The Law Society of New South Wales – Cultural Diversity Networking Event

# CULTURAL DIVERSITY IN THE LAW: IT IS NOT REVOLUTION – BUT WE ARE GOING TO OCCUPY THE BUILDINGS

The Honourable Justice Hament Dhanji*

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## Introduction

1 Good evening.

2 I would like to begin by acknowledging the Traditional Custodians of the land on which we sit, the Gadigal people of the Eora Nation, and I pay my respects to their Elders past, present and emerging. I look forward to the recognition of the original inhabitants of the land in the constitutional document which establishes our federation.

3 I am honoured to be invited to give the keynote address at this important event. I would like to thank the Law Society for organising this Cultural Diversity Networking Event and for inviting me to speak, although I apprehend the real reason I was invited was because, at the time the invitation was issued, there weren't too many other candidates, to a large extent highlighting the need for such an event. It may be organisers are now regretting their invitation given that since my appointment there have been appointments of another two Supreme Court judges, Yehia and Chen JJ with culturally diverse backgrounds, both of whom are likely to be far more entertaining than me. Alas, as an accident of timing, you will unfortunately have to bear with me.

* I am grateful for the very significant contribution of my tipstaff, Jennifer Tsui, in the preparation of this address.

4 As I have just alluded to, I am here as there was apparently some novelty to my appointment to the Supreme Court. This is somewhat curious. My legal background is criminal law, which is not particularly rare for a Supreme Court judge. My ethnic background is Indian, which is, it seems, rare for a Supreme Court judge. But it is surprising it has taken this long. Indians have been making a contribution to the criminal law of this State for quite some time. *Saraswati v The Queen*,[1] involving an Indian man charged with committing acts generally not considered appropriate, was handed down by the High Court more than 30 years ago. The *Prasad* direction – so named after *R v Prasad*,[2] a South Australian decision of 1979 involving an Indian charged with fraud – was a significant part of criminal law practice until the High Court abolished it in 2019. Clearly, Indians have been contributing to the criminal law in this country for many years.

5 That was obviously intended as a source of amusement. But what these cases point out is the obvious gap between those being judged and those doing the judging. A quick scroll through the names on the Caselaw website will also very quickly illustrate this point.

6 This, incidentally, raises a question as to how judges choose pseudonyms. Should a pseudonym reflect the ethnic background of the person whose identity is being protected? Would the community to which that person belongs want this form of representation? Can a judge that is not of that background choose a suitable name? Is there a danger of the use of stereotypical names like

[1] (1991) 172 CLR 1; [1991] HCA 21.
[2] (1979) 23 SASR 161.

"Mario" that may sound more like a gaming character? I raise this perhaps only to highlight the fact that there is a broad range of issues to be confronted.

7 Certainly, many of you here will be aware of the types of issues that I will be talking about. I do not think it would be productive for me to spend the whole time today convincing you that cultural diversity in the law is a good thing, although I will spend a portion of today's address on this – just in case there is anyone not yet convinced. What I do propose to do is to reflect on the history of cultural diversity in the law – the structures, attitudes and values that we have inherited – and to think about how we appropriate what we have inherited such that our profession can truly embrace cultural diversity. Or to put it another way – the imperative that we (that is a pluralistic, multicultural community) occupy our inherited colonial structures.

**Outline of keynote address**

8 I will first go through the history of cultural diversity (or rather, cultural homogeneity) in the law and how that impacts on our ability to move forward as a profession towards embracing diversity; then touch on why cultural diversity is important in the law; and finally, what we need to dismantle in order to encourage more cultural diversity in the profession.

9 This is perhaps an overambitious agenda and I will likely raise more questions than I answer, but I hope that today's address, as with the Law Society's Cultural Diversity Guidance published last year, will provide you with some perspectives on the importance of cultural diversity in the law and the

assumptions and ways of thinking we need to dispense with in order for us to move forward as a profession.

**History of cultural diversity/homogeneity in the law**

10 In order to understand how to promote more cultural diversity in the law, we need to delve into the origins of our legal system and the history of exclusions which have played a role in "maintaining the legal profession as a culturally and racially homogenous enterprise".[3]

11 The legal system as we know it today was of course inherited from the English. The most obvious markers of this colonial import are the courthouses, wigs, robes and legal language, which themselves combine to create the impression that the legal profession is an exclusive club. A person with dark skin putting on a robe and wig, at least when I first did it, appeared to involve something of an incongruity as was the case when women first went to the Bar and to the bench.

*The Rules*

12 In practice, the first lawyers admitted by the NSW Supreme Court were British settler barristers who had already been admitted in the UK.[4] In 1829, the NSW Supreme Court ruled that only barristers that had been called to the Bar in the UK or Ireland could be admitted as a barrister in NSW. This meant that there could be no locally trained barristers until the mid-1800s when the *Barristers*

[3] Sara Dehm, 'Legal Exclusions: Émigré Lawyers, Admission to Legal Practice and the Cultural Transformation of the Australian Legal Profession' (2021) 49(3) *Federal Law Review* 327, 330.
[4] Ibid 331.

*Admission Act 1848* (NSW) was passed.[5] This clearly limited the pool out of which the profession was drawn.

13 In contrast, you could be admitted as a solicitor in NSW if you had either been admitted in the UK or Ireland, undertaken a three- or five-year clerkship in England or NSW respectively, or had served a five-year term as clerk of the NSW Supreme Court.[6] However, the English practice of articled clerkships was the predominant way in which lawyers in NSW gained post university practical legal training and entered the profession up until the 1960s. This tended to privilege lawyers with family and personal connections and entrench nepotism.[7] This is one of the ways that seemingly neutral legal admission rules have prevented more diversity within the legal profession over the centuries.

14 Admission to legal practice in NSW was governed by a combination of the Supreme Court Rules and the specific Barristers' or Solicitors' Admission Rules passed by the Supreme Court.[8] The Supreme Court Rules provided that any person applying for admission must be a "fit and proper person", a standard which remains to this day. Meanwhile, the Barristers' Admission Rules, from at least 1848 when the NSW Barristers Admission Board was established by the *Admissions Act 1848*, required candidates to be examined in Latin and Greek Classics, Mathematics and Law.[9] This rule was amended a number of times to, for example, allow a candidate to substitute Logic or French for Greek or for

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[5] Ibid.
[6] Ibid citing John Michael Bennett, *A History of the New South Wales Bar* (Law Book Company, 1969) 45.
[7] Angela Melville, 'Barriers to Entry into Law School: An Examination of Socio-Economic and Indigenous Disadvantage' (2014) 24(1) *Legal Education Review* 45, 46; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, February 2000) 158.
[8] Dehm (n 3) 342.
[9] *Legal Practitioners Act 1898* (NSW) s 6.

candidates to bypass these requirements if they satisfied other criteria, but this rule continued to exist in some form in the Barristers Admission Rules until at least the 1950s.[10]

15 In order to be admitted to legal practice, candidates also needed to swear an oath of allegiance, which was an oath of allegiance to the British Monarch. There was some uncertainty as to whether this prevented "aliens" from being admitted. The High Court in *Kahn* (1939) 62 CLR 422 considered this issue incidentally to considering whether a rule in Victoria requiring candidates to be natural-born or naturalised British subjects in order to be eligible for admission was lawful. The High Court found that the Council of Legal Education in Victoria had full power to prescribe a condition relating to nationality, and was therefore able to require candidates to be British subjects, but the bench split in obiter as to whether an oath of allegiance *necessarily*, in and of itself, barred a non-British subject from admission.

16 For a period of time in the 1900s, the NSW admission regime also had a rule, similar to the Victorian one, that expressly prohibited "aliens" from being admitted to practice. This rule was presumably passed by the Barristers' Admission Board in response to a case involving a Jewish refugee lawyer from Austria by the name of Edward Korten, who was refused admission as a barrister by the Barristers' Admission Board in 1941 by reason of him being an "enemy alien".[11] After being refused admission by the board, he applied to the Supreme Court to ask the Court to admit him despite the Board's refusal.

[10] See *Legal Practitioners (Amendment) Act 1954* (NSW), which omitted s 6 of the *Legal Practitioners Act 1898* (NSW).
[11] Dehm (n 3).

Before the Supreme Court hearing, the Barristers' Admission Board passed the rule to expressly prohibit "aliens" from admission to practice, which would come into effect at the start of 1942 after the Supreme Court hearing. Nonetheless, the NSW Supreme Court interpreted that the requirement for an applicant to be a "fit and proper person" would mean that non-British subjects were not eligible for admission.† The Court also found that the rule to expressly prohibit aliens from admission was lawful. Hardly surprising against a background of express government policies designed to maintain a white Australia which extended well into the 20th century.

17 It was only following several court challenges to the requirement of British subjecthood in the next few decades that the NSW Supreme Court amended the Barristers' Admission Rules to remove the prohibition on the admission of (so called) aliens and change the requirement for candidates to swear an oath of allegiance to an "oath of office", which is a general oath (or now, oath or affirmation) that one will conduct themselves truly and honestly in the practice of a solicitor or barrister (and therefore, untied to one's nationality).[12] This came in March 1977. South Australia was the first State to do so in 1975, and from 1978, all States allowed the admission of "alien" lawyers.

† There was no legal concept of Australian citizenship until the *Nationality and Citizenship Act 1948* (Cth) came into effect in 1949. Despite the passage of this Act, Australian citizens were still considered British subjects by virtue of s 7 of that Act, until the *Australian Citizenship Amendment Act 1984* (Cth) was passed to omit s 7 and other relevant provisions.

[12] New South Wales, *Government Gazette*, No 32, 1 April 1977, 1277.

*The reality*

18 In reality, the first "culturally diverse" lawyers recorded were admitted in the early 1900s. William Ah Ket, born to migrants from China, was admitted to practice in 1903 in Victoria, Eugene Gabriel Sayegh, a person born in New Zealand with a Syrian background was admitted in 1924 in New South Wales, and William Jangsing Lee was called to the NSW Bar in 1938.[13] These were rare exceptions – the educational and apprenticeship requirements and the admission rules preventing "aliens" from being admitted meant that the profession remained overwhelming racially homogenous.

19 As can be seen, the racial constitution of the legal profession in NSW was a product of the racial, class and gender divides that existed in the UK at the time and professional institutional arrangements, such as the adoption of the English practice of clerkships and the requirements to be well versed in the Ancient Classics to be admitted. It should not be assumed that the lack of cultural diversity was simply a reflection of a lack of diversity amongst the people at the time and thus, appropriate. In fact, Nadia Rhook described the pre-Federation Victorian Supreme Court as a "polyglot linguistic theatre", in which the speakers of languages other than English regularly "participated in legal proceedings, albeit as witnesses, defendants or interpreters rather than as jurors, lawyers or magistrates".[14]

[13] Dehm (n 3) 333.
[14] Ibid 332 quoting Nadia Rhook, 'Hearing the Supreme Court' in Simon Smith (ed), *Judging for the People: A Social History of the Supreme Court in Victoria 1841-2016* (Royal Historical Society of Victoria, 2016) 196.

**How culturally diverse is the law currently?**

20 Fast-forwarding to the 21st century, Australia is as diverse as it has ever been. As of last year, 27.6% of Australians were born overseas, near half had at least one parent born overseas, 22.3% spoke a language other than English at home and 3.2% identified as Aboriginal or Torres Strait Islander, the highest in the past 20 years.[15]

21 Unfortunately, this diversity is still not reflected in the legal profession.

22 The statistics speak for themselves.

- The Asian Australian Lawyers Association reported in 2015 that Asian Australians accounted for 0.8% of the judiciary, 1.6% of barristers and 3.1% of law firm partners, despite making up almost 10% of the Australian population.[16]

- The situation is even more dire for our First Nations people. As of 2021, only 1.0% of practising solicitors in NSW identified as Aboriginal or Torres Strait Islander despite representing approximately 3.4% of the population.[17] This statistic is more startling as it cannot be excused on the basis that this community is just establishing itself.

[15] Australian Bureau of Statistics, 'Cultural Diversity: Census', *ABS* (Web Page, 28 June 2022) <https://www.abs.gov.au/statistics/people/people-and-communities/cultural-diversity-census/2021>.
[16] Asian Australian Lawyers Association, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015* (Infographic, 2015).
[17] The Law Society of New South Wales, *2021 Annual Profile of Solicitors NSW* (2 June 2022) 15.

- No judge of a non-European background has ever sat on the High Court, despite non-Europeans making up approximately 24% of Australians.[18]

23 These statistics are concerning when considering the cultural diversity in Australia. The representation of women at the upper reaches of the profession tells a similar story. The figures speak against a meritocracy in a profession that is meant to have an understanding of the importance of fairness.

24 That said, there has been some progress in the past few decades.

25 To take an example from my own personal experience, this table shows the membership at Forbes Chambers at the time I joined in 1997 compared with the current membership. This shows that Forbes has gone from having only 3 members with culturally diverse backgrounds and no women with diverse backgrounds in 1997, to at least 10 diverse members and 3 diverse women 25 years later. This shows, at least, a step in the right direction.

26 Recent judicial appointments have also introduced more cultural diversity onto the judicial bench, with the appointment of Justice Crowley, the first Indigenous Supreme Court judge being appointed in Queensland, 30 years after the momentous Mabo case, and, as I previously mentioned, the appointments of Justice Yehia and Justice Chen to our own Supreme Court. Sonja Stewart, a Yuin woman was also appointed CEO of the NSW Law Society in 2020. But the question remains – why so slow?

[18] Australian Human Rights Commission, *Leading for change: A blueprint for cultural diversity and inclusive leadership revisited* (April 2018) 12.

27 When reflecting on the history, two things emerge. There is clearly the capacity for change. We have removed the legal admission rules that had the effect of excluding entire cultural groups altogether and cultural diversity is, at least on its face, becoming more visible within the legal profession. At the same time, so much appears to remain the same. Every day, the courtrooms we sit in, the wigs and robes we put on and the legal jargon we use are all reminders of our colonial history and British legal inheritance. As the legal system we inherited was one run by predominantly privileged Anglo-Saxon men, these structures and customs have become not only markers of exclusivity, but reproducers and reinforcers of exclusivity. How do we transform a system which is so deeply rooted in a history of exclusion? Do we throw away our wigs and robes and reject the legal customs that we have inherited, and start a new, more inclusive system from scratch?

28 The point I would make is this. Although we have inherited these colonial structures, we still have control over what life we bring to these structures and what we do with these structures to serve the community. We have many colonial structures, in the literal sense. To take the art gallery, for example, one can appreciate the colonial architecture. More than that, one can appreciate the space it provides. But if you were to fill it only with 19th century European art, it would fail in its objective of serving the community. It is a structure that accommodates the ancient and modern artworks that reflect us as a people – and as a result is frequented by, and serves, a broad population. In order to transform our profession, we need to inhabit our structures with people from diverse groups who will offer fresh and challenging perspectives. This requires a profession which is inclusive and open to difference. This is the challenge

that we face when we attempt to transform what has been, for a long time, a privileged White male-dominated profession.

**Why is cultural diversity important in the law?**

29 Most of us have things we could be doing on a Tuesday evening. So why is it important for us to talk about cultural diversity? Why is it so important in this profession specifically?

30 Many rationales have been raised over the years as to why cultural diversity in the workplace is important.

31 The Diversity and Inclusion Committee published a paper outlining the business case for diversity and inclusion in law firms, which indicates that diverse and inclusive workplaces can benefit from greater innovation, higher morale and increased staff retention, enhanced reputation in the community, improved productivity and reduced absenteeism.[19] Economic benefits have been, at least perceived to be, highly motivating for lawyers.

32 However, to my mind, diversity is not, at least not fundamentally, a means to a pragmatic end.

33 Diversity is important for the legal profession on dimensions other than the business dimension – it is important at a societal and individual level.

[19] The Law Society of New South Wales, *Diversity and Inclusion in the Legal Profession: The Business Case* (October 2021) 5-6; Sarah Webster, 'Unconscious Biases and Uncomfortable Truths: Reassessing Institutional Values and Professionalism in the Law' (Essay, William Ah Ket Scholarship, 2021) 5.

*Societal*

34 Most fundamentally, diversity is important because it is integral to legitimacy. Sovereignty is dependent on the recognition of the authority of the state over its subjects. The Constitution is the source of (and a constraint on) the legislative, executive and judicial powers exercised over us. In the case of each of these powers, including judicial power, the acceptance of the legitimacy of that power is fundamental to societal cohesion. Clearly, the legitimacy of our liberal democracy is undermined if those subject to the laws are noticeably different from those making, enforcing and adjudicating with respect to those laws. This harks back to the example I gave earlier about the gap between those being judged and those doing the judging.

35 As Lord Chief Justice Hewart put it in 1923 in the case of *R v Sussex Justices; Ex parte McCarthy* [1923] EWHC KB 1; [1924] 1 KB 256, “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.” The second limb of this quote - that justice should be seen to be done - reflects this notion that confidence in the judiciary is compromised if the impartiality of the judiciary is in question by reason of the lack of representation.

36 However, diversity is also important for the first limb of this quote – that justice should actually be done. While clearly, confidence in the judiciary is reliant on it manifesting values of independence, impartiality and transparency, it is difficult to separate values from judicial decision-making. Thus, cultural diversity in the profession and on the bench enhances justice beyond just appearances.

37 As stated by the Honourable Michael Kirby AC CMG at the launch of the NSW Branch of the Asian Australian Lawyers Association: “Law is not an ordinary profession ... Law is about the values that inform what we do, how we do it and outcomes ... therefore it’s more important in law to reflect the diversity of values than it is in just about anywhere else because law is about power ... And if values affect the exercise of power, it is very, very important that the diversity of values and the experience of backgrounds should be reflected.”[20]

38 The importance of values in informing judicial discretion is most clearly demonstrated by the well-known “reasonable person” standard. I doubt that anyone would dispute my characterisation of the “man on the Clapham omnibus” as a celebrity of the legal world (although less so in my corner of the legal world). He has, over time, travelled the world and been spotted in other jurisdictions riding other trams that only other fair-minded people like him would ride, and become known as “the man on the Bondi tram” (New South Wales), “the man on the Bourke Street tram” (Victoria), “the man on the Prospector to Kalgoorlie” (Western Australia), “the man on the Shaukiwan Tram” (Hong Kong). The phrase apparently derived from a description by a 19th century journalist, that “public opinion… is the opinion of the bald-headed man at the back of the omnibus. It is not the opinion of the aristocratic classes as such; or of the most educated or refined classes as such; it is simply the opinion of the ordinary mass of educated, but still commonplace mankind”. It was apparently first used in a legal judgment in 1903 in an English Court of Appeal libel case

[20] Michael Kirby, ‘Keynote Address’ (Speech, Asian Australian Lawyers Association, 2 November 2015).

of *McQuire v Western Morning News Co Ltd*, although this is disputed.[21] At that time, Clapham was reportedly a fairly ordinary suburb. The phrase was intended to evoke the extreme ordinariness of a lower, middle-class commuter, likely a clerk or an office worker who was somewhat educated but not a professional, travelling in by bus to work in central London.

39 However, it is quickly clear that this "man on the Clapham omnibus", perhaps once taken to be synonymous with the "reasonable person", manifests traits that are not particularly universal. Despite the attempt to embrace diversity – or at least reach across the rigid English class divides – by capturing the ordinary mass of "commonplace mankind", it doesn't reach very far across this divide, given the author of the phrase was envisioning a "bald-headed *man*" who had a day job outside of the home to go to. And it did not need to be said that he is white. Interestingly, Clapham is now a much more affluent part of town, having been subjected to gentrification, and has higher household incomes than the average for local areas within England and Wales.[22]

40 Even though these expressions have now fallen out of favour, what they do illustrate is our reliance on judicial officers to make important assessments on reasonableness, proportionality, and perhaps most significantly, decisions that have an impact on the liberty of accused and convicted persons.

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[21] Walter Bagehot, *The English Constitution* (Chapman & Hall, 1867) 325-6; *McQuire v Western Morning News Co Ltd* [1903] 2 KB 100.

[22] Office for National Statistics, 'Income estimates for small areas, England and Wales: financial year ending 2018' (Web Page, 5 March 2020) <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/smallareamodelbasedincomeestimates/financialyearending2018>.

41 I have, of course, not yet made mention of the jury system. The English ruling class, in inventing the concept of the "man on the Clapham omnibus", clearly had some insight into its remove from the rest of society. The jury system is also reflective of this insight. Perhaps it is simply that the rigidity of the English class system means an appreciation of their "otherness" is fundamental to their understanding of the world. Whatever be the case, great significance has always been placed on the jury being "representative of the wider community" in trials on indictment: *Cheatle v R* (1993) 177 CLR 541 at 560; *Brownlee v R* (2001) 207 CLR 278. The legal community is clearly conscious of the importance of the representativeness of the jury for the community's perception of the impartiality of the jury and the community's acceptance of jury verdicts as reasonable. In other words, the legitimacy of which I have spoken. In spite of this understanding, the representativeness of the judicial bench has been somewhat forgotten. An expectation of impartiality does not explain it; as I previously pointed out, it is not possible to separate values from judgment. There is clearly a need for cultural diversity not only in the pool from which we choose jurors, but also on the judicial bench.

*Individual*

42 Diversity is also important on an individual level. As I noted earlier, cultural diversity is not only important because it is a means to a pragmatic end; that is to say, cultural diversity is not only important because it will make your business more competitive or because diversity is essential to the legitimacy of our institutions. Cultural diversity and inclusion are important because a person's

cultural or ethnic background should not prevent that person from reaching their full potential.

**What are the barriers to achieving cultural diversity?**

43 What is it, then, that is preventing the culturally diverse from entering, staying in, and becoming leaders of the legal profession?

*Privilege and disadvantage*

44 The first barrier, which I have already touched on, is the effects of privilege and disadvantage on both one's aspirations to be a lawyer, and one's actual capacity to be a lawyer.

45 A footrace may involve, ostensibly, that supposed Australian institution, the "level playing field". However, some kids will have better running shoes or will have received intensive training from elite coaches. Participation may be open but in the race, in reality, we all start from different distances away from the "finish line".

**Privilege and the affordability of becoming a lawyer**

46 The most direct way in which privilege affects one's capacity to be a lawyer is with regards to the affordability of such a career path. A university law degree in Australia is now typically at least $40,000, if subsidised by the government. It costs, approximately, an additional $10,000 to complete the Practical Legal Training, thousands more if one wishes to complete the Bar practice course, and more than a thousand again to purchase the robes and wig if called to the

Bar. This does not account for the amount of unpaid work that students often feel pressured to take on in order to get the experience required to be considered for competitive clerkship, graduate or associateship positions. Taking on unpaid work experience might simply be unrealistic for students who already have to juggle studies and paid work to pay the bills.

47 While Australia is fortunate compared to some other countries due to the existence of government subsidies, being a lawyer remains an expensive career path to pursue. This will seem particularly so to a person uncertain of future acceptance.

**Privilege and one's sense of belonging in the profession**

48 But before one even gets to the practicalities, privilege also determines whether a person develops the aspiration to enter the legal profession and their sense of belonging within the profession. The converse is typified by what Stan Grant described as "the tyranny of low expectations" affecting First Nations people.[23]

49 According to a study in the UK in a new book called "The Class Ceiling: Why it Pays to be Privileged", children of lawyers are 17 times more likely to go into law, second only to doctors, whose children are 24 times more likely than peers to enter the medical profession.[24] Curiously, this trend doesn't apply to all jobs; apparently, children of management consultants are no more likely than the rest of the population to enter the management consultancy profession. It seems even the children of management consultants do not find them inspiring. A

[23] Stan Grant, *Talking to My Country* (Harper Collins, 2016) 44.
[24] Sam Friedman and Daniel Laurison, *The Class Ceiling: Why it Pays to be Privileged* (Policy Press, 2020) 34.

survey conducted in 1978 in Australia indicated that 50% of solicitors and 40% of barristers were related to someone who was legally qualified, showing that the "class ceiling" exists in Australia too.[25] Thus, it appears that law is, as the Secret Barrister, an anonymous junior barrister practising criminal law in the UK put it, a "highly heritable disease".[26]

50 This impression is confirmed at law admission ceremonies. Although there is no longer a requirement for applicants to arrange their own mover as a Court registrar will move the application in the absence of a nominated mover, the ritual for an applicant to be "moved" can arguably be seen as a recognition of the role that connections play in bringing new people into the legal profession. Even the phrase, "being called to the Bar", seems to suggest that you can only become a barrister by special invitation emanating from the inside. It is not unfair for one to look at the legal profession and assume that it is exclusive, privileged, and unwelcoming.

51 In "Nothing But the Truth", by The Secret Barrister, the author reflects on how a person's upbringing might impact on their sense of belonging in the legal profession in practice. She expresses awe at seeing Bar students feeling so at home when chatting with barristers and judges, having been exposed to the "pomp and grandeur" from their early years and, as a result, having been brought up to "feel level with the people doing the ruling".[27] In contrast, she expressed feeling out of place and socially awkward. I am sure some of you here today will relate to this feeling of discomfort and lack of belonging, if not

[25] Melville (n 7) 46.
[26] The Secret Barrister, *Nothing but the Truth* (Pan Macmillan, 2022) 91.
[27] Ibid 41-2.

only because of the susceptibility of lawyers to imposter syndrome. The law, with its jargon, formalities and theatrics, can be especially isolating for those not exposed or accustomed to it.

52 The issue of belonging becomes especially difficult when it comes to our First Nations people. As Angela Melville has pointed out, the first Indigenous university graduate only came in 1965 and the first Indigenous *law* graduate was in 1972.[28] A study revealed that students of a low socio-economic status and those who identify as Indigenous often do not enrol in university as they consider university admission to be unattainable, they place little value on higher education, and they are more likely to feel alienated from university culture. In addition, some First Nations people in a qualitative study conducted in 2003 revealed that they are shaped by a desire to assist their home communities rather than to advance their own individual careers.[29] Teela Reid, in a Diverse Women in Law panel event that I attended earlier in the year, also noted the dilemma that First Nations people may feel about entering a profession and a system that oppressed and continues to oppress their people.

53 Clearly, in order for the legal profession to truly embrace cultural diversity, there needs to be policies in place to ensure that students of all backgrounds are not only financially or academically able to subscribe to the law pathway, but also feel a sufficient sense of belonging to stay. This will require strategies to tackle disadvantage outside of the legal sphere, and in the case of increasing

[28] Melville (n 7) 51.
[29] Ibid 57 citing Adrian Parente, Rhonda Craven and Geoff Munns, 'What do Indigenous Students Say about their Aspirations' (2003) 12 *Journal of Aboriginal Studies Association* 11.

Indigenous representation, the need to recognise the continuing dispossession of our First Nations people and the role of the law in this dispossession.

*Unconscious bias*

54 The second major barrier is unconscious bias.

55 An Australian field study was done in 2012, where researchers submitted over 4000 fictional applications for entry-level jobs, varying only the name as an indicator of ethnicity. This 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 25% more applications, Middle Eastern applicants required 64% more applications and Chinese applicants required 68% more applications.[30] Another study done in 2019 revealed that female High Court judges in Australia are interrupted more often than their male counterparts, although these results have more recently been disputed.[31] What these studies attempt to illustrate is unconscious bias, which is arguably a "more devastating, enduring" form of prejudice than the acts of brazen racism or sexism that go viral and prompt public uproar.[32]

56 Unconscious bias occurs as a result of the brain's subconscious thought patterns. In an attempt to process and retain information more efficiently and

[30] 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.
[31] Amelia Loughland, 'Female Judges, Interrupted: A Study of Interruption Behaviour during Oral Argument in the High Court of Australia' (2019) 43(2) *Melbourne University Law Review* 822.
[32] Waleed Aly, 'Curse of Australia's silent pervasive racism', *Sydney Morning Herald* (online, 5 April 2013) <https://www.smh.com.au/opinion/curse-of-australias-silent-pervasive-racism-20130404-2h9i1.html>.

effectively, the brain categorises information into groups, which causes the brain to form stereotypes and in turn, unconscious biases.[33] Unconscious biases are dangerous because they can often directly contradict our conscious views or beliefs about the world and can affect our behaviour and decision-making in a way that we don't intend or desire.

57 There is, at times, a resistance against or a sense of fatigue towards conversations about prejudice or unconscious bias. There were reports of a sensitivity training workshop in which some white male employees entered as a group with targets pinned to their shirts, in an attempt to make "a sartorial statement about their anticipated persecution".[34] However, it is important to recognise that unconscious bias affects all of us, even those who view themselves as unbiased, and it is the result of natural and inevitable mental processes. It is not necessarily criticism when one points out the existence of unconscious bias.

58 Managing unconscious bias may be a particular challenge in the context of the amount of information we are now required to process. As at 2018, 2.5 quintillion bytes of data were created every day and 90% of all the data in the world were generated in the last two years.[35] In 2021, every minute, there were 5.7 million google searches and 12 million iMessages sent, just to point out a

[33] Paradigm, 'Managing Unconscious Bias: Strategies to Address Bias and Build More Diverse, Inclusive Organizations' (White Paper) <https://womensplace.osu.edu/sites/default/files/documents/2021/10/Guidebook_Paradigm.pdf>.
[34] Nora Zelevansky, 'The Big Business of Unconscious Bias', *The New York Times* (online, 20 November 2019) <https://www.nytimes.com/2019/11/20/style/diversity-consultants.html>.
[35] Bernard Marr, 'How much data do we create every day? The mind-blowing stats everyone should read', *Forbes* (online, 21 May 2018) <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/?sh=42713d1960ba>.

few of the stats on the screen.[36] There are also so many High-Definition movies on the web today that you would need 47 million years to watch them all.[37] Although psychologists estimate that our brains are capable of processing approximately 11 million bits of information every second,[38] we are clearly suffering from information overload in the 21st century.

59 The natural response to dealing with large quantities of information is to fall back on heuristics. These rules of thumb have their place. But as Daniel Kahneman explained it, this type of, what he called "system one" thinking needs to be avoided when making important decisions in place of "slow" or more deliberate thinking – where relevant criteria are fairly assessed and stereotyped assumptions are eschewed.[39]

60 But it is also important to understand what the relevant criteria are. It is obvious that the cultural origin of a person's name will not inform you as to their suitability for a position. However, there is also an unconscious bias towards a particular leadership and communication style.

61 The Western Leadership style is generally understood to value "self-promotion and assertive direct communication while undervaluing and misinterpreting quiet reserve, and deference and respect for seniority".[40] A survey conducted in 2017 of culturally diverse women found that more than two thirds felt

[36] DOMO, 'Data Never Sleeps 9.0' (Web Page, 2022) <https://www.domo.com/learn/infographic/data-never-sleeps-9>.
[37] Waterford Technologies, 'Big Data Statistics & Facts – Are you in Control?' (Web Page, 5 July 2021) <https://waterfordtechnologies.com/big-data-interesting-facts/>.
[38] Tor Nørretranders, *The User Illusion: Cutting Consciousness Down to Size* (Penguin, 1999).
[39] Daniel Kahneman, *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2013).
[40] Chin Tan, 'Diversity in the Legal Profession – William Lee Address' (Speech, Australian Human Rights Commission, 5 June 2019).

pressured to conform to existing leadership styles.[41] Conformity, in turn, so often leads to burnout.

62 Additionally, the fact remains that the role of a lawyer (at least in the context of advocates) is to persuade judges, most of whom, until recent decades were middle aged, white men. Even if a solicitor harboured no personal prejudice, when briefing a barrister, there may have been a perceived need for an assessment as to who would have the best chance at persuading a judge with a predictable background, and likely to have particular traits and ways of thinking. This might mean that particular barristers were disadvantaged in the work they received, simply as a result of how solicitors or clients thought they will be received, in a sense, pre-emptively accounting for the possible biases of others. Certainly, William Jangsing Lee, who was the first barrister of Chinese descent to be admitted in NSW in 1938, said that his initial years were tough and that he had very little work at the start.[42]

63 If you look around at work, there may certainly be an appearance of more cultural diversity and inclusion compared to the past. What we need to re-evaluate, however, is whether the values of the profession have really changed. Which of the traits that we associate with a "good lawyer" are actually entrenching the view that the good lawyer is "white" and "male"?

64 Some ways of minimising the effects of unconscious bias include reforming recruitment processes, such as adopting blind CVs that redact identifying

[41] Jane O'Leary, Dimitria Groutsis and Rose D'Almada-Remedios, *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century* (Report, Diversity Council Australia, 2017).
[42] Dehm (n 3) 333.

information.[43] There is also benefit in firms reassessing their ideas of "cultural fit" to identify precisely why the workplace prioritises certain traits or values (as opposed to favouring those traits or values simply because that is how it has always been), and to evaluate "whether alternative values could be additive, rather than destructive, to [the culture of that workplace]".[44]

65 I am aware that some firms or organisations have convened working groups to consult the views of their employees and to consider how recruitment processes can be made more inclusive. These efforts are certainly valuable and should continue. All this impetus for change is encouraging to see. However, when taking steps to facilitate change, we need to remember to always question the bases for the particular views that are held and reached. Otherwise, at the end of a process designed to facilitate change, you end up legitimising the same kinds of practices and perspectives that undermined diversity in the first place.

**Conclusion**

66 I may have opened up more questions than given answers in the course of the address today. But that is the nature of the conversation about diversity and inclusion. It is about questioning the things that we have failed to question for far too long.

67 What is clear is that there is a need to re-equip our profession. There are multiple meanings to this. First, we clearly need more culturally diverse people

[43] Webster (n 19) 17.
[44] Ibid 18.

in the profession, and especially, in higher positions such as judicial office, for the reasons I have explained. Secondly, we need to re-equip our profession with new ways of thinking. This includes questioning our assumptions about what a lawyer looks like, thinks like, talks like and leads like, and asking ourselves whether we are foregoing other valuable traits and values by conforming, or expecting others to conform to some outmoded image of how a lawyer should be. These new perspectives will hopefully bring about more inclusive recruitment methods and a cultural shift, which will ensure that culturally diverse people can enter the profession and confidently feel that they belong.

68 There is one last thing that I want to touch upon.

69 As the profession moves forward, and different organisations put in place measures to promote cultural diversity, there is a danger for those who don't appear to "benefit" out of this to believe that in order to promote diversity, you need to forgo merit, or that promotions are tokenistic rather than merits-based. There is equally a danger for those who do appear to benefit (by getting the promotion or other advancement) to suffer from imposter syndrome or negative self-talk, and to not feel themselves worthy of the recognition received. But, as I hope I have explained, it is in fact a non-representative profession that is reflective of a failure, somewhere in the process, to promote on merit.

70 The message I want to leave tonight is that diversity is not a challenge to overcome. Diversity is not a number to chase. There is some good in the fundamental structures inherited from our past. But to fully benefit from those

structures, we (in the inclusive sense) must inhabit them.  That is what I mean when I say, it is not a revolution – but we are going to occupy the buildings.