

STRUCTURAL IMPROVEMENTS REQUIRED: BUILDING A CULTURALLY DIVERSE LEGAL PROFESSION

CLAIRE RUIYAN SMART

INTRODUCTION

Since the inception of the Australian legal system, the makeup of the legal profession has underrepresented the diversity of the Australian people. Australia's first barrister of Chinese descent, William Ah Ket, forecasted that he would '[n]ever be made a judge...because I am Chinese'.¹ This outcome ultimately ensued: despite being commended by former prime minister Sir Robert Menzies as 'a phenomenon at the Victorian Bar' who 'would be a very competent judge', Mr Ah Ket was appointed neither Silk nor judge.² In spite of, or perhaps because of, the discrimination he faced, Mr Ah Ket dedicated his life and career to removing cultural barriers in the legal profession.³ To honour Mr Ah Ket's legacy, this essay explores structural improvements that can be made to the current Australian legal profession and judiciary to dissolve existing cultural barriers.

Aside from the obvious need to reduce barriers for culturally diverse lawyers, structural improvements which aim to promote cultural diversity offer a range of other benefits. First, the business case for increased diversity is well-established. Diverse teams enhance innovation by incorporating a broader range of skills and ideas⁴ and different perspectives.⁵ Second, cultural diversity is not just a matter of business pragmatism.⁶ Improved inclusion and representation of diverse communities supports the rule of law⁷ by strengthening public confidence in the legal system and facilitating better access to justice.⁸ Further, promoting diversity increases the legitimacy of the legal profession because it ensures that the

¹ Isabel Carter, *Woman in a Wig: Joan Rosanove, QC* (Lansdowne Press, 1970) 13.

² Sir Robert Menzies, *The Measure of the Years* (Cassell London, 1970) 249.

³ Toylaan Ah Ket, 'William Ah Ket - Building Bridges between Occident and Orient in Australia, 1900-1936' (Speech, Conference of the Chinese Studies Association in Australia, 5 July 1995).

⁴ Sylvia Hewlett, Melinda Marshall and Laura Sherbin, 'How Diversity Can Drive Innovation' (December 2013) *Harvard Business Review*.

⁵ Mark Irving QC, 'An incomplete picture: data about cultural diversity at the Bar' (2021) 170 *Victorian Bar News* 40, 40.

⁶ Julian Sher, 'Personal reflections on cultural diversity in the legal profession' (Speech, Asian Australian Lawyers Association, 17 August 2017) 36.

⁷ Sarah Webster, 'Unconscious biases and uncomfortable truths: Reassessing institutional values and professionalism in the law' (Research Paper, 2021) 5-6.

⁸ Tianyi Long 'Being the Change: Towards Diversity Intelligence in the Australian Legal Profession' (Research Paper, 2019) 10.

profession reflects the community it seeks to serve.⁹ Celebrating cultural diversity also enables individual lawyers, as officers of the court, uphold principles of equality and justice.¹⁰

Yet the legal profession fails to reap the benefits of diversity, as culturally diverse lawyers are inadequately represented. For example, 3.2% of the Australian population,¹¹ but only 0.8% of Australian solicitors,¹² identify as Aboriginal or Torres Strait Islander. In 2015, Asian Australians accounted for almost 10% of the population, yet only 3.1% of partners, 1.6% of barristers and 0.8% of the judiciary.¹³ Although representation is improving at junior levels,¹⁴ there is still a lack of cultural diversity at senior levels and in the judiciary.¹⁵ Alarming, cultural gaps extend beyond representation in the profession. For instance, one North American study found that culturally diverse lawyers were more likely to earn less than their white colleagues and work an average of 0.52 hours per day more.¹⁶

The profession must undergo a structural shift towards understanding existing and evolving cultural gaps and embracing continuous positive change. This requires three measures. First, all members of the profession must develop a deeper understanding of the existing barriers faced by culturally diverse lawyers. These are set out in Part I. Second, the profession must take practical steps to enhance its members' understanding of and ability to address cultural gaps, discussed in Part II. Finally, when undergoing a structural shift, the profession should adhere to overarching principles of consultation, onus recognition and intersectionality, which are explained in Part III.

In this paper, I use the term 'cultural diversity', which includes differences in ethnicity, language, birthplace, religion, ancestry, national origin and race.¹⁷ I use the term 'culturally diverse lawyers' to

⁹ Irving (n 5) 40.

¹⁰ Sher (n 6) 36.

¹¹ Australian Bureau of Statistics, 'Snapshot of Australia: National summary data 2021' (Webpage, 28 June 2022) <<https://www.abs.gov.au/statistics/people/people-and-communities/snapshot-australia/latest-release>>.

¹² Law Society of NSW, *2020 National Profile of Solicitors* (Report, 1 July 2021) 11.

¹³ Asian Australian Lawyers Association, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015*, (Report, 2015).

¹⁴ Law Society of New South Wales, *National Profile of Solicitors 2016* (Report, 24 August 2017).

¹⁵ See, e.g., Michael Pelly, 'Judges are mostly Anglo-Celtic, married and speak only English' *Australian Financial Review* (Online, 2 August 2022); Asian Australian Lawyers Association (n 13) 4.

¹⁶ Fiona Kay, Cristi Masuch, Paula Curry, 'Growing Diversity and Emergent Change: Gender and Ethnicity in the Legal Profession' in Sheila McIntyre and Elizabeth Sheehy (ed) *Calling for Change: Women, Law, and the Legal Profession* (2006, University of Ottawa Press) 214.

¹⁷ J O'Leary and D Groutsis, 'Key Definitions and State of Play' (Webpage, 26 June 2020) <www.dca.org.au/topics/culture-faith/key-definitions-and-state-play>.

refer to lawyers who do not identify with the dominant cultures in Australia, that is, Anglo/Celtic-Western cultures.¹⁸

I UNDERSTANDING EXISTING CULTURAL BARRIERS

In order to address cultural gaps, it is important to first understand the challenges faced by culturally diverse lawyers. These challenges can be viewed through a historical lens, a study of collegiality in the profession, and with reference to individuals' biases.

A Historic barriers that influence today's profession

Deconstructing the exclusionary history of the Australian legal profession (including its colonial origins)¹⁹ allows for a better understanding of the cultural gaps in the legal system today.²⁰ Past discrimination has generational effects²¹ that impact the makeup of today's legal profession. Until the mid-1970s, all Australian states excluded émigré lawyers by requiring candidates for admission to legal practice to be British subjects.²² This had two primary objects – to protect the makeup of the profession during the influx of European migration following World War II and the dissolution of the White Australia Policy,²³ and to exclude Chinese immigrants flocking to Victoria and NSW from the 1850s gold rush onwards.²⁴ Like the legislature, courts too have historically excluded culturally diverse lawyers. The NSW Supreme Court in 1941 construed the requirement for applications for admission to be 'fit and proper' to exclude 'aliens'.²⁵ While that interpretation of 'fit and proper' has since evolved, the controlled cultural identity of the legal profession in the past has been a source of lack of representation and support for culturally diverse lawyers today.

In addition, it is important to reflect on the experiences of culturally diverse lawyers to understand the deep-seated biases that continue to impact culturally diverse lawyers. Legal biography, as a historical method, encourages reform of conventional understandings of the profession.²⁶ For instance,

¹⁸ SBS Cultural Atlas, *Australian Culture* 'Core Concepts' (Webpage, 2022) <<https://culturalatlas.sbs.com.au/australian-culture/australian-culture-core-concepts>>.

¹⁹ Tuanh Nguyen and Reynah Tang, 'Gender, Culture, and the Legal Professional: A Traffic Jam at the Intersection' (2017) (Special Issue) *Griffith Journal of Law & Human Dignity* 92, 92.

²⁰ Sarah Dehm, 'Legal Exclusions: Émigré Lawyers, Admissions to Legal Practice and the Cultural Transformation of the Australian Legal Profession' (2021) 49(3) *Federal Law Review* 327, 329.

²¹ Sue Grand and Jill Salberg, *Trans-generational Trauma and the Other: Dialogues across history and difference* (Routledge, New York, 2017) 2.

²² Dehm (n 20) 328.

²³ Mark Lunney, 'Legal Emigres and the Development of Australian Tort Law' (2012) 36(2) *Melbourne University Law Review* 494.

²⁴ Dehm (n 20) 331.

²⁵ *Ex parte Kortzen* (Unreported, Supreme Court of New South Wales, Halse Rogers, Street and Maxwell JJ, 11 December 1941) cited in Dehm (n 20) 342.

²⁶ Dehm (n 20) 329.

contemplating Mr Ah Ket's experiences of discrimination (including rejection from clients who refused representation by a Chinese barrister)²⁷ provides a personal insight into the kinds of barriers faced by culturally diverse lawyers. Despite almost a century having passed, Mr Ah Ket's experiences of bias are familiar among culturally diverse lawyers today, including myself. A biographical analysis also helps us understand the kinds of structural shifts that are required. Mr Ah Ket's belief, drawn from Confucian values, that 'whoever wishes to improve external conditions must begin by improving his inner self'²⁸ serves as a reminder that overcoming cultural barriers in the legal profession starts with a reflection of how our own thoughts, experiences and actions shape the culture of the profession.

B Lack of support, representation and collegiality

Another significant cultural barrier in the profession is a lack of support and respect. Culturally diverse lawyers often lack 'relationship capital',²⁹ that is, the existing political, social or professional networks that their colleagues might benefit from. First-generation migrants in particular tend not to have connections to clients and other lawyers – a phenomenon known as 'racial nepotism'.³⁰ In a profession that is disproportionately comprised of white, wealthy and elite individuals, culturally diverse lawyers statistically have fewer opportunities to secure entry level positions, promotions and interesting work because of the absence of the benefits of word of mouth or reputation by association, when compared to their white or wealthy counterparts.³¹

Further, culturally diverse lawyers tend to lack opportunities to build support networks because they are generally not well-represented³² and cannot see people like themselves around or above them.³³ They are more susceptible to being disrespected, because their cultures are more likely to be misunderstood,³⁴ or because they are more at risk of experiencing everyday micro-aggressions such as careless mispronunciation of names by judicial officers.³⁵ Where there is a lack of support and respect, there is likely to be a greater sense of isolation and potential of leaving the profession altogether, which exacerbates the existing lack of representation. For lawyers whose first language is not English, there is also a heightened risk of isolation and retreating to 'ethnic enclaves' where they work with higher

²⁷ Menzies (n 2) 249.

²⁸ William Ah Ket (Speech, George E Morrison Lecture, 1933).

²⁹ Nguyen and Tang (n 19) 105.

³⁰ Samuel Pararajasingham, 'Race and the Bar' [2019] (Autumn) *Bar News* 60, 60.

³¹ Kay et al (n 16) 205.

³² Nguyen and Tang (n 19) 102.

³³ Ibid.

³⁴ Ibid, 105.

³⁵ Pararajasingham (n 30) 60.

proportions of individuals from their minority group and, as a result, are exposed to fewer opportunities to practice and improve English language skills.³⁶

Finally, a key factor contributing to the lack of cultural diversity in the profession is the competitive culture of legal environments, which begins in law schools. Frank suggests that diversifying the legal profession requires a cultural shift from ‘competition and conformity’ to collaboration and inclusivity in law schools, as well as the profession more generally.³⁷ The current system benefits law students and lawyers who ascribe to the status quo.³⁸ In a profession where the status quo is disproportionately white, it is difficult for diverse individuals to succeed. Lawyers who disrupt the status quo by making complaints about racism are at risk of being isolated, treated as ‘troublemakers’ or otherwise disincentivised from raising complaints.³⁹ Racism may go unreported, as lawyers may prefer to stay quiet until they reach a status where they feel they can make a difference without sacrificing their careers. Instead, they must be supported and consulted, so that their experiences of racism are taken seriously and they retain control over how their complaints are handled.

Addressing the lack of diversity in the profession also requires an understanding of the cultural gaps in the pathways that lead to the profession. While there are some existing measures in law schools aimed at enacting cultural shifts in the profession, diversity measures tend to focus on the admission process and post-admission scholarships, rather than addressing the broader socioeconomic and cultural circumstances that might prevent culturally diverse students from applying for law schools.⁴⁰ Access to high quality law school education by culturally diverse students is impacted by a number of factors, such as the use of standardised tests which disadvantage culturally diverse students more than other academic measures,⁴¹ the cost of preparation for law school,⁴² greater language barriers preventing access to extracurricular activities such as debating, public speaking and student government,⁴³ and fewer connections in the legal profession.⁴⁴

³⁶ Mai Chen, ‘Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study’ (Report, Superdiversity Institute for Law Policy and Business, 2019) 98.

³⁷ Demetria Frank, ‘Social Inequity, Cultural Reform & Diversity in the Legal Profession’ (2019) 13 *Southern Journal of Policy and Justice* 25, 26-27.

³⁸ *Ibid*, 38.

³⁹ Hagar Cohen and Raveen Hunjan, ‘Three lawyers speak out with allegations of racism inside Legal Aid’ *ABC News* (Online, 7 June 2022).

⁴⁰ Frank (n 37) 26.

⁴¹ Rodney Larsen, ‘Standardised Testing in Diversity Settings’ (Blog Post, 4 December 2020) <<https://www.kbhsblog.com/post/standardized-testing-and-diversity-issues>>.

⁴² Frank (n 37) 33.

⁴³ *Ibid*, 36.

⁴⁴ Webster (n 7) 10.

C Unconscious bias and stereotyping

Finally, all members of the profession must make the effort to understand existing biases. Without recognising and reframing these attitudes or challenging the innate ‘in-group’ mentalities that cultivate stereotyping, it is almost impossible to improve cultural diversity in the profession.⁴⁵

Both micro-aggressions and overt racism continue to pervade the legal profession. Recently, 20 current and former Legal Aid NSW lawyers reported experiencing race-based exclusion, witnessing refusal to hire lawyers because of their cultural identities and being isolated for exposing racism in the profession.⁴⁶

1 Unconscious bias impacts recruitment and progression

Unconscious biases impact opportunities available to culturally diverse lawyers. For example, a 2014 study found that to obtain a job interview, individuals with a Chinese name had to submit 68% more job applications than individuals with an Anglo-Saxon name.⁴⁷

Biases can also impact culturally diverse lawyers in more subtle ways. For example, Asian Australians can face the expectation to work hard and are less likely to be perceived as good leaders.⁴⁸ As individuals with East and South-East Asian backgrounds often value humility, deference to seniority and indirect communication, they can be seen to be dependent and appear to lack confidence in Western leadership models.⁴⁹ These biases can negatively impact entry into and progression through the legal profession, as well as the day-to-day experiences of culturally diverse lawyers. Nguyen provides anecdotal evidence of her experiences of assumptions about her seniority:⁵⁰

‘I walked into a room for completion with a junior associate. I was the short, female, Asian lawyer, while he was the very tall, blonde, Caucasian lawyer. The initial reaction we received from others on the transaction was that he was the senior lawyer and I was his ‘lackey’ and it took some express clarification to the respective clients and other lawyers that, in fact, it was the other way around.’

Nguyen further recalls instances of partners stating that Asian women are ‘too softly-spoken and lack presence, and therefore, would not be able to command a client’s respect of attention’.⁵¹ This experience

⁴⁵ Nguyen and Tang (n 19) 104.

⁴⁶ Cohen and Hunjan (n 39).

⁴⁷ Alison Booth, Andrew Leigh, Elena Varganova ‘Does Ethnic Discrimination Vary Across Minority Groups? Evidence from a Field Experiment’ (2012) 74(4) *Oxford Bulletin of Economics and Statistics* 547, 558.

⁴⁸ Nguyen and Tang (n 19) 105.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*, 98.

⁵¹ *Ibid.*, 99.

reflects a Diversity Council Australia study which found that only 10% of culturally diverse women felt their organisations recognised their leadership qualities.⁵²

2 Biases are entrenched in the current system

It is worth acknowledging that beyond individuals' biases, the existing reward structures in the profession can be biased against culturally diverse lawyers, who often feel pressured to conform to existing leadership styles.⁵³ These pressures to conform can have cultural roots: clinical psychologist Eve Yee Han Graham notes that racial discrimination can cause people with Chinese backgrounds to lose 'face', making it difficult for them to call out racism and challenge biases of the existing system.⁵⁴

3 Bias impacts the opportunity to define one's own identity

In addition to stifling progression and retention, unconscious biases can limit the identities of culturally diverse lawyers, as they are sometimes identified solely by their ethnicity rather than other identifying factors such as their technical skill or personal qualities. For example, William Jangsing Lee was reported as the 'first Chinese' to be admitted to the NSW Bar in 1938 in a publication that focused on his Chinese identity, despite him being born in Sydney.⁵⁵ In this way, unconscious bias can detract from culturally diverse lawyers' merit and force upon them an externally determined cultural identity, preventing them from defining their own reputation.

II PRACTICAL STEPS FOR BREAKING DOWN PERSISTING CULTURAL BARRIERS

Once gaining an understanding of the cultural barriers explored in Part I, the profession must take practical steps to close existing cultural gaps. Given the multi-faceted nature of cultural gaps in the profession, a range of practical structural improvements should be implemented.

A Celebrating cultural diversity in the everyday

As a starting point, there are practical steps that can be taken to support culturally diverse lawyers in their everyday working lives. Workplaces can facilitate diversity by celebrating culturally significant

⁵² J O'Leary, D Groutsis and R D'Almada-Remedios, *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century* (Report, Diversity Council Australia, 7 September 2017) 8.

⁵³ Ibid, 16.

⁵⁴ Eve Yee Han Graham 'Chinese Immigrants Experiences of Racial Discrimination in New Zealand' (Thesis, Massey University) 7, cited in Mai Chen, 'Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study' (Report, Superdiversity Institute for Law Policy and Business, 2019) 92.

⁵⁵ Malcolm Oakes SC, 'William Lee: First Barrister of Chinese Descent Admitted to the New South Wales Bar' [2015] (Winter) *Bar News* 73, 75.

events, consistently catering for religious dietary requirements, providing a prayer room⁵⁶ and encouraging the use of name pronunciation guidance in all employees' signature blocks. Organisations should normalise informal conversations about cultural bias and inequality in the workplace, and establish cultural networks for culturally diverse lawyers to come together. Although these small measures, when implemented widely, can lead to meaningful structural change, they must be supported by more significant action so as not to come across as inauthentic.

B Unconscious bias training and other education

In addition to smaller, day-to-day changes, organisations should implement formal training on cultural intelligence and overcoming unconscious bias. Regular education on unconscious bias and cultural differences can help recruiters, colleagues and managers understand their own biases and how they impact their interactions with culturally diverse lawyers.

Cultural intelligence and unconscious bias training programs could be implemented at regular intervals. For example, Long advocates for amendment of the current CPD requirements so that at least one of the mandated 10 hours of CPD activities must be spent developing diversity intelligence to promote it as an essential skill.⁵⁷ However, the content and delivery of cultural training should be approached with caution. For example, training should focus on 'cultural intelligence' rather than 'cultural competence', as this acknowledges that while it is important to work effectively across cultures and acknowledge one's own cultural lens, the goal is not to become 'competent' in another culture.⁵⁸ Training should cover practical skills to reflect on and overcome bias,⁵⁹ as well as real-world examples of bias, noting that the Australian Human Rights Commission considers that unconscious racial bias is reduced most when people hear stories incorporating self-involvement and personal reflection.⁶⁰

Regular training on unconscious bias should extend to judges, to supplement existing guidance about the needs of culturally and linguistically diverse communities in judges' bench books.⁶¹ This may also improve the perception of justice, as 41% of students in a 2012 study of attitudes towards the profession agreed that judges often impose their own cultural values on the legal decisions they make.⁶² Training

⁵⁶ NSW Law Society, 'Cultural Diversity Guidance' (Policy Report, September 2021) 5.

⁵⁷ Long (n 8) 18.

⁵⁸ Andrea Curcio, Teresa Ward and Nisha Dogra, 'Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process' (2012) 16 *University of Western Sydney Law Review* 100, 102-103.

⁵⁹ Long (n 8) 12.

⁶⁰ Australian Human Rights Commission, 'Leading for Change. A Blueprint for Cultural Diversity and Inclusive Leadership' (Report, 1 July 2016) 2.

⁶¹ For commentary on judge's bench books, see The Hon Justice Wood, 'Cultural Diversity: reflections on the role of the judge in ensuring a fair trial' (2016) 28 *Judicial Officers' Bulletin* 35, updated 2021.

⁶² Curcio (n 58) 112

is likely to be an effective means of addressing this issue, as judges who reflect on their biases and consciously take steps to counter that bias are often able to do so.⁶³

Training has several other benefits. First, lawyers' abilities to understand their own and others' (including clients') cultural perspectives is integral to other lawyering skills.⁶⁴ For example, failure to recognise the role that culture plays in individuals' displays of emotions and eye contact may warp a lawyer's perception of clients' reactions or the credibility of a witness.⁶⁵ Lawyers may be ineffective negotiators or dealmakers if they are unaware of the appetite for confrontation⁶⁶ or maintaining 'face' in some Asian cultures.⁶⁷ Cultural training would equip lawyers to recognise these cultural differences and overcome unconscious biases that impact their understanding of their clients. Second, this, in turn, assists solicitors and barristers to act consistently with their ethical and professional duties, by increasing their levels of competence and ability to act in the best interests of culturally diverse clients⁶⁸ and, for barristers, the duty not to discriminate.⁶⁹ This is particularly the case where the law requires a subjective consideration of an individual and their background, such as assessment of a person's character in migration law⁷⁰ and assessment of a child's best interests in family law.⁷¹ Third, unconscious bias training enhances the administration of justice, as it gives decision-makers an increased awareness of how their biases might impact their decision-making.⁷² As the application of the law requires a decision-maker's discretion (and therefore bias),⁷³ unconscious bias training helps mitigate the risk that the law is applied inconsistently to the detriment of culturally diverse members of the community.

However, training and education fits within a web of structural changes, and should be supplemented by other checks and balances.⁷⁴ Without other structural improvements that empower culturally diverse

⁶³ Australian Law Reform Commission, 'Cognitive Biases, Social Biases, and the Law' (Web page, 16 June 2021) <<https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/spotlight-on/cognitive-biases/>>.

⁶⁴ Curcio (n 58) 105.

⁶⁵ See, e.g. Debra Chopp, 'Addressing Cultural Bias in the Legal Profession' (2017) 41(3) *New York University Review of Law and Social Change* 367.

⁶⁶ Curcio (n 58) 105.

⁶⁷ *The Korean Times Pty Ltd v Un Dok Pac* [2011] NSWCA 365.

⁶⁸ As required by the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.1 and the *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 35.

⁶⁹ *Legal Profession Uniform Law Conduct (Barrister) Rules 2015* r 123.

⁷⁰ *Migration Act 1958* (Cth) s 501(6)(c).

⁷¹ *Family Law Act 1975* (Cth) s 60CC.

⁷² Long (n 8) 15.

⁷³ Dominic Rolfe, 'The burden of unconscious bias' (2017, Online) *Law Society of NSW Journal*.

⁷⁴ Webster (n 7) 18.

lawyers to speak out about the biases that impact them individually, the attitudes and behaviours that training seeks to address are not adequately exposed.

C Affirmative measures

Affirmative measures are another useful way to counteract the existing disadvantages facing culturally diverse lawyers, particularly in recruitment and promotion.

1 Quotas and targets

Targets can promote cultural diversity by enabling proactive steps to be taken to address inequality.⁷⁵ Soft targets (as opposed to hard quotas) have successfully increased gender diversity in the legal profession⁷⁶ and have been widely adopted in Australia, including in the form of the Law Council of Australia's Equitable Briefing **Policy** which provides a target of briefing women counsel in at least 30% of all matters and paying 30% of the value of all brief fees to women by 2020.⁷⁷ Since the Policy was introduced, there has been a significant increase in briefing to junior and senior women counsel.⁷⁸ A similar policy setting targets for briefing culturally diverse counsel could promote awareness of cultural inequalities in the profession and increase opportunities available to culturally diverse barristers.

However, affirmative measures have been criticised for undermining the merit of diverse individuals and pushing away diverse talent when used to promote equal representation.⁷⁹ They can be seen as an artificial or tokenistic means of improving diversity and equality.⁸⁰ To mitigate this, cultural diversity targets should be supported by policies with clearly-explained intentions of remedying past discrimination, regular review mechanisms and clear timelines.⁸¹ Targets should also be supported by other policies such as cultural leave policies that facilitate a diverse workplace and cultural intelligence

⁷⁵ Thomas K Abraham, 'Affirmative Action in Piercing the Bamboo Ceiling within the Australian Legal Profession – Utopian Ideal or Dystopian Nightmare?' (2018) 6(1) *Griffith Journal of Law and Human Integrity* 65, 83, citing Phillip Tahmindjis, 'Affirmative Action in a Democratic Society' (1997) 13 *Queensland University of Technology Law Journal* 204.

⁷⁶ Kieran Pender, 'An Act of Parity: Are Quotas and Salary Transparency the Solution to Law's Gender Equity Woes?' (2021) 77 *Law Society Journal* 24, 25.

⁷⁷ Law Council of Australia, 'Equitable Briefing Policy' (Policy paper, June 2016) 2.

⁷⁸ See, e.g. Law Council of Australia, 'Equitable Briefing Policy Annual Report 2019-2020' (Report, 2020) 5.

⁷⁹ Institute of Environmental Management and Assessment 'Big question: What role should quotas play in promoting diversity in the workplace' (Webpage, 1 March 2019) <<https://www.iema.net/articles/big-question-what-role-should-quotas-play-in-promoting-diversity-in-the-workplace>>.

⁸⁰ Abraham (n 75) 79.

⁸¹ See, e.g., Adrian Liu, 'Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans' (2008) 13(2) *Michigan Journal of Race and Law* 407; Joel Goldstein, 'Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter' (2006) 67 *Ohio State Law Journal* 83.

training to enable instructing solicitors to work sensitively and effectively with culturally diverse barristers.⁸²

2 Recruitment and retention measures

Beyond diversity targets, more must be done to ensure promotion and retention of culturally diverse lawyers – while proportions of Asian lawyers at junior levels are increasingly representative of the Australian population, there is still an unacceptable lack of diversity at senior levels, the bar and the judiciary.⁸³ In particular, diverse groups must be represented in positions of power because they can use that power to effect meaningful changes to the culture of the legal profession.⁸⁴

One current measure aimed at encouraging recruitment and promotion of culturally diverse candidates is the removal of diversity indicators in hiring processes, such as through the use of blind CVs during recruitment and bulk promotion rounds.⁸⁵ However, where selection criteria is more subjective, such as during the interview process, the risk of unconscious bias increases. Further, diversity can manifest itself in other ways that are not captured by redacting names in job applications, such as limited education and work experience opportunities. Therefore, blind applications should be used only as a ‘first line of defence’ and must be supported by other measures.⁸⁶ For example, law firms, in-house practices and law schools should develop stronger retention strategies and provide greater support tailored to culturally diverse lawyers including by encouraging diversity of presenters for internal training and panel discussions, diversifying their media strategies to social media platforms used by different cultural communities and celebrating examples of cultural diversity in their current workforce.⁸⁷

D Increased support in the profession

1 External support networks

Another way to reduce cultural barriers in the profession is to invest more in formal support networks and enhance incentives to celebrate diversity. This could include a range of measures, such as formal

⁸² Joyce He and Sarah Kaplan, ‘The debate about quotas’ (Online research brief, 26 October 2017) <<https://www.gendereconomy.org/the-debate-about-quotas/>>.

⁸³ Law Society of New South Wales, *National Profile of Solicitors 2016* (Report, 24 August 2017); Asian Australian Lawyers Association (n 13) 4.

⁸⁴ Kay et al (n 16) 204.

⁸⁵ Nguyen and Tang (n 19) 107.

⁸⁶ Joe Caccavale, ‘The Truth About Name Blind Recruitment’ (Blog post, 28 June 2021) <<https://www.beapplied.com/post/the-truth-about-name-blind-recruitment-heres-what-the-science-says/>>.

⁸⁷ See, e.g. Jeremy Tipper, ‘How to increase diversity through your recruitment practices’ (2004) 36(4) *Industrial and Commercial Training* 160, cited in Law Society of NSW (n 56) 4.

mentoring to address the current lack of diverse role models,⁸⁸ awards recognising individuals' and organisations' commitments to improving diversity and listing more diverse lawyers in legal guides such as 'Chambers and Partners' and Doyle's Guide.⁸⁹

Senior members of the profession can also take informal steps to support culturally diverse practitioners. For example, Nguyen and Tang suggest that if senior barristers took positive steps to put forward young Asian Australian barristers when asked for recommendations, Asian Australian barristers could develop their profiles and overcome potential biases of instructing solicitors.⁹⁰ Organisations could also benefit from representative consultative diversity committees that identify areas for improvement while providing a space for diverse lawyers to come together to share their experiences. These committees might also be a useful forum for members to identify instances of racism in a space where they will be respected, rather than isolated for speaking up.⁹¹

This culture of support should start as early as possible in order to invoke longer term cultural shifts in the profession. Exposing law students and junior lawyers to successful role models from similar cultural backgrounds can reinforce to them that their own success is possible,⁹² and provides an avenue of support from mentors who may have encountered similar cultural challenges in the profession. Law schools, firms and professional associations that have the resources to address the lack of support for culturally diverse lawyers should support the development of and provide mentoring opportunities for culturally diverse law students and lawyers.⁹³

2 Support networks to overcome our self-imposed limitations

Jane Hyun, who coined the term 'bamboo ceiling' postulates that cultural limitations can partly be due to Asian professionals' self-limiting behaviours and attitudes.⁹⁴ To overcome these self-imposed challenges, culturally diverse lawyers should be encouraged to actively participate in networks and organisations supporting culturally diverse lawyers (and rewarded for doing so), creating a space where lawyers can share their cultural values and reflect on how cultural influences impact their professional experiences.

⁸⁸ Jing Zhu and Helen Tung, 'The Call for Asian Cultural Diversity in the Legal Profession' (2016) *Law Society of South Australia Bulletin* 22, 22.

⁸⁹ Abraham (n 75) 91.

⁹⁰ Nguyen and Tang (n 19) 102.

⁹¹ Cohen and Hunjan (n 39).

⁹² Webster (n 7) 17.

⁹³ See, e.g. Frank (n 37) 47.

⁹⁴ Jane Hyun, *Breaking the Bamboo Ceiling: Career Strategies for Asians* (HarperCollins, 2005).

D Data collection and research

Given the relative lack of data on diversity in the legal profession, it is difficult to measure the success of any practical steps until further research on cultural diversity in the legal profession is undertaken. It is important that continual research is done to build a more complete picture of how structural improvements might improve cultural diversity in the profession, and what further changes might be required as the cultural makeup of the profession evolves.

This should include data collection about representation in the profession. In 2020, the Law Institute of Victoria (LIV) started collecting data about cultural diversity in the annual practicing certificate renewal process.⁹⁵ Webster suggests that collecting data about lawyers' cultural diversity could be done through admission applications and practicing certificate renewals, in order to promote responsiveness and avoid 'survey fatigue'.⁹⁶

To fully understand the experiences of culturally diverse lawyers, a greater range of data should be collected. Data is most commonly collected about cultural heritage. For example, the LIV asked voluntary questions about country of birth, ancestry and languages spoken.⁹⁷ The Victorian Bar cultural diversity survey and ABS census both collect data about a person's country of birth, whether a parent was born overseas and languages spoken at home.⁹⁸ However, data about individuals' self-assessed identities should also be collected, as a person's self-assessed cultural identity may differ from their cultural background.⁹⁹ Giving culturally diverse lawyers the opportunity to assert their identities using their own terminology (such as through a free-text field) also provides a more accurate reflection of their identity¹⁰⁰ and the makeup of the profession generally. To further promote autonomy, surveys seeking information on cultural identities should always provide an option of 'prefer not to say'.¹⁰¹

In addition to data about cultural identity, information about income and working hours should be collected to assess whether culturally diverse lawyers are remunerated equally in comparison to the rest of the profession. This would assist in understanding the extent of biases in the profession, such as the expectation that lawyers of east-Asian decent are hard working. This highlights the need for a multi-

⁹⁵ Victorian Legal Services Board and Commissioner, 'Legal profession demographics' (Webpage, July 2021) <<https://lsbc.vic.gov.au/about-us/board-and-commissioner/legal-profession-demographics>>.

⁹⁶ Webster (n 7) 15.

⁹⁷ Victorian Legal Services Board and Commissioner (n 97).

⁹⁸ Australian Bureau of Statistics, 'Cultural diversity: Census' (Web page, 28 June 2022) <<https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/latest-release>>.

⁹⁹ Australian Human Rights Commission (n 60).

¹⁰⁰ Ming Kalanon and Kelvin Ng, 'What does parity in cultural diversity look like?' (Research paper, 2018) 12.

¹⁰¹ NSW Law Society (n 56) 3.

faceted approach – collecting more data about the experiences of culturally diverse lawyers and using it to identify potential biases helps inform appropriate content for cultural training required to overcome inequalities in representation, pay and working hours.

More broadly, surveys and data collection increase awareness of cultural diversity in the profession. For example, students who completed surveys about the impact of culture in the legal profession noted that they ‘[thought] twice about the impact of race, culture [and ethnic] backgrounds’ on clients and in the profession and were encouraged to reflect on their own prejudices.¹⁰²

III OVERARCHING PRINCIPLES FOR IMPOSING STRUCTURAL IMPROVEMENTS

Regardless of the measures that are adopted, there are a range of principles that must be considered when developing and imposing structural changes aimed at bridging cultural diversity gaps. The concepts of consultation, onus recognition and intersectionality are essential in ensuring that culturally diverse lawyers are heard, and that structural improvements, however well-intentioned, do not widen existing cultural gaps.

A Consultation

Firstly, culturally diverse members of the profession should be consulted about any potential structural improvements, as lawyers from minority backgrounds are better placed to understand the nature of systemic injustices which impact them because of their experiences and understanding of their cultural values.¹⁰³ Members of culturally diverse communities are in a strong position to identify and question existing biases and advocate for change in a way that promotes a culture of respect in the legal system.¹⁰⁴ This position would enable them to guide potential improvements and ensure they are implemented effectively.

Reform measures are also more likely to positively influence institutional culture when stakeholders understand the reasoning and intentions behind them.¹⁰⁵ Consultation not only gives culturally diverse lawyers the opportunity to be heard and to shape the profession in meaningful ways, but is also a useful way to ensure transparency of the intentions and outcomes of structural improvements.

¹⁰² Curcio (n 58) 113.

¹⁰³ Yolanda Young, ‘Why the US Needs Black Lawyers’, *The Guardian* (11 May 2015), cited in Frank (n 37) 28.

¹⁰⁴ Long (n 8) 9.

¹⁰⁵ Frank (n 37) 46.

B Onus recognition

Another important structural shift involves rebalancing the onus of change between the disadvantaged and the resource-rich. Therefore, any structural changes must be underlined by principles of onus-recognition, that is, recognising that the burden of speaking up about racism and enacting change often falls disproportionately on culturally diverse individuals. While consultation is vital to successfully developing changes that reflect the needs of diverse communities, the burden of advocating for and developing structural improvements should not rest solely on culturally diverse minorities. Too often, culturally diverse individuals alone carry the burden of reforming the systems that disadvantage them. On the one hand, Frank suggests that minorities are better placed to enact cultural change.¹⁰⁶ And yet on the other, Nguyen and Tang suggest that it is incumbent on resource-rich organisations, such as the LCA, LIV and other major law firms to lead the profession on diversity measures.¹⁰⁷

While the burden of funding and supporting structural changes that bridge cultural gaps should lie on those with greater resources, those powerful and well-resourced groups may be disproportionately white, and potentially removed from the nuanced cultural issues with currently divide the profession. To combat this, the development of structural improvements must be approached with a careful balance between different actors in the profession, relying on the resources of councils, firms and organisations, while championing to the voices of culturally diverse individuals.

C Intersectionality

Although valuable discussions on cultural diversity in Australia's legal profession have emerged, the role of intersectionality remains a gap in the existing discussions. The intersection of diverse identities (such as in individuals with multiple cultural identities, or who are diverse in a number of ways including cultural backgrounds, gender, sexuality, ability or neurodiversity) presents unique and complex challenges. Efforts to improve diversity in cultural identity, gender, sexuality and ability should be addressed simultaneously, as measures to improve cultural diversity may also contribute to gender and other representation.¹⁰⁸ Supporting and celebrating a range of diverse identities would enable the profession to not only close cultural diversity gaps, but also address other aspects of the profession that are inadequately represented.¹⁰⁹

There are two key considerations when developing measures to promote intersectional diversity. First, it is worth noting that all individuals have multiple identities and experiences, including their cultural

¹⁰⁶ Ibid, 28.

¹⁰⁷ Nguyen and Tang (n 19) 92.

¹⁰⁸ Australian Human Rights Commission (n 60) 12.

¹⁰⁹ Frans Johansson, *The Medici Effect* (Harvard Business School Press, 2006) 2-3, cited in Abraham (n 75) 88-89.

background, gender, ability and sexual orientation, among other things. Second, as not all members of a particular cultural group have the same cultural experience or beliefs,¹¹⁰ it is important not to classify culturally diverse lawyers solely into the cultural groups they may ascribe to. Gathering data on and seeking to understand the intersection of various factors such as gender, ethnicity and sexual orientation provides a more accurate and nuanced understanding of the characteristics of Australia's legal profession. Revising diversity and inclusion frameworks to engage individuals through the multiple ways they define themselves can further enhance diversity in the profession,¹¹¹ and the measures discussed above – particularly education and understanding cultural gaps – should account for the complex intersection between different diversity 'factors'.

CONCLUSION

The first structural shift required to address cultural diversity gaps in the profession is knowledge-building across the profession to ensure that existing inequalities in the Australian legal system are properly acknowledged and understood. To improve the cultural diversity of the legal profession, lawyers must be willing to acknowledge existing inequalities and embrace continuous change. As the Hon Michael Kirby aptly noted, 'lawyers must be ever vigilant to see new truths which earlier generations did not perceive'.¹¹²

Once a nuanced understanding of the cultural barriers in the Australian legal system is established, universities, legal services providers, law societies and all individual members of the profession must take practical steps to support and promote increased cultural diversity. These support mechanisms would facilitate the progression of culturally diverse lawyers to senior levels, including to the bar and the bench.

Finally, as the profession moves from adopting small day-to-day measures to implementing widespread structural changes, key principles of consultation, onus-recognition and intersectionality must be borne in mind as structural improvements are developed and, eventually, implemented and evaluated. This principled approach has the potential to allow the profession to continually work towards reducing and, eventually, closing cultural diversity gaps.

¹¹⁰ Curcio (n 58) 104.

¹¹¹ See, e.g. W Sean Kelly and Christie Smith, *What if the road to inclusion were really an intersection?* (Deloitte University Leadership Center for Inclusion Paper, 2014) 13.

¹¹² The Hon Michael Kirby AC, 'The rule of law beyond the law of rules' (2010) 33 *Australian Bar Review* 195.

BIBLIOGRAPHY

A Articles/Books/Reports

- Abraham, Thomas, 'Affirmative Action in Piercing the Bamboo Ceiling within the Australian Legal Profession – Utopian Ideal or Dystopian Nightmare?' (2018) 6(1) *Griffith Journal of Law and Human Integrity* 65
- Australian Human Rights Commission, 'Leading for Change. A Blueprint for Cultural Diversity and Inclusive Leadership' (Report, 1 July 2016)
- Asian Australian Lawyers Association, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015*, (Report, 2015)
- Booth, Alison, Andrew Leigh, Elena Varganova 'Does Ethnic Discrimination Vary Across Minority Groups? Evidence from a Field Experiment' (2012) 74(4) *Oxford Bulletin of Economics and Statistics* 547
- Carter, Isabel, *Woman in a Wig: Joan Rosanove, QC* (Lansdowne Press, 1970)
- Curcio, Andrea, Teresa Ward and Nisha Dogra, 'Educating Culturally Sensible Lawyers: A Study of Student Attitudes About the Role Culture Plays in the Lawyering Process' (2012) 16 *University of Western Sydney Law Review* 100
- Chen, Mai, 'Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study' (Report, Superdiversity Institute for Law Policy and Business, 2019)
- Chopp, Debra, 'Addressing Cultural Bias in the Legal Profession' (2017) 41(3) *New York University Review of Law and Social Change* 367
- Dehm, Sarah 'Legal Exclusions: Émigré Lawyers, Admissions to Legal Practice and the Cultural Transformation of the Australian Legal Profession' (2021) 49(3) *Federal Law Review* 327
- Frank, Demetria, 'Social Inequity, Cultural Reform & Diversity in the Legal Profession' (2019) 13 *Southern Journal of Policy and Justice* 25
- Goldstein, Joel, 'Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter' (2006) 67 *Ohio State Law Journal* 83
- Graham, Eve Yee Han 'Chinese Immigrants Experiences of Racial Discrimination in New Zealand' (Thesis, Massey University)
- Grand, Sue and Jill Salberg, *Trans-generational Trauma and the Other: Dialogues across history and difference* (Routledge, New York, 2017)
- Hewlett, Sylvia, Melinda Marshall and Laura Sherbin, 'How Diversity Can Drive Innovation' (December 2013) *Harvard Business Review*
- Hon Michael Kirby AC, 'The rule of law beyond the law of rules' (2010) 33 *Australian Bar Review* 195
- Hon Justice Wood, 'Cultural Diversity: reflections on the role of the judge in ensuring a fair trial' (2016) 28 *Judicial Officers' Bulletin* 35
- Hyun, Jane, *Breaking the Bamboo Ceiling: Career Strategies for Asians* (HarperCollins, 2005)
- Irving, Mark, 'An incomplete picture: data about cultural diversity at the Bar' (2021) 170 *Victorian Bar News* 40
- Kalanon, Ming and Kelvin Ng, 'What does parity in cultural diversity look like?' (Research paper, 2018) 12
- Kay, Fiona, Cristi Masuch, Paula Curry, 'Growing Diversity and Emergent Change: Gender and Ethnicity in the Legal Profession' in Sheila McIntyre and Elizabeth Sheehy (ed) *Calling for Change: Women, Law, and the Legal Profession* (2006, University of Ottawa Press)

Kelly, W Sean and Christie Smith, *What if the road to inclusion were really an intersection?* (Deloitte University Leadership Center for Inclusion Paper, 2014)

Law Council of Australia, 'Equitable Briefing Policy' (Policy paper, June 2016)

Law Council of Australia, 'Equitable Briefing Policy Annual Report 2019-2020' (Report, 2020)

Law Society of New South Wales, 'Cultural Diversity Guidance' (Policy Report, September 2021)

Law Society of New South Wales, *2020 National Profile of Solicitors* (Report, 1 July 2021)

Law Society of New South Wales, *National Profile of Solicitors 2016* (Report, 24 August 2017)

Liu, Adrian, 'Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans' (2008) 13(2) *Michigan Journal of Race and Law* 407

Long, Tianyi 'Being the Change: Towards Diversity Intelligence in the Australian Legal Profession' (Research Paper, 2019)

Lunney, Mark, 'Legal Emigres and the Development of Australian Tort Law' (2012) 36(2) *Melbourne University Law Review* 494

Menzies, Robert, *The Measure of the Years* (Cassell London, 1970)

Nguyen, Tuanh and Reynah Tang, 'Gender, Culture, and the Legal Professional: A Traffic Jam at the Intersection' (2017) (Special Issue) *Griffith Journal of Law & Human Dignity* 92

O'Leary, J, D Groutsis and R D'Almada-Remedios, *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century* (Report, Diversity Council Australia, 7 September 2017)

Oakes, Malcolm, 'William Lee: First Barrister of Chinese Descent Admitted to the New South Wales Bar' [2015] (Winter) *Bar News* 73

Pararajasingham, Samuel, 'Race and the Bar' [2019] (Autumn) *Bar News* 60

Pender, Kieran, 'An Act of Parity: Are Quotas and Salary Transparency the Solution to Law's Gender Equity Woes?' (2021) 77 *Law Society Journal* 24

Rolfe, Dominic, 'The burden of unconscious bias' (2017, Online) *Law Society of NSW Journal*

Webster, Sarah, 'Unconscious biases and uncomfortable truths: Reassessing institutional values and professionalism in the law' (Research Paper, 2021)

Zhu, Jing and Helen Tung, 'The Call for Asian Cultural Diversity in the Legal Profession' (2016) *Law Society of South Australia Bulletin* 22

B Cases

Ex parte Korten (Unreported, Supreme Court of New South Wales, Halse Rogers, Street and Maxwell JJ, 11 December 1941)

The Korean Times Pty Ltd v Un Dok Pac [2011] NSWCA 365

C Legislation

Family Law Act 1975 (Cth)

Legal Profession Uniform Conduct (Barristers) Rules 2015

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

D Other

Ah Ket, Toylan, 'William Ah Ket - Building Bridges between Occident and Orient in Australia, 1900-1936' (Speech, Conference of the Chinese Studies Association in Australia, 5 July 1995)

Ah Ket, William (Speech, George E Morrison Lecture, 1933)

Australian Bureau of Statistics, 'Cultural diversity: Census' (Web page, 28 June 2022)
<<https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/latest-release>>

Australian Bureau of Statistics, 'Snapshot of Australia: National summary data 2021' (Webpage, 28 June 2022)
<<https://www.abs.gov.au/statistics/people/people-and-communities/snapshot-australia/latest-release>>

Australian Law Reform Commission, 'Cognitive Biases, Social Biases, and the Law' (Web page, 16 June 2021)
<<https://www.alrc.gov.au/inquiry/review-of-judicial-impartiality/spotlight-on/cognitive-biases/>>

Caccavale, Joe, 'The Truth About Name Blind Recruitment' (Blog post, 28 June 2021)
<<https://www.beapplied.com/post/the-truth-about-name-blind-recruitment-heres-what-the-science-says/>>

Cohen, Hagar and Raveen Hunjan, 'Three lawyers speak out with allegations of racism inside Legal Aid' *ABC News* (Online, 7 June 2022)

He, Joyce and Sarah Kaplan, 'The debate about quotas' (Online research brief, 26 October 2017)
<<https://www.gendereconomy.org/the-debate-about-quotas/>>

Institute of Environmental Management and Assessment 'Big question: What role should quotas play in promoting diversity in the workplace' (Webpage, 1 March 2019) <<https://www.iema.net/articles/big-question-what-role-should-quotas-play-in-promoting-diversity-in-the-workplace>>

Larsen, Rodney 'Standardised Testing in Diversity Settings' (Blog Post, 4 December 2020)
<<https://www.kbhsblog.com/post/standardized-testing-and-diversity-issues>>

O'Leary, J and D Groutsis, 'Key Definitions and State of Play' (Webpage, 26 June 2020)
<www.dca.org.au/topics/culture-faith/key-definitions-and-state-play>

Pelly, Michael, 'Judges are mostly Anglo-Celtic, married and speak only English' *Australian Financial Review* (Online, 2 August 2022)

SBS Cultural Atlas, *Australian Culture* 'Core Concepts' (Webpage, 2022)
<<https://culturalatlas.sbs.com.au/australian-culture/australian-culture-core-concepts>>

Sher, Julian, 'Personal reflections on cultural diversity in the legal profession' (Speech, Asian Australian Lawyers Association, 17 August 2017)

Victorian Legal Services Board and Commissioner, 'Legal profession demographics' (Webpage, July 2021)
<<https://lsbc.vic.gov.au/about-us/board-and-commissioner/legal-profession-demographics>>

Young, Yolanda 'Why the US Needs Black Lawyers', *The Guardian* (11 May 2015)