broad interpretation.

Notwithstanding the above, the apprehensions about the delimitations of the concept of discrimination are not without basis. Scholars have critiqued that the often complex and artificial language used in an attempt to describe discrimination with more specificity has actually hindered the development of non-discrimination principles in Australia. However, the treatment of section 10 highlights the opposite issue. While its broad wording allows for the possibility of a broad range of legislations violating section 10 where there is a difference in effect based on race, there is no clear guidance in case law on what constitutes such an effectual distinction. Courts have conceded that laws that completely exclude individuals from exercising rights or freedoms or laws that entirely eradicate a right or freedom on a racial basis are within the terms of section 10. For instance, in *Maloney*, the majority was open to considering that the *Liquor Act 1992* (Qld) and regulations made the requisite 'racial distinction' because the prohibition applied only to community areas of Palm Island, populated almost exclusively by First Nations peoples.[117] However, where the distinction arises from the

[115] Ibid.

[116] In other words, it is not appropriate to ask whether the impugned law's distinction on the basis of race is 'reasonably proportionate and adapted' to achieve its stated objective: See *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 265 ALR 536, 589 [166]-[167] (Keane JA). See also *Bropho v Western Australia* [2008] FCAFC 100.

[117] See Simon Rice, 'Case Note: Joan Monica Maloney v The Queen [2013] HCA 28' (Web Page, August 2013) <http://www.austlii.edu.au/au/journals/IndigLawB/2013/31.pdf>.'

intersectionality of race, socio-economic disadvantage and historical systemic racial oppression, the legal framework—as construed through white lenses—struggles to apply the broad principles of distinction to capture the substantive effect of the impugned laws. We contend that this is because white lenses lack the literacy and foresight to extrapolate the effects of the law beyond the pristine environment of privileged legalese.

The law impugned by section 10, however, does not exist in a vacuum. Even where the form of the black letter law does not purport to distinguish based on race, systemic and structural racism may render such a law differentiating by race and/or discriminative.[118] Keane JA acknowledged this reality by discerning between the practical effect of a law and the formal expression of it.[119] Thus, in *Aurukun*, the appellants' complaint was not of a formalistic distinction based on 'race', but instead a 'consequence of the different geographical and socio-economic conditions which obtain, and which have obtained for many years, in different areas of the State'.[120] The case involved the newly amended section 106 of the *Liquor Act 1992* (Qld), which prevented local governments from applying for or holding general liquor licenses. The Aurukun and Kowanyama Shire Councils, which previously held such licenses, challenged the amendments, contending they were inconsistent with section 10 of the RDA. However, Keane JA disappointingly concluded that the practical effect of the impugned provision was that no resident in Queensland was able to acquire alcohol from their local government, and that section 10 was not to remedy the 'serious level of relative socio-economic disadvantage which affects the appelant's [Indigenous] communities'. The appellants could not rely on section 10 to guarantee equality of

[118] Systemic and structural racism span across the criminal justice systems in relation to bias and profiling; the education system concerning diminished resources for schools in predominantly marginalised neighborhoods; geopolitics and housing discrimination such as limited access to affordable housing in desirable areas due to discriminatory lending practises and zoning policies, and; biopolitics and health inequities: see, e.g., Braveman (n 6) 172. See, also, Gilbert Cee and Chandra Ford, 'Structural Racism and Health Inequities' (2011) 8(1) *Du Bois Review* 115, 115-132.

[119] *Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 265 ALR 536 ('*Aurukun*')

[120] Ibid [179].

opportunity, as the disparities in the ability to acquire alcohol was not due to a discriminatory effect of the law, but rather to economic and geographical inequalities.[121]

R v Woods & Williams further exemplifies the judicial failure of considering intersectionality.[122] The Full Court of the Northern Territory Supreme Court considered whether the *Juries Act 1962* (NT) was invalid due to its inconsistency with section 10, in that in its operation, the *Juries Act* infringed the right in Article 5(a) of the *Convention on the Elimination of All Forms of Racial Discrimination* by disqualifying from jury service persons in custody within the previous seven years. Specifically, the disqualification disproportionately affected First Nations peoples, who constituted eighty-three percent of the Northern Territory prisons. The intersectionality of the *Juries Act* and racialised incarceration[123] rendered the legal preclusion from jury service a form of distinction based on race.[124] The Court rejected this contention by holding that there was a lack of direct evidence as to the number of persons in any single case that would in fact be precluded to serve as members of the jury by the impugned law. Further, statistical evidence and 'usual experience' did not support the inference that First Nations peoples were actually precluded from jury service such that First Nations defendants would not enjoy a right to a fair trial 'on equal footing' vis-a-vis non-Aboriginal defendants.[125] The practical effect of this decision means that, in the Northern Territory, an Indigenous defendant will face not only a legal disadvantage in the courts due to the absence of cultural protocols, but will also be deprived of the presence of a jury capable of bridging this cultural divide between the non-Indigenous bench and the defendant.[126]

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[121] Ibid. See also *Gerhardy v Brown* (1985) 159 CLR 70; *Mabo v Queensland* [1988] HCA 69; *Western Australia v Ward* (2002) 213 CLR 1.

[122] *R v Woods & Williams* (2010) 264 FLR 4 ('*Woods & Williams*').

[123] See Priscilla A Ocen, 'Unshackling Intersectionality' (2013) 10(2) *Du Bois Review: Social Science Research on Race* 471, 471-483.

[124] *Woods & Williams* (n 121) 9-10.

[125] Ibid 19-20.

[126] For an example of the measures taken by judges to bridge the cultural divide, see Erin Parke, 'Judges Go Bush to Learn About Indigenous Culture, With Aim to Deliver Fairer Justice in Courts', *ABC News* (Web Page, 14 September 2022) <https://www.abc.net.au/news/2022-09-14/judges-go-bush-in-wa-to-learn-about-indigenous-culture/101414554>.

In summary, the 'expansive' interpretation of what constitutes 'distinction' has contributed to a lack of analysis into what specific kinds of behaviours, policies, practices and laws constitute a 'distinction of race'. Absent clear articulation of what acts distinguish on the basis of race, section 10 has become a malleable tool that has been brandished in a manner inconsistent with the purposes of the RDA. In other words, section 10 has become a blunt knife; while it casts a wide net, it fails to capture any laws that substantively distinguish and discriminate based on race.

V CONCLUSION: CONNECTING THE DOTS

Mere legal reform is not enough. The costs of pursuing litigation and the fact that courts are most likely to order compensation at modest *quantum* has meant that very few discrimination complaints reach the courts each year.[127] Compensation fails to tackle societal discrimination or bring about the necessary systemic transformation; nor does it promote compliance because respondents are not obliged to take anticipatory action and proactively avert future complaints.[128] Legislation such as the RDA must find support through judicial decision-making that better represents the diverse needs and experiences of our communities, and through organisation- and firm-level initiatives that hold its leaders accountable.

In 2019, Tienyi Long identified 'diversity intelligence' as a solution at the individual level that can empower lawyers to be the catalysts of change within a legal system that lacks representation of diverse communities.[129] In 2021, Sarah Webster echoed the distinctive conceptual significance of reducing bias in the law, exposing how conventional notions of legal professionalism bar diverse individuals from the upper echelons of the profession.[130] This essay contributes to

[127] Dominique Allen, 'Remedying Discrimination: Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 85, 85.

[128] Ibid.

[129] Tienyi Long, 'Being the Change: Towards Diversity Intelligence in the Australian Legal Profession' (Essay, William Ah Ket Scholarship, 2019).

[130] Sarah Webster, 'Unconscious Biases and Uncomfortable Truths: Reassessing Institutional Values and Professionalism in the Law' (Essay, William Ah Ket Scholarship, 2021).

the ongoing scholarship by championing systemic changes through a bifurcated approach. Its recommendations for corporate initiatives, as well as its inquiry into the operation of section 10 of the RDA, are grounded in a detailed appreciation for the historical factors that shape our legal system. To borrow from Justice Dhanji's words, cultural diversity is not a problem requiring quick fixes, but instead an opportunity to 'inhabit' and 'occupy' the legal structures inherited from our past, and use them in our pursuit of justice.[131]

[131] Dhanji (n 3) [70].

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