

UNCONSCIOUS BIASES AND UNCOMFORTABLE TRUTHS: REASSESSING INSTITUTIONAL VALUES AND PROFESSIONALISM IN THE LAW

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In 1906, William Ah Ket, Australia's first barrister of Chinese descent,¹ exposed law reforms that discriminated against Chinese factories as indulging a 'wholesale condemnation' of the Chinese that was driven by 'ignorant prejudice' and belied 'the whole truth', including the fact that any race 'must necessarily include good, bad, and indifferent'.² Mr Ah Ket's observations that 'blind' prejudice suppresses the truth and prevents individuals from accessing equal opportunities are just as resonant in today's offices, chambers and courtrooms. The impact of unconscious bias is particularly acute in a legal context, where the stakes are high and ample opportunities exist for bias to infiltrate decision making and prevent the 'whole truth' from being told. To commemorate the legacy of Mr Ah Ket, this essay will focus on the role of unconscious bias in determining the membership of the Australian legal profession by preserving the archetype of a lawyer as Caucasian, male and privileged. It will outline the impetus for change and suggest research-driven measures that may assist legal practitioners to bring an 'unbiased mind' to recruitment and promotion. Chiefly, this essay seeks to contribute two things to the discussion of these issues. The first is to contend that minimising bias has unique conceptual importance in the law, which should stand equally alongside the practical benefits of improving diversity in providing momentum for change. The second is to expose traditional ideals of legal professionalism as awkward anachronisms that bar diverse entrants from the upper echelons of the profession and require revision.

I UNCONSCIOUS BIAS AND THE POWER OF STEREOTYPES

Hamilton and Troiler define stereotypes as 'cognitive structures that contain the perceiver's knowledge, beliefs, and expectations about a human group.'³ Stereotypes are part of normal cognitive functioning used by 'all people, not just "prejudiced" ones... to simplify the task of

¹ Jane Lee, 'The story of William Ah Ket, the first Chinese-Australian barrister', *ABC Radio National* (online, 28 August 2018) <<https://www.abc.net.au/news/2018-08-30/william-ah-ket-the-first-chinese-australian-barrister/10160198>>; 'History', *Asian Australian Lawyers Association* (Web Page, 2015) <<http://www.aala.org.au/History-of-William-Ah-Ket>>.

² William Ah Ket, *The Chinese and the Factories Acts* (Arbuckle, Waddell & Fawckner, 1906) 3.

³ David L Hamilton and Tina K Troiler, 'Stereotypes and stereotyping: An overview of the cognitive approach' in J F Dovidio and S L Gaertner (eds), *Prejudice, discrimination, and racism* (Academic Press, 1986) 127, 133.

perceiving, processing, and retaining information'.⁴ While the proportion of the population holding overt stereotypes has declined,⁵ 'unconscious' or 'implicit' biases remain prevalent. An unconscious bias is a learned stereotype that is 'automatic, unintentional, deeply engrained [and] universal'.⁶

Kahneman conceptualised human cognition as operating through two systems: 'System 1', which automatically produces impressions, intuitions and provisional judgments; and 'System 2', which consciously accepts, rejects or corrects the outputs of System 1.⁷ The strength of implicit attitudes manifested by System 1 can be measured using the Implicit Association Test, which asks individuals to associate attributes (such as 'good' or 'bad') with social categories (such as 'black' or 'white').⁸ Experiments have consistently shown implicit preferences for Caucasians over Asians, African-Americans and Hispanics.⁹ Australian participants in one study displayed an implicit bias in favour of Caucasians and against Indigenous Australians.¹⁰

Unconscious bias can manifest in subtle ways including dismissive glances, gestures and vocal tones ('microaggressions') or in behaviours that isolate or devalue others ('microinequities').¹¹ Even if a single biased encounter is negligible, repeated occurrences can have significant cumulative impact.¹² For example, an Australian field study found that to secure the same number of interviews as an Anglo-Saxon applicant, Italian applicants had to submit 12% more applications, Indigenous applicants required 35% more applications, Middle Eastern applicants required 64% more applications and Chinese applicants required 68% more applications.¹³

⁴ Linda Hamilton Krieger, 'Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity' (1995) 47(6) *Stanford Law Review* 1161, 1188.

⁵ Susane T Fiske and Shelley E Taylor, *Social Cognition: From Brains to Culture* (Sage, 2nd ed, 2013) 282.

⁶ Leah M Backhus et al, 'Unconscious Bias' (2019) 29(3) *Thoracic Surgery Clinics* 259, 259.

⁷ Carey K Morewedge and Daniel Kahneman, 'Associative Processes in Intuitive Judgment' (2010) 14(10) *Trends in Cognitive Science* 435.

⁸ Anthony G Greenwald, Debbie E McGhee and Jordan L K Schwartz, 'Measuring Individual Differences in Implicit Cognition: The Implicit Association Test' (1998) 74(6) *Journal of Personality and Social Psychology* 1464.

⁹ Perry Hinton, 'Implicit stereotypes and the predictive brain: cognition and culture in "biased" person perception' (2017) 3 *Palgrave Communications* 17086.

¹⁰ Siddharth Shirodkar, 'Bias against Indigenous Australians: Implicit Association Test results for Australia' (2019) 22(3-4) *Journal of Australian Indigenous Issues* 3.

¹¹ Mary P Rowe, 'Barriers to equality: The power of subtle discrimination to maintain unequal opportunity' (1990) 3 *Employee Responsibilities and Rights Journal* 153.

¹² Anthony G Greenwald and Mahzarin R Banaji, 'Statistically Small Effects of the Implicit Association Test Can Have Societally Large Effects' (2015) 108(4) *Journal of Personality and Social Psychology* 553.

¹³ Alison Booth, Andrew Leigh and Elena Varganova, 'Does Ethnic Discrimination Vary Across Minority Groups? Evidence from a Field Experiment' (2012) 74(4) *Oxford Bulletin of Economics and Statistics* 547. See also

A Case Study of the 'Model Minority' Stereotype

The 'yellow peril' trope depicting Asian immigrants as 'inassimilable foreigners' underlies Mr Ah Ket's critique.¹⁴ Today, Australians with Asian heritage (broadly referred to as 'Asian Australians') are likely to encounter a different stereotype. The 'model minority' stereotype introduced by sociologist William Petersen in 1966,¹⁵ portrays individuals with Asian heritage as intense, diligent, self-reliant and high-achieving.¹⁶ While this sounds complimentary, it generates several problems for Asian Australians.

First, it overgeneralises the varied experiences and personalities of a large, diverse group. The Australian Standard Classification of Cultural and Ethnic Groups includes 66 groups under the categories 'South-East Asian', 'North-East Asian' and 'Southern and Central Asian'.¹⁷ Asian Australians therefore differ immensely in their values, religious beliefs, ethnic identities and spoken languages, in addition to their socioeconomic status, skills and immigration circumstances. Second, it suggests that Asian Australians have overcome all obstacles and do not require policy consideration.¹⁸ It invites comparison between minorities and ultimately 'maintains the dominance of Whites in the racial hierarchy by diverting attention from racial inequality and by setting standards for how minorities should behave.'¹⁹ Third, the term 'minority' has 'exclusionary power'.²⁰ It reinforces the idea that an individual is a 'forever foreigner'.²¹ Fourth, being subjected

Marianne Bertrand and Sendhil Mullainathan, 'Are Emily and Greg more employable than Lakisha and Jamal? A field experiment on labor market discrimination' (2004) 94(4) *The American Economic Review* 991.

¹⁴ Yao Li and Harvey L Nicholson Jr, 'When "model minorities" become "yellow peril" – Othering and the racialization of Asian Americans in the COVID-19 pandemic' (2022) 15(2) *Sociology Compass* e12849.

¹⁵ William Petersen, 'Success Story, Japanese-American Style', *The New York Times Magazine* (online, 9 January 1966) 20 <<https://www.dartmouth.edu/~hist32/Hist33/Petersen.pdf>>.

¹⁶ Hanna Yun-Han Chang, 'The Internalization of the Model Minority Stereotype, Acculturative Stress, and Ethnic Identity on Academic Stress, Academic Performance, and Mental Health Among Asian American College Students' (2017) *Dissertations* 2785.

¹⁷ 'Australian Standard Classification of Cultural and Ethnic Groups', *Australian Bureau of Statistics* (Web Page, 18 December 2019) <<https://www.abs.gov.au/statistics/classifications/australian-standard-classification-cultural-and-ethnic-groups-ascecg/latest-release>>.

¹⁸ Kristy Y Shih, Tzu-Fen Chang and Szu-Yu Chen, 'Impacts of the Model Minority Myth on Asian American Individuals and Families: Social Justice and Critical Race Feminist Perspectives' (2019) 11(3) *Journal of Family Theory & Review* 412.

¹⁹ Stacey J Lee, *Unraveling the 'Model Minority' Stereotype: Listening to Asian American Youth* (Teacher's College Press, 1996) 6.

²⁰ Daphna Oyserman and Azumi Sakamoto, 'Being Asian American: Identity, Cultural Constructs, and Stereotype Perception' (1997) 33(4) *Journal of Applied Behavioral Science* 435, 450.

²¹ Min Zhou and Carl L Bankston III, 'The Model Minority Stereotype and the National Identity Question: The Challenges Facing Asian Immigrants and Their Children' (2019) 43(1) *Ethnic and Racial Studies* 233.

to the stereotype can be restrictive and frustrating. It may belittle individual success and produce double standards. Fundamentally, it implies that an Asian Australian will behave a certain way by default. As Zhou and Lee opine, the ‘model minority’ stereotype can give rise to other stereotypes that hinder the pursuit of senior positions in the workplace.²² The image of the ‘invisible, inoffensive and submissive Asian’²³ may prompt employers to perceive Asian Australians as passive, risk averse or lacking the social skills to be effective leaders.

A compelling example of the restrictive power of this stereotype emerges in American case law. In *Chin v Runnels*, a Chinese American defendant sought a writ of habeas corpus on the basis that the exclusion of Chinese American, Filipino American and Latino forepersons from San Francisco grand juries breached his right to equal protection under the law.²⁴ The Deputy District Attorney testified that the criteria applied in selecting a grand jury foreperson included ‘administrative capabilities, leadership and people skills’. He was looking for a ‘hardy handshake sort of guy’. The district court concluded there had been no intentional discrimination and denied Mr Chin’s petition. One commentator has since argued that Chinese Americans and Filipino Americans were overlooked because of court officials’ unconscious reliance on the ‘model minority’ stereotype.²⁵

Of course, Asian Australians are not the only group disadvantaged by racial biases. In *R v Justices of Rankine River*, the court found that a judicial officer who had commented that ‘[n]atives must be kept under the thumb’ had ‘unconsciously, but effectively, allowed discriminatory and disciplinary leanings against the two [Indigenous] accused before him to displace judicial impartiality in his mental processes.’²⁶ In 2019, a complaint was made against a judge for making inappropriate generalisations concerning ‘Indigenous laissez-faire parenting’.²⁷

²² Min Zhou and Jennifer Lee, ‘Hyper-Selectivity and the Remaking of Culture: Understanding Asian American Achievement’ (2017) 8(1) *Asian American Journal of Psychology* 7. See also Ronald Takaki, *Strangers from a Different Shore – A History of Asian Americans* (Little Brown & Company, 1989) 474.

²³ Tim Soutphommasane, ‘The Invisible Race: Unconscious Bias and the Bamboo Ceiling’, *ABC News* (online, 13 June 2014) <<https://www.abc.net.au/religion/the-invisible-race-unconscious-bias-and-the-bamboo-ceiling/10099224>>.

²⁴ *Chin v Runnels*, 343 F Supp 2d 891, 896 (N D Cal, 2004).

²⁵ Darren Seiji Teshima, ‘A “Hardy Handshake Sort of Guy”: The Model Minority and Implicit Bias About Asian Americans in *Chin v. Runnels*’ (2006) 11(1) *Asian Pacific American Law Journal* 122.

²⁶ *R v Justices of Rankine River* (1962) 3 FLR 215.

²⁷ Jacqueline Breen, ‘NT Chief Judge Elizabeth Morris finalises investigation into complaint against judge Greg Borchers’, *ABC News* (online, 11 December 2019) <<https://www.abc.net.au/news/2019-12-11/nt-chief-judges-investigates-complaint-against-greg-borchers/11784300>>; ‘Complaint against Borchers LCJ’, *Criminal Lawyers Association of the Northern Territory* (Web Page) <<https://clant.org.au/news/complaint-against-borchers-lcj/>>.

These examples illustrate the power of stereotypes in a legal context and the need to embrace diverse viewpoints in order to identify and challenge biased decision making. While everyone is susceptible to unconscious bias, housing a diverse group of legal practitioners increases the likelihood that bias will be called out, alternative perspectives will be voiced and the ‘whole truth’ will be told. Mr Ah Ket’s paper revealing the ‘ignorant prejudice’ underlying the discriminatory Factories Acts provides a poignant example of this. Further, there is evidence to suggest that consistent, long-term exposure to counterstereotypes can undermine implicit associations.²⁸ In essence, surrounding ourselves with admired legal practitioners of different ethnicities, genders and socio-economic backgrounds can undermine negative implicit associations towards certain groups, creating a virtuous cycle between embracing diversity and reducing bias.

II THE IMPETUS FOR MINIMISING BIAS IN THE LEGAL PROFESSION

There is growing recognition of the business case for quashing bias and embracing diversity. Research demonstrates that diverse and inclusive workplaces benefit from greater innovation, higher morale, improved productivity and reduced absenteeism.²⁹ However, there is relatively little acknowledgment that minimising bias in the Australian legal system is imperative on a conceptual level. Any student or practitioner of the law will immediately recognise the formidable image of Justice, a blindfolded woman wielding a sword and a set of scales as a symbol for the impartiality of the law.³⁰ The idea that the law must apply equally to all has been described as ‘a fundamental concept of our legal system’³¹ and represents part of the rule of law.³² However statistical and anecdotal evidence indicates that this is aspirational rather than reflective of reality.

²⁸ Hinton (n 9). See also Plant et al, ‘The Obama effect: Decreasing implicit justice and stereotyping’ (2009) 45(4) *Journal of Experimental Social Psychology* 961; ‘Judicial Impartiality: Cognitive and Social Biases in Judicial Decision-Making’, *Australian Law Reform Commission* (Background Paper, April 2021) 21 <<https://www.alrc.gov.au/publication/cognitive-social-biases-ji6/>>.

²⁹ Scott Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools and Societies* (Princeton University Press, 2007); Deloitte, *Waiter, is that an inclusion in my soup? A new recipe to improve business performance* (Report, May 2013) 9; Jane O’Leary, Graeme Russell and Jo Tilly, ‘Building Inclusion: An Evidence-Based Model of Inclusive Leadership’, *Diversity Council Australia* (Web Page, 2015) 12 <<https://www.dca.org.au/research/project/building-inclusion-evidence-based-model-inclusive-leadership>>.

³⁰ Bennett Capers, ‘Blind Justice: Representing and Contesting Ideologies of the Public Spheres: Envisioning and Signifying Justice’ (2012) 24(1) *Yale Journal of Law & the Humanities* 179, 183.

³¹ ‘Equality before the Law Bench Book – Section 1 – Equality’, *Judicial Commission of New South Wales* (Web Page, 16 April 2020) <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/section01.html>>.

³² A V Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 1959); Tom Bingham, *The Rule of Law* (Penguin Books, 2010) 56.

Given the nature of legal decision making, this is not surprising. The application of broad rules to individual circumstances invariably requires the exercise of discretion, ‘the space...between legal rules in which legal actors may exercise choice’.³³ Where there is discretion, there is room for bias. The Hon Tony Pagone observed that fact finding involves ‘a large amount of intuitive decision without conscious deliberation’ which is undoubtedly ‘done with some preconceived or unconscious bias’.³⁴ In elucidating the relationship between discretion and the rule of law, the Hon Anthony Murray Gleeson explained, ‘the rule of law suggests that the outcome of...litigation should depend as little as reasonably possible upon the identity of the judge who hears the case.’³⁵ Yet the mounting research uncovering the predominance of unconscious bias indicates that the identity, training and environment of the decision maker can influence how the law is applied in individual circumstances. The pervasiveness of bias as a barrier to the legal profession undermines the conceptual foundations of the law in a way that is unique to any other industry. Even if the business case for diversity had not been made out, the minimisation of bias in the law is a matter of existential importance.

Reducing unconscious bias and embracing diversity in the legal profession will promote the rule of law by minimising the extent to which the law is inconsistently applied and empowering minority groups to access the legal system. The Law Council of Australia includes in its Rule of Law Principles that ‘the law must be both readily known and available’ and that ‘everyone should have access to competent and independent legal advice’.³⁶ Yet countless minority groups including migrants,³⁷ Indigenous Australians,³⁸ homeless and disadvantaged young people face barriers to

³³ Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 1992) 11.

³⁴ Dominic Rolfe, ‘The burden of unconscious bias’, *Law Society of NSW Journal* (Web Page, 1 June 2017) <<https://lsj.com.au/articles/the-burden-of-unconscious-bias/>>.

³⁵ Anthony Murray Gleeson, ‘Courts and the Rule of Law’, *High Court of Australia* (Web Page, 7 November 2001) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm>.

³⁶ Law Council of Australia, ‘Policy Statement: Rule of Law Principles’, *Law Council of Australia* (Policy Statement, March 2011) <<https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>>.

³⁷ Redfern Legal Centre, ‘NSW migrants’ unmet legal needs’, *Redfern Legal Centre* (Web Page) <<https://rlc.org.au/sites/default/files/attachments/NSW%20Migrants%27%20Unmet%20Legal%20Needs%20MO SAIC%20RLC.pdf>>

³⁸ Scott Ludlum and Chiara Lawry, ‘Closing the Justice Gap for Indigenous Australians’ (2010) 7(17) *Indigenous Law Bulletin* 12.

accessing the legal system.³⁹ These include language barriers,⁴⁰ the inaccessibility of legal information and lack of specialist legal services.⁴¹ A diverse group of legal practitioners who are relatable and empathetic,⁴² and can communicate effectively in other languages and cultural contexts will be better equipped to serve their clients and communities.

Fostering a diverse membership is also more likely to promote trust in the impartiality of the judiciary and the effectiveness of the legal system, which may in turn encourage minority groups to access legal services. The Hon Michael McHugh observed that ‘when a court is socially and culturally homogenous, it is less likely to command public confidence in the impartiality of the institution.’⁴³ Seeing legal practitioners span a broad demographic spectrum is powerful in both symbolism and practice.

To date, organisations have been slow to leverage the cultural and socio-economic diversity of their employees to improve client service.⁴⁴ Notably, research is emerging on the costs of excluding job applicants on the basis of social class, a permeable form of diversity that intersects with other characteristics to magnify exclusion.⁴⁵ Recruitment for entry level roles at prestigious chambers and private practices often draws heavily on high-scoring alumni from Group of Eight universities and elite secondary schools. The cost of exclusively hiring these graduates is twofold. First, they are more likely to have planned their exit from the organisation within a few years.⁴⁶ Second, this approach fails to unlock the unique skillsets of ‘social class transitioners’ who may

³⁹ S Forell, E McCarron and L Schetzer, *No home, no justice? The legal needs of homeless people in NSW* (Report, 2005) ch 4.

⁴⁰ See, eg, ‘Access to interpreters’, *Australian Law Reform Commission* (Web Page, 11 January 2018) 10.6 <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/10-access-to-justice/access-to-interpreters/>>.

⁴¹ Louis Schetzer and Judith Henderson, *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW* (Report, August 2003).

⁴² See Ian Gallacher, ‘Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance’ (2011) 8 *Journal of the Association of Legal Writing Directors* 109.

⁴³ Michal McHugh, ‘Women Justices for the High Court’ (Speech, High Court of Australia, 27 October 2004).

⁴⁴ See, eg, Lisa Annese, ‘Busting the Culture Club – how Australia’s companies can harness the benefits of cultural diversity’, *Diversity Council Australia* (Blog Post, 29 April 2015) <<https://www.dca.org.au/blog/busting-culture-club-how-australias-companies-can-harness-benefits-cultural-diversity>>.

⁴⁵ Brown et al, *Class at Work: Does Social Class Make a Difference in the Land of the ‘Fair Go’?* (Report, 2020) 18 <<https://www.dca.org.au/research/project/class-work>>.

⁴⁶ L A Rivera, *How Social Class Determines Who Lands the Best Jobs* (Princeton University Press, 2016) 281.

be better placed to bridge socio-cultural divides and connect with a wider spectrum of clients.⁴⁷ Part III outlines options for unlocking the potential of a broader range of legal practitioners.

III MEASURES FOR REDUCING THE IMPACT OF UNCONSCIOUS BIAS ON RECRUITMENT AND PROMOTION

Implicit associations can form at an early age and remain fixed throughout life, even if an individual changes their conscious beliefs. Initiatives that rely on individuals to police their own unconscious biases have predictably produced mixed results, despite considerable investment.⁴⁸ In private practice, fee earners who are assessed on billable hours and cannot bill for time spent on recruitment and training initiatives are incentivised to de-prioritise these activities and complete them with minimal time and effort. These are precisely the circumstances in which the brain relies on the effortless outputs of System 1.⁴⁹ As the Australian Law Reform Commission recognised, ‘interventions are only sustainable if they are institutionalised’.⁵⁰ The systemic nature of unconscious bias requires a systematic response, starting with a shift in the way we think about the legal profession.

A *Embedding Diversity and Inclusion in Institutional Values*

The legal profession is an historic institution with deeply entrenched values. This necessitates a values-based approach to embracing diversity that is consistent with the overarching aims of the profession. A pivotal step in reducing unconscious bias is to recognise diversity and inclusion as elements of the rule of law and as necessary ingredients for ensuring that justice is not only done but seen to be done. Organisations such as the Australian Bar Association are beginning to openly enshrine diversity and inclusion in their values.⁵¹ However, many organisations remain wary of broadcasting a commitment to diverse membership because this risks accusations that their

⁴⁷ S Martin and S Cote, ‘Social Class Transitioners: Their Cultural Abilities and Organisational Importance’ (2019) 44(3) *Academy of Management Review* 618.

⁴⁸ Catherine Fox, *Stop Fixing Women* (NewSouth, 2020) 129-130.

⁴⁹ Jeffrey W Sherman, ‘The Dynamic Relationship Between Stereotype Efficiency and Mental Representation’ in Gordon B Moskowitz (ed), *Cognitive Social Psychology* (Psychology Press, 1st ed, 2001) 177.

⁵⁰ ‘Judicial Impartiality: Cognitive and Social Biases in Judicial Decision-Making’ (n 28) 19.

⁵¹ ‘Diversity and Inclusion Principles’, *Australian Bar Association* (Web Page) 1
<https://austbar.asn.au/uploads/pdfs/ABA_Diversity_and_Inclusion_Principles.pdf>.

appointments are tokenistic rather than merit-based.⁵² Similar concerns arise from the controversial use of quotas, which produce immediate, measurable outcomes but have been criticised as myopic, blunt instruments that subject beneficiaries to greater scrutiny and fail to address the root causes of underrepresentation.⁵³ This criticism can undermine trust in the quality of membership and further alienate diverse members. A recent survey of culturally diverse women indicated that 60% experienced discrimination at work. Concern that their appointment was tokenistic represented a common issue for these women.⁵⁴

1 *The Merit Versus Diversity Debate*

The view that merit is antithetical to diversity is a dangerous fallacy because of its accessibility. It can be easily grasped without pouring over a litany of nuanced and esoteric research papers. It conveniently glosses over privilege by encouraging a superficial comparison between candidates at a point in time based on cosmetic and biased indicators of aptitude. ‘Privilege’ in this context extends beyond affluence to capture social and knowledge capital. The legal community was, and in some respects continues to represent, a tightly knit community. A survey conducted in 1978 indicated that 50% of solicitors and 40% of barristers were related to someone who was legally qualified.⁵⁵ In historic institutions such as the law, which maintain high barriers to entry and have been dominated by a certain in-group, that in-group holds a monopoly over the institutional knowledge, social and relationship capital that all but guarantees success. Members of the in-group enjoy intangible benefits which ensure they are well placed to secure positions based on both ‘cultural fit’ and prevailing measures of merit. These include: understanding the breadth of roles available in the profession and their entry requirements; deciphering the hierarchy of prestige in schools, tertiary institutions and professional organisations; accessing a superior suite of extra-

⁵² Elizabeth Handsley and Andrew Lynch, ‘Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-2013’ (2015) 37(2) *Sydney Law Review* 187.

⁵³ See, eg, Joyce He and Sarah Kaplan, ‘The debate about quotas’, *Gender and the Economy* (Web Page, 26 October 2017) <www.gendereconomy.org/the-debate-about-quotas>; Lea M Petters and Marina Schroder, ‘Negative side effects of affirmative action: How quotas lead to distortions in performance evaluation’ (2020) 130(4) *European Economic Review* 103500; Rainbow Murray, ‘Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All’ (2014) 108(3) *American Political Science Review* 520; Drude Dahlerup (ed), *Women, Quotas and Politics* (Routledge, 2005) ch 2.

⁵⁴ Women of Colour Australia, *Workplace Survey Report 2021* (Report, 2021).

⁵⁵ Angela Melville, ‘Barriers to Entry into Law School: An Examination of Socio-Economic and Indigenous Disadvantage’ (2014) 24(1) *Legal Education Review* 45, 46.

curricular programs to develop desirable skills; and leveraging interpersonal connections to ‘get a foot in the door’ at organisations through internal referrals or information sharing.

In contrast, a candidate who is not a member of the in-group is less likely to know anyone who practises the law. This has been recognised as a factor contributing to the low rates of Indigenous students completing law degrees.⁵⁶ Without intervention, the dominance of an in-group becomes a self-perpetuating cycle as individuals with the raw materials to succeed as legal practitioners but who are not privy to the same repository of know-how as the in-group may struggle to compete with the ‘polish’ that comes from years of extensive preparation.

The merit versus diversity debate sheds light on the factors driving the homogeneity of the profession. Clearly, reducing bias requires reassessing unspoken practices that insidiously exclude individuals from pursuing legal careers (explored in section B) and considering ways to level the playing field by better equipping diverse candidates to apply for legal positions (canvassed in section C).

B *Redefining ‘Professionalism’ for a Diverse Professional Body*

Identifying as a ‘professional’ involves becoming a particular type of person.⁵⁷ While ‘professionalism’ connotes community and collegiality, it can be harnessed to consolidate power and exclude others.⁵⁸ It has been ‘inextricably linked historically to masculinity, whiteness, class privilege and Protestantism’,⁵⁹ culminating today in the quintessential image of a lawyer, aptly described by Cooper as ‘a neatly dressed man wearing a conservative dark suit, white shirt, and muted accessories.’⁶⁰ While an increasingly diverse group of individuals now practise the law, the in-group and the dominant culture of the profession remains unchanged. Men constitute approximately 61% of judicial officers in Australia,⁶¹ and 70% of partners in large and medium-

⁵⁶ Carolyn Penfold, ‘Indigenous Students’ Perceptions of Factors Contributing to Successful Law Studies’ (1996) 7(2) *Legal Education Review* 155.

⁵⁷ David B Wilkins, ‘Identities and Roles: Race, Recognition, and Professional Responsibility’ (1998) 57(4) *Maryland Law Review* 1502.

⁵⁸ Constance Backhouse, ‘Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives’ (Conference Paper, Colloquia organised by Chief Justice of Ontario Advisory Committee on Professionalism, October 2003).

⁵⁹ *Ibid* 3.

⁶⁰ Elizabeth B Cooper, ‘The Appearance of Professionalism’ (2019) 71 *Fordham Law Review* 1.

⁶¹ ‘AIJA Judicial Gender Statistics’, *Australasian Institute of Judicial Administration* (Web Page, 30 June 2020) <<https://aija.org.au/wp-content/uploads/2020/07/2020-JUDICIAL-GENDER-STATISTICS-v3.pdf>>.

sized law firms.⁶² In NSW, men represent approximately 75% of all barristers and 88% of senior counsel.⁶³ The result is that anachronistic ideals continue to be applied, perpetuating a culture of explicit and unspoken norms that create an unequal burden when it comes to compliance.

Strict behavioural norms are particularly pervasive in the legal profession as practitioners are considered to hold privileged positions and are bound by ethical conduct codes. For example, under the Australian Solicitors' Conduct Rules, solicitors are prohibited from engaging in conduct, in their personal or professional lives, which demonstrates that they are not a 'fit and proper person to practise law'.⁶⁴ Since the twelfth century, advocates have sworn oaths upon their admission, which recognise the special responsibility of the legal profession.⁶⁵ The concept that only a particular kind of person is entitled to practise the law is an ideological substratum on which the legal profession has been built.

1 *Lawyers as 'white'*

Racial stereotypes are often incongruous with expectations of how a lawyer should look, sound and act. Leadership traits that appear to be race neutral, including intelligence, confidence and decisiveness, tend to be associated more strongly with Caucasians than ethnic minority groups.⁶⁶ Rosette and Leonardelli posit that this is due to the 'presumption that prototypical leaders were White'.⁶⁷ One survey of culturally diverse women found that 88% of participants intended to advance to a senior position but only 10% strongly agreed that their organisations recognised their leadership qualities. More than two thirds felt pressure to conform to existing leadership styles.⁶⁸

⁶² Hannah Wootton and Michael Pelly, 'Legal sector's slow march to equality hits reverse', *Women Lawyers NSW* (Web Page, 13 December 2019) <<https://womenlawyersnsw.org.au/press/legal-sectors-slow-march-to-equality-hits-reverse/>>.

⁶³ 'Statistics', *NSW Bar Association* (Web Page) <<https://nswbar.asn.au/the-bar-association/statistics>>.

⁶⁴ *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) reg 5. See also M Slabbert, 'The Requirement of Being a 'Fit and Proper' Person for the Legal Profession' (2011) 14(4) *Potchefstroom Electronic Law Journal* 209.

⁶⁵ Carol Rice Andrews, 'The Lawyer's Oath: Both Ancient and Modern' (2009) 22(1) *Georgetown Journal of Legal Ethics* 3, 10.

⁶⁶ Gundemir et al, 'Think Leader, Think White? Capturing and Weakening an Implicit Pro-White Leadership Bias' (2014) 9(1) *Plos One* 1.

⁶⁷ Ashleigh Shelby Rosette and Geoffrey J Leonardelli, 'The White Standard: Racial Bias in Leader Categorization' (2008) 93(4) *Journal of Applied Psychology* 758.

⁶⁸ J O'Leary, D Groutsis and R D'Almada-Remedios, *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century* (Report, 2017) <<https://www.dca.org.au/research/project/cracking-glass-cultural-ceiling>>.

A report prepared by the Asian Australian Lawyers Association in 2015 exposed the gross scale of the underrepresentation of Asian Australians, who accounted for 0.8% of the judiciary, 1.6% of barristers and 3.1% of law firm partners, despite representing almost 10% of the Australian population.⁶⁹ Career progression for Asian Australians is hampered by the ‘bamboo ceiling’, a term introduced by Jane Huyn to explain the lattice of cultural barriers and misconceptions that prevent individuals with Asian heritage from progressing to senior leadership positions.⁷⁰ The existence of a bamboo ceiling is supported by the results of a survey undertaken by eight law firms as part of the Cultural Diversity Initiative, which revealed that individuals with Asian backgrounds constituted 25% of graduates but only 8% of partners.⁷¹ Bias also contributes to the underrepresentation of Indigenous Australians in the legal profession. As of 2018, 0.7% of practising solicitors in New South Wales identified as Aboriginal or Torres Strait Islander, despite representing approximately 3% of the population.⁷²

2 *Lawyers as male*

In the late 1800s, when Clara Brett Martin unsuccessfully petitioned to join the Law Society of Upper Canada, the concept of women ascending to ‘high offices’ was considered ‘so contrary to all notion of feminine sweetness, modesty and delicacy’ that it was laughable.⁷³ The media response illustrated the deep historic connection between masculinity and the legal profession. Commentators reminded women that they were intended to ‘occupy a different position from men’ and that their ‘gush and sentiment’ rendered them unsuitable.⁷⁴

Victoria became the first Australian state to permit women to practise the law when it passed the *Women’s Disabilities Removal Act 1903* (Vic). Subscribers to the ‘trickle up’ hypothesis expected the numbers of men and women rising to senior positions would eventually equalise but time was

⁶⁹ Asian Australian Lawyers Association, *Cultural Diversity Report* (Report, 14 April 2015) <<http://www.aala.org.au/cultural-diversity-report-2015>>.

⁷⁰ Jane Huyn, *Breaking the bamboo ceiling: career strategies for Asians: the essential guide to getting in, moving up, and reaching the top* (Collins, 2005).

⁷¹ Michael Pelly, ‘Asian lawyers hit ‘bamboo ceiling’, *Australian Financial Review* (online, 26 April 2019) <<https://www.afr.com/work-and-careers/workplace/asian-lawyers-hit-bamboo-ceiling-20190425-p51h8w>>.

⁷² Urbis, *2018 National Profile of Solicitors* (Report, 17 July 2019) 10 <<https://www.lawsociety.com.au/sites/default/files/2019-07/2018%20National%20Profile%20of%20Solicitors.pdf>>.

⁷³ ‘Woman’s Rights’, *Canadian Illustrated News* (online, 21 November 1874) 323 <https://www.canadiana.ca/view/oocihm.8_06230_264/4?r=0&s=1>.

⁷⁴ ‘Female Students-at-Law’, *Toronto Daily Mail* (Toronto, 6 April 1882); ‘Women as Lawyers’, *Toronto Daily Mail* (Toronto, 7 April 1892).

not the only obstacle.⁷⁵ As the Hon Margaret Beazley observed, the elimination of legal barriers failed to address the ‘prevailing attitude...that law was not a woman’s game’ and thus ‘there was, at best, a slow trickle of women entering the legal profession.’⁷⁶ Today, despite men and women graduating with law degrees in approximately equal numbers, women constitute only 31% of partners and 39% of judicial officers.⁷⁷

The ‘communal qualities’ historically expected of women (such as kindness and compassion) are frequently perceived as inconsistent with ‘agentic qualities’ expected of leaders (such as assertion, self-promotion and competitiveness), giving rise to ‘role incongruity’.⁷⁸ Due to this mismatch of stereotypes, women may be evaluated less favourably when they apply for, and occupy, leadership roles.⁷⁹ Women leaders may struggle to reconcile these cross-pressures, particularly when conflicting cultural expectations are overlaid.⁸⁰

To comply with prevailing norms, individuals may downplay their identity (known as ‘covering’)⁸¹ and subscribe to the dominant audio-visual language of power. Women in a male-dominated workplace may ‘cover’ by lowering their tone of voice and downplaying their roles as mothers or carers. Some consider that short hairstyles ‘highlight professionalism and downplay femininity’,⁸² the troubling implication being that the appearance of ‘femininity and professional competence are antithetical’.⁸³ The popularity of short hairstyles among politicians yielded the label ‘political bob’ (or ‘pob’). In 2016, Vogue Magazine published articles dedicated to the ‘thinking woman’s hairstyle of choice’, observing that ‘the short, masculine haircut is favoured by women in power. It is discreet, non-sexual, and it says “woman able to compete in a man’s

⁷⁵ Sally J Kenney, ‘Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States’ in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Bloomsbury Publishing, 2013) 461, 464.

⁷⁶ Margaret Beazley, ‘100 Years of Women in Law in NSW’ (Speech, Carroll & O’Dea Lawyers, 18 October 2018).

⁷⁷ Wootton and Michael Pelly (n 62); ‘AIJA Judicial Gender Statistics’ (n 61).

⁷⁸ Koenig et al, ‘Are Leader Stereotypes Masculine? A Meta-Analysis of Three Research Paradigms’ (2011) 137(4) *Psychological Bulletin* 616.

⁷⁹ Alice H Eagly and Steven J Karau, ‘Role Congruity Theory of Prejudice Toward Female Leaders’ (2002) 109(3) *Psychological Review* 573.

⁸⁰ Laurie A Rudman and Peter Glick, ‘Prescriptive Gender Stereotypes and Backlash Toward Agentic Women’ (2001) 57(4) *Journal of Social Issues* 743.

⁸¹ Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House Group, 1st ed, 2006) 76-79; Kenji Yoshino, ‘Covering’ (2001) 111 *Yale Law Journal* 769.

⁸² Rose Weitz, ‘Women and their Hair: Seeking Power through Resistance and Accommodation’ (2001) 15(5) *Gender & Society* 667, 677.

⁸³ *Ibid* 678.

world”.⁸⁴ Another commentator considered that the ‘pob’ says ‘dependable, no-nonsense, tough on immigration’.⁸⁵

Another traditionally masculine trait, the lower pitched voice, has frequently been ‘associated with credibility, truthfulness, safety, tranquility, naturalness, persuasion, power, closeness, attractiveness and trust’.⁸⁶ Men and women are more likely to select male and female leaders with lower pitched voices.⁸⁷ A public speaking guide published in 1797 suggested that a barrister should avoid speaking in a higher tone as it ‘destroys the solemnity of preaching, the weight and dignity of pleading, and gives to every thing you say a squeaking effeminacy, unbecoming a manly and impressive speaker.’⁸⁸ Intriguingly, Ada Evans, the first woman barrister in New South Wales, was reported as having a ‘low and sweet’ voice.⁸⁹ A study of the voicemail greetings of female lawyers in leading US law firms indicated that over one third alternated their voice between two frequencies, with the lower frequency fostering the perception of the women as higher ranking.⁹⁰

3 *Reassessing effective lawyering*

These findings are instructive for two reasons. They remind us that the legal profession had a history of homogeneity, and they expose the startling staying power of implicit associations, which

⁸⁴ Nicola Moulton, ‘Can Good Hair Save the World’ *Vogue UK* (Web Page, 3 November 2016) <<https://www.vogue.co.uk/article/power-hair-hillary-clinton-theresa-may-hairstyles>>. See also Mackenzie Wagoner, ‘From Hillary Clinton to Veep, the Unspoken Hair Rules for Women in Politics’ *Vogue* (Web Page, 7 June 2016) <<https://www.vogue.com/article/julia-louis-dreyfus-emmy-2015-veep-nomination-haircut>>.

⁸⁵ Lauren Cochrane, ‘The power of the political bob’, *The Guardian* (Web Page, 26 July 2016)

<<https://www.theguardian.com/fashion/2016/jul/26/pob-power-haircut-women-theresa-may-political-bob>>.

⁸⁶ Josefa D Martín-Santana et al, ‘Effectiveness of radio spokesperson's gender, vocal pitch and accent and the use of music in radio advertising’ (2015) 18(3) *BRQ Business Research Quarterly* 143, 145.

⁸⁷ Casey A Klofstad, Rindy C Anderson and Susan Peters, ‘Sounds like a winner: voice pitch influences perception of leadership capacity in both men and women’ (2012) 279(1738) *Proceedings of the Royal Society B: Biological Sciences* 2698; Rindy C Anderson and Casey A Klofstad, ‘Preference for leaders with masculine voices holds in the case of feminine leadership roles’ (2012) 7(12) *Plos One* 1. See also William J Mayew, Christopher A Parsons and Mohan Venkatachalam, ‘Voice pitch and the labor market success of male chief executive officers’ (2013) 34(4) *Evolution and Human Behavior* 243.

⁸⁸ T Knox, *Hints for public speakers: intended for young barristers, students at law, and all others who may wish to improve their delivery and attain a just and graceful elocution* (Gale ECCO, 2010) 11.

⁸⁹ ‘A Woman’s Letter’, *The Bulletin* (Melbourne, 19 May 1921) 42; Justice Virginia Bell, ‘By the Skin of Their Teeth’ (2018) 46 *Law Society Journal* 40, 40.

⁹⁰ Yosh Halberstam, ‘Gender identity and mode-switching behaviour: Evidence from the human voice’ (Paper, April 2021) <http://individual.utoronto.ca/halberstam/Voice_at_Work.pdf>. See also Basia Borkowska and Boguslaw Pawlowski, ‘Female voice frequency in the context of dominance and attractiveness perception’ (2011) 82(1) *Animal Behaviour* 55.

once formed in relation to a homogenous group have been clumsily transposed onto an increasingly diverse group for whom compliance is impossible. The result is that individuals who differ in some respect from the in-group are encouraged to bring a false, carefully constructed self to work at the expense of their time, energy and self-esteem. To truly reduce bias and embrace diversity, we must develop an impartial and inclusive model of professionalism that distinguishes between core skills and window dressing. Several practical measures can be adopted to support this goal, which are explored in section C.

C *Practical Measures to Reduce Bias*

1 *Developing a clearer picture of diversity*

Capturing reliable data on diversity is a necessary precursor to rolling out initiatives to reduce bias as this allows us to grasp the scale of underrepresentation, focus resources and measure progress. Some law societies and bar associations publish statistics on limited demographics, commonly gender and age,⁹¹ although our understanding of other aspects of diversity and how they intersect is poor. Surveying legal practitioners to collect data presents multiple challenges: inundating individuals with surveys can create survey fatigue and reduce responsiveness; and given the complexity, dynamism and sensitivity of the subject matter, organisations may feel unsure about selecting language that is respectful, inclusive and informative. In 2021, Diversity Council Australia published a series of questions to guide organisations in establishing their own cultural diversity surveys.⁹² The profession would benefit from building upon this work to develop a standardised methodology. In 2020, cultural diversity questions were included in the annual practising certificate renewal process in Victoria for first time,⁹³ which serves as a reminder that applications for admission and practising certificate renewals present natural opportunities for collecting this data.

⁹¹ ‘Statistics’ (n 63); Victorian Bar, *Membership Statistics* (Report, June 2020) <<https://www.vicbar.com.au/sites/default/files/Membership%20Statistics%2030%20June%202020.pdf>>; ‘Law Society Profiles Surveys and Statistics’, *Law Society of New South Wales* (Web Page) <<https://www.lawsociety.com.au/advocacy-and-resources/gender-statistics/profiles-surveys-and-statistics>>.

⁹² D’Almada- Remedios et al, *Counting Culture: Towards a Standardised Approach to Measuring and Reporting on Workforce Cultural Diversity in Australia* (Report, 2021) <<https://www.dca.org.au/research/project/counting-culture-2021>>.

⁹³ Law Institute of Victoria and Victorian Legal Services Board, ‘Diversity in the legal profession measured for the first time in Victoria’, *Law Institute of Victoria* (Web Page, 16 October 2020) <<https://www.liv.asn.au/Staying-Informed/Media-Releases/Media-Releases/October-2020/Diversity-in-the-legal-profession-measured-for-the>>.

2 *Championing financial scholarship, community outreach and mentoring programs*

The path to becoming a legal practitioner in Australia is long and intellectually rigorous, which can exclude individuals from an early age. The requirement to graduate from law school constitutes the primary barrier for students from socioeconomically disadvantaged backgrounds.⁹⁴ Access to elite undergraduate law schools is granted to students who score exceptionally well in the Higher School Certificate ('HSC'), despite research demonstrating that HSC results are biased with respect to the types of schools students attend.⁹⁵ The standard pathway demands that students diligently apply themselves to their studies over a sustained period; identify the study of law at university as an attainable personal goal; and command the know-how and tenacity to apply for admission. This disadvantages students who attend poorly resourced schools, work part time, lack supportive home environments or lack sound career advice. It is not surprising that '[i]n NSW, high SES [socio-economic status] students outnumber low SES students in the 90-plus ATAR group by more than seven to one'.⁹⁶ The University of New South Wales has eschewed the ATAR as the sole criteria for admission by requiring applicants to also complete the Law Admission Test ('LAT'), which assesses critical thinking and analytical skills. This has broadened the range of students admitted, however the median ATAR of successful applicants remained as high as 98 in 2017.⁹⁷

Well-resourced firms with an interest in fostering diverse talent have a significant role to play in financial scholarship, community outreach and mentoring programs. In addition to the obvious financial benefits, scholarships promote self-esteem and encourage the pursuit of academic

⁹⁴ Melville (n 55).

⁹⁵ See, eg, Terrence R Dunn, 'An empirical demonstration of bias in HSC examinations' (1982) 26(2) *Australian Journal of Education* 190; 'UAC Guide 2021-22', *Universities Admissions Centre* (Guide, 2021) <<https://www.uac.edu.au/assets/documents/uac-guide/uac-guide-2021-22.pdf>>. See also Julie Hare, 'Learner profiles prove ATAR is not everything', *Australian Financial Review* (online, 18 July 2021) <<https://www.afr.com/work-and-careers/education/learner-profiles-prove-that-atar-is-not-everything-20210714-p589lo#:~:text=With%20powerful%20correlations%20between%20wealth,employment%20rates%20among%20school%20leavers>>.

⁹⁶ Kate Allman, 'A profession for the wealthy? The enduring problem for diversity in law', *Law Society of NSW Journal* (Web Page, 1 December 2020) <<https://lsj.com.au/articles/a-profession-for-the-wealthy-the-enduring-problem-for-diversity-in-law/>>.

⁹⁷ Misa Han, 'Ridiculously high' marks no longer enough to get into UNSW law school', *Australian Financial Review* (online, 22 January 2017) <<https://www.afr.com/policy/health-and-education/ridiculously-high-marks-no-longer-enough-to-get-into-unsw-law-school-20170120-gtv6a3>>.

endeavours by validating past efforts.⁹⁸ Mentoring programs provide students with a valuable access point to obscure, institutional know-how and staff with an opportunity to contribute to their communities. High school and university students have historically been targeted by these programs although educational disadvantage can take root much earlier, impeding confidence, literacy and ultimately the likelihood that a student will reach the stage where they become eligible for such programs.⁹⁹ Law firms should consider this when designing mentoring programs and aim to involve diverse and relatable staff members in the process, as exposing students to successful role models that share similarities with them, such as gender, socio-economic or ethnic background, can reassure students that their own success is plausible. A study of female engineering students indicated that their implicit attitudes improved after they were exposed to successful female engineers. Dasgupta proffers that this effect is ‘more likely if individuals see themselves as similar to those same-sex experts’.¹⁰⁰ Conversely, when ‘experts are portrayed as “superstars” who are unique and exceptional, they have little impact on young women’s views of themselves.’¹⁰¹ Indeed, seeing successful individuals who are dissimilar from ourselves can have a deflating effect.¹⁰²

3 *Systematising and prioritising recruitment*

Research demonstrating that job applicants are discriminated against based on their names alone suggests ‘blind CVs’ that redact identifying information are an important part of an organisation’s first line of defence against bias.¹⁰³ Applications should be systematically assessed against a pre-agreed list of selection criteria, which is made available to all applicants through accessible job listings. According to guidelines developed by the Australian Human Rights Commission, criteria

⁹⁸ Donna Aitken, Cathy Schapper and Eric Skuja, ‘Do Scholarships Help? Preliminary Results of a Case Study of Students in Scholarship Programmes at Monash University, 1997-2001’ (2004) 6(1) *Widening Participation and Lifelong Learning* 15.

⁹⁹ Melville (n 55) 54; Gillian Considine and Gianni Zappala, ‘The Influence of Social and Economic Disadvantage in the Academic Performance of School Students in Australia’ (2002) 38(2) *Journal of Sociology* 129.

¹⁰⁰ Nilanjana Dasgupta, ‘Implicit Attitudes and Beliefs Adapt to Situations: A Decade of Research on the Malleability of Implicit Prejudice, Stereotypes, and the Self-Concept’ in Patricia Devine and Ashby Plant (eds), *Advances in Experimental Social Psychology* (Academic Press, 2013) 233, 264.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* 266.

¹⁰³ See, eg, Bertrand and Mullainathan (n 13).

should reflect the genuine requirements of the role and distinguish between what is essential and what is nice to have.¹⁰⁴

Interviews provide fertile ground for unconscious bias. Interviewers facing time and billing pressures may attend interviews unprepared; ask questions spontaneously and inconsistently; let their assessments of one attribute inform their opinions of other attributes (the ‘halo effect’);¹⁰⁵ rely on ‘gut feel’; and present a biased evaluation under the guise of poor ‘cultural fit’. Interview questions should be thoughtfully designed, articulated with inclusive language and posed uniformly to all interviewees to facilitate an evidence-based, side-by-side comparison.¹⁰⁶ Requiring interviewers to score applicants in real-time and report detailed reasons for assigning candidates certain scores can embed accountability into the process. Establishing a system whereby interviewers independently submit their written assessments in advance of any roundtable and are allocated time to voice their views individually can reduce the risk that certain voices dominate. Assessments of ‘cultural fit’ should be interrogated to understand precisely what values the applicant embodies or rebuffs, the basis for that opinion and whether alternative values could be additive, rather than destructive, to culture. Additionally, counting time spent on recruitment and promotion as billable for the purpose of internal performance metrics can signify the importance of these activities and permit fee earners to dedicate appropriate time and care to the endeavour.

All of this can be supplemented with training programs awarding continuing professional development points that promote bias awareness. Pleasingly, training on this topic has become more common in the profession. For instance, a section on ‘avoiding bias and stereotyping’ appears in the Equality before the Law Bench Book in NSW.¹⁰⁷ As training programs rely on self-awareness and self-policing, they should not represent the sole focus of organisational efforts to reduce bias, but form part of a suite of robust checks and balances.

¹⁰⁴ ‘A step-by-step guide to preventing discrimination in recruitment’, *Australian Human Rights Commission* (Web Page, November 2014) 2 <<https://humanrights.gov.au/our-work/employers/step-step-guide-preventing-discrimination-recruitment>>.

¹⁰⁵ Juan Luis Nicolau, Juan Pedro Mellinas and Eva Martin-Fuentes, ‘The halo effect: A longitudinal approach’ (2020) 83 *Annals of Tourism Research* 102938.

¹⁰⁶ Fox (n 48) 129-130.

¹⁰⁷ ‘Equality before the law’, *Judicial Commission of New South Wales* (Web Page, 16 April 2020) <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/section01.html>>.

IV CONCLUSION

The enduring relevance of Mr Ah Ket's observations testifies to the ubiquity of bias in the legal profession and the challenge of minimising it. Unconscious biases of gatekeepers that hire and promote legal practitioners come at a significant cost. They narrow the talent pool, reduce community trust in the legal system and undermine equal access to the law. While those who practise the law may no longer be exclusively white, privileged and male, the norms underpinning legal professionalism mean they still need to act like it. Practical interventions that level the playing field for disadvantaged candidates must support two distinct conceptual efforts: an appreciation for diversity and inclusion as essential components of the rule of law; and a renewal of the concept of legal professionalism. This requires organisations to critically assess the skills necessary to be an effective lawyer and to embrace diverse models of leadership and lawyering. Insights drawn from new research remind us that perhaps most importantly, if we are truly to bring an 'unbiased mind' to bear on these issues, we must remain willing to re-evaluate our efforts in light of compelling new information.