



## **Ethics and Cultural Diversity in the Legal Profession**

*Remarks by the Honourable Associate Justice Ierodiaconou<sup>1</sup> to the New Barristers' Committee CPD Event, Victorian Bar*

29 August 2016

### **Introduction**

Good evening. I would like to begin by acknowledging the traditional custodians of the land on which we meet today. I offer my respects to their elders, past and present, and extend respect to those with Aboriginal and Torres Strait Island heritage here today.

Justice Jack Forrest, members of the profession and other supporters, it is a privilege to share my thoughts with you tonight. Thank you to the New Barristers' Committee for giving me this opportunity.

Let me take you on a journey. The year is 1988, and the setting is apartheid-era South Africa. Twenty-five black men and women have been convicted of murdering a black policeman. Most have been found not to have physically participated in the killing. A judge infers they have a common purpose to murder after finding they had thrown stones at the home of the policeman to drive him out of his house, so that he could be killed shortly afterwards. Five of the people convicted had not even been

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<sup>1</sup> Associate Justice of the Supreme Court of Victoria. I would like to thank my Associate, Kalina Sobczak, for her editorial assistance.

initially charged – they had been pulled off the street by police to make up numbers in an identity parade. During the 2 ½ year case, they had been represented by an advocate appointed by the court, but he could not continue to act. The 25 now face the death penalty.

A solicitor, Andrea Durbach, receives a phone call shortly after the convictions. It is from Anton Lubowski. He is going to act as barrister for the 25 people convicted, and needs a solicitor. He asks Ms Durbach to act as the solicitor for the 25 convicted, and to prepare the case for extenuation. If extenuating circumstances are not accepted by the court, then the death penalty could be imposed.

At the time Ms Durbach receives the phone call, her area of speciality is labour law, not criminal law. Her home and workplace are in Cape Town, and the place of trial is about 800km away, in Upington. The 25 people convicted cannot afford to pay her. Their case will be an immense undertaking. She says yes and takes on the case. Her belief in justice and the rule of law are significant in this decision. She writes:

When I took on the Upington case, I had been in practice as a lawyer for seven years, working with trade unionists, students, journalists, and anti-apartheid activists. We had achieved some victories in the courts, and the application of harsh apartheid laws and state conduct may have been restrained as a result. Often, however, legal remedies remained symbolic, having little chance of enforcement. The overriding scale of hardship and harm and the enormity of damaged lives endured, barely dented. These were the times when fatigue set in and undid the optimism of triumph and I would doubt any ties at all between justice and the law. But as lawyers working with fragile communities diminished by the law's impact, we learned that we had to ride the waves of legal opportunity, to wait for the moment when the intimate facts and the exterior forces might effectively combine to undermine the loathsome intent of a law or

regulation—when we could use the courts as sites of struggle, and nudge, even inch, the law towards justice.<sup>2</sup>

When we think of ‘ethics’ we sometimes think of it as a subject at law school, or rules on professional conduct. Tonight I am going to encourage you to think of ethics broadly.

Ethics asks us to consider – what does it mean to be a good person?<sup>3</sup>

I want to encourage you – as new members of the Bar – to engage with the challenges that our profession is facing. We need your energy and your ideas. Each of you has the potential to make a difference. Andrea Durbach – now Professor Durbach – did.

After a year and a half, 14 of the Upington 25 were sentenced to death. Leave to appeal was not initially given. Professor Durbach campaigned with the international human rights community, and eventually the Chief Justice gave conditional leave to appeal. The appellate court set aside the death sentences and overturned 21 of the 25 murder convictions. The story of the Upington 25 is told in Professor Durbach’s fascinating book *Upington*, and in the moving documentary, *A Common Purpose*.<sup>4</sup>

One of the challenges that the legal profession is facing is a lack of cultural diversity. Tonight I want to use ethics as a tool to examine the issue of cultural diversity in the legal profession. I will demonstrate how different ethical approaches can provide a useful framework for decision-making, and ultimately to guide your actions.

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<sup>2</sup> Andrea Durbach, ‘Of Trials, Reparation and Transformation in Post-Apartheid South Africa: The Making of A *Common Purpose*’ (2015-2016) 60 *New York Law School Law Review* 345, 351-52.

<sup>3</sup> Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (Cambridge University Press, 2<sup>nd</sup> ed, 2014) 9.

<sup>4</sup> Andrea Durbach, *Upington: A Story of Trials And Reconciliation* (Sydney, Allen & Unwin, 1<sup>st</sup> Ed, 1999); Looking Glass Pictures 2011.

## Cultural Diversity

The Asian Australian Lawyers Association published a report, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015*.<sup>5</sup> Whilst there were some methodological limitations to the research in the report, it does provide some important insights into the issue described as the ‘bamboo ceiling’. The report indicates Asian Australians account for almost 10% of the Australian population, yet only 3.1% of partners in law firms, 1.6% of barristers and 0.8% of the judiciary.<sup>6</sup> At the time of the report, there were six large law firms, and 44 medium sized firms with no Asian Australian partners.<sup>7</sup> Of more than 6,000 barristers in Australia, 94 were Asian Australian, and only 7 were senior counsel.<sup>8</sup> There was not one Asian Australian senior counsel identified in Victoria at the time of the report.<sup>9</sup>

The statistics on the legal profession and cultural diversity are congruent with statistics on the cultural backgrounds of senior Australian leaders.<sup>10</sup>

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<sup>5</sup> Asian Australian Lawyers Association, Inc, *The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015*, (2015).

<sup>6</sup> Ibid 4.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid, 7.

<sup>10</sup>For instance, the percentage of senior Australian leaders with non-European cultural backgrounds of the CEOs of ASX 200 companies was slightly less than 5%, of public service secretaries and heads of department was 1.61%, of federal parliamentarians was 3.54%, and of university vice-chancellors was zero. Australian Human Rights Commission, *Leading for Change. A Blueprint for Cultural Diversity and Inclusive Leadership* (2016) 2.

Whilst we like to think merit is an objective concept, it is often applied subjectively. A 2009 study by Australian National University economists found, that to obtain a job interview, and assuming both people had completed secondary school in Australia: a person with a Chinese name would have to submit 68% more job applications than someone with an Anglo-Saxon name.<sup>11</sup>

Some of you may have received training on unconscious bias. It is a fascinating area because we all have unconscious biases. The first two things we notice about a person are their gender and race.<sup>12</sup> The issue is not to fall into negative stereotyping. The Australian Human Rights Commission concludes that:

Countering bias and discrimination requires more than just consciousness raising (...).

The best approach seems to be one that transforms people's experience. Research studies have indicated that unconscious racial bias was most effectively reduced where people listen to stories that involved 'high self-involvement' – for example, scenarios that prompted people to ask themselves if they would react differently to a person if they belonged to a different race. Bias can be eliminated through effort.<sup>13</sup>

High performing workplaces that truly embrace cultural diversity have a culture of inclusion.<sup>14</sup> The Australian Human Rights Commission explains:

Getting the most out of cultural diversity, however, requires more than just having laws or rules in place. It is broadly recognised that what is required is a 'culture of

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<sup>11</sup> Alison L. 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.

<sup>12</sup> Contreras JM, Banaji MR, Mitchell JP, 'Multivoxel Patterns in Fusiform Face Area Differentiate Faces by Sex and Race' (2013) 8(7) *PLoS ONE*. < <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0069684>>

<sup>13</sup> Australian Human Rights Commission, above n 9, 24.

<sup>14</sup> Victorian Equal Opportunity and Human Rights Commission and Deloitte, *Waiter, Is That Inclusion In My Soup? A New Recipe to Improve Business Performance* (2012) 9-10.

inclusion'. This is a culture in which differences are recognised and valued, and in which different voices are heard in decision making.<sup>15</sup>

Two elements affect whether people feel included in a workplace.<sup>16</sup> First, a perception of fairness and respect. This is 'underpinned by ideas about equality of treatment.'<sup>17</sup> Second, a perception of value and belonging. This is 'about having a voice and being connected'.<sup>18</sup> It involves being active in both formal and informal networks, and participating in decision-making.<sup>19</sup>

### **Ethics – professional conduct**

I want to now address some of the laws that regulate barrister conduct. Rule 123 of the *Legal Profession Uniform Conduct (Barrister) Rules 2015* stipulates that 'a barrister must not in the course of practice, engage in conduct which constitutes discrimination (...)'.<sup>20</sup> Federal and state laws prohibit race discrimination and racial vilification.<sup>21</sup> Duty-holders must take reasonable and proportionate measures to eliminate discrimination and victimisation as far as possible.<sup>22</sup>

Laws and organisational rules communicate expectations ('formal social controls'). Research indicates formal social controls have a strong influence on how people will actually behave in a

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<sup>15</sup> Australian Human Rights Commission above n 9, 7.

<sup>16</sup> Victorian Equal Opportunity and Human Rights Commission and Deloitte, above n 13, 4.

<sup>17</sup> Victorian Equal Opportunity and Human Rights Commission and Deloitte, above n 13, 12.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Rule 125 of the *Legal Profession Uniform Conduct (Barrister) Rules 2015* defines discrimination by reference to the applicable state or federal legislation, and states it includes all forms of unlawful discrimination. This will include race discrimination and racial vilification.

<sup>21</sup> *Equal Opportunity Act 2010* (Vic); *Racial Discrimination Act 1975* (Cth) ; *Racial and Religious Tolerance Act 2001* (Vic).

<sup>22</sup> Section 15 of the *Equal Opportunity Act 2010* (Vic). It describes factors to take into account in determining what is reasonable and proportionate.

particular situation.<sup>23</sup> Another strong influence on behaviour is what people believe others, particularly influential individuals, believe or expect of them ('informal social sanctions').<sup>24</sup> For these reasons, having and implementing organisational policies is important.

The goals of the Victorian Bar's Equality and Diversity Policy are as follows:

### ***Membership***

(To) remove any impediments which may discourage competent and dedicated lawyers from joining or remaining at the Bar; and

(To) foster a strategy of inclusion and equality throughout all levels at the Bar that supports and enhances the diversity of the legal profession in Victoria.

### ***Development***

The Bar will co-operatively improve all of its members' opportunities for success. If particular areas of need are identified the Bar will move expeditiously to specifically address these.

### ***Leadership***

A vibrant Bar also encourages advancement for all its members. The Bar will promote a process of advancement for all its members with the requisite ability and experience. The Bar actively encourages members to seek to participate in decision-making structures within the Bar. The Bar also aims to have membership and leadership of committees and working groups of the Victorian Bar that reflects the diversity of the overall membership of the Bar.

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<sup>23</sup> VicHealth, *Findings from the 2013 Survey of Victorians' Attitudes to Race and Cultural Diversity* (2014) Victorian Health Promotion Foundation, 16.

<sup>24</sup> *Ibid*, 1.

**Benchmark**

In order to effectively benchmark against international best practice in this area, the Bar will set targets, measure, compare and engage. The Bar will give effect to this policy by adopting its own set of “Best Practices”.<sup>25</sup>

I recall an experience when I was working as a Senior Associate in a national law firm. A senior partner met with the CEO of an international company to take instructions and informed him that I would be working on the file, and would attend a conciliation conference to represent his company. To that, the CEO unhappily exclaimed “The little Greek girl!” To which the partner responded “Mate, just get out of her way!” Needless to say, I did the work. The whole experience was such an eye-opener for the CEO that he later asked me to roll out equal opportunity training across the company.

In this case, the partner made an instinctive decision not to accommodate a client’s racist and sexist request. In doing so, he advocated for me, and for equality. He complied with the firm’s equal opportunity policy. At the same time, the needs of the actual client – the company – were also met. The partner created a ripple of positive change that spread to an entire company.

**Virtue ethics**

We can take a broad ethical view of cultural diversity in the legal profession by using virtue ethics. Virtue ethics asks ‘what kind of person should I be in order to be a good person?’<sup>26</sup> It asks us to consider our values. As members of the Victorian Bar, the values expressed in the Equality and Diversity Policy of the Victorian Bar will be relevant. The Policy states:

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<sup>25</sup> Equality and Diversity Policy of the Victorian Bar, 2010, The Victorian Bar Incorporated, <[http://www.vicbar.com.au/uploads/publications/Victorian\\_Bar\\_Equality\\_and\\_diversity\\_policy.pdf](http://www.vicbar.com.au/uploads/publications/Victorian_Bar_Equality_and_diversity_policy.pdf)>

<sup>26</sup> Parker and Evans, above n 2, 9.



The Victorian Bar is committed to promoting equality and diversity in the legal profession. Such an approach is consistent with the principles of justice, integrity, equity and the pursuit of excellence upon which the Bar is founded.

Diversity is an inclusive concept and encompasses matters such as ethnicity, gender, sexual orientation, religion, race, colour, nationality, age, disability and marital and parental status.

The Bar recognises that a strong and vibrant Bar is a diverse and egalitarian one where a variety of views are encouraged, accommodated and respected. By fostering diversity we will ensure that the very best lawyers are drawn to the Bar and given the opportunity to participate in the Bar's decision-making processes. In this way, the Bar is enriched and, with a greater skill-set to draw upon, the Bar will be more effective in performing its institutional role in the practice of the law and the administration of justice. At an individual level, members will be encouraged to promote their abilities and make a real contribution to the legal profession, as well as broader society<sup>27</sup>.

If you share these values, you may wish to reflect on what you can do to advance them, both as an individual, and as a member of the Bar. Prior to my appointment, I practised in the areas of employment and discrimination law. I was also Chair of the Diversity Taskforce at the Law Institute of Victoria. I can share some practical steps, if you wish to advance cultural diversity.

On an individual level:

- Role model appropriate and inclusive behaviour
- Mentor someone from a different cultural background

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<sup>27</sup> Equality and Diversity Policy of the Victorian Bar, above n 24.

- Be a ‘buddy’ with a work colleague from a different cultural background, who is a year or two junior to you
- Distance yourself from the ‘beer-worthy’ test when referring or allocating work – prepare yourself a checklist of more objective criteria, for instance, evidence of specialisation in the subject-matter
- Actively build social relationships with people from a different background to yourself – reach out to others through formal and informal networks
- When you are planning or attending a social event, take active steps to include others from a different cultural background
- Provide support to colleagues and others who are affected by race discrimination – this might be anything from being a trusted person with whom they can debrief without judgment, to supporting them to make a formal complaint
- Ask yourself whether or not you are unconsciously using racial stereotypes. Take the opportunity to attend training on cultural diversity and unconscious bias.

At an organisational level:

- If you are in a leadership position in your workplace or community, communicate your commitment to cultural diversity and inclusion
- If you are in a leadership position, ask yourself if your leadership team, for instance a committee, is culturally diverse and if not, take steps to redress it
- Ensure there are systems in place in your organisation to report and respond to racial discrimination – and training programs targeted at preventing racial discrimination and promoting cultural diversity and inclusion

- Ensure there are systems in place to measure progress on cultural diversity and inclusion
- If you are organising a speaking panel, consider a diverse range of speakers.<sup>28</sup>

## Ethics of Care

Another useful tool for a broad ethical view on cultural diversity is the ethics of care. It ‘focuses attention on people’s responsibilities to maintain relationships and communities, and to show caring responsiveness to others in specific situations.’<sup>29</sup> The ethics of care is concerned with how we relate with and respond to others.<sup>30</sup>

People experiencing racism are more troubled by it when bystanders do nothing.<sup>31</sup> A Victorian Equal Opportunity and Human Rights Commission report on racism concluded:

Research shows that when we fail to respond to low-level racist incidents, it creates an environment where this type of behaviour is tolerated, replicated and can escalate. Indeed it is the failure to bear witness to racism and hatred that is often harshly felt by victims, who feel isolation and fear when subjected to racism in their daily lives.

While much good work is underway, our study shows that individuals, communities and organisations need greater support to understand how they can respond safely and effectively to the racism they encounter.<sup>32</sup>

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<sup>28</sup> See also: American Bar Association, *Diversity in the Legal Profession, The Next Steps* (April 2010).

<[http://www.americanbar.org/content/dam/aba/administrative/diversity/next\\_steps\\_2011.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf)>

<sup>29</sup> Parker and Evans, above n 2, 9.

<sup>30</sup> Ibid.

<sup>31</sup> Nelson J, Dunn K, Paradies Y, Pedersen A, Sharpe S, Hynes M, & Guerin B, *Review of Bystander Approaches in Support of Preventing Race-Based Discrimination*, Victorian Health Promotion Foundation (VicHealth 2010), 24.

<sup>32</sup> Victorian Equal Opportunity & Human Rights Commission, *Reporting Racism: What You Say Matters* (2013) 5.

When people affected by racism are supported by bystanders they report ‘productive effects on their senses of belonging, citizenship and community.’<sup>33</sup>

Applying the ethics of care, you may wish to consider how you relate and respond to others on race issues. There may be opportunities to ‘influence workplace climate through bystander intervention’.<sup>34</sup> This needs to be done in a calm and measured manner.<sup>35</sup> The safety of the situation should be assessed, the action to be taken considered, and thought given as to what outside assistance is required.<sup>36</sup> The research indicates that the ‘most effective bystander action is that which communicates a message of disapproval or discomfort without damaging interpersonal relations.’<sup>37</sup> Further, the most effective interventions will be those that ‘avoid inducing defensiveness’. A research report for VicHealth makes the following suggestions:

1. Ask questions, rather than make statements. For example, ‘why do you say that?’ As Fisher and Ury (1983) argued, “Statements generate resistance, whereas questions generate answers... Questions offer... no target to strike at, no position to attack”.
2. Target the offender’s egalitarian self-image where possible. For example, ‘I’m surprised to hear you say that, because I’ve always thought of you as someone who is very open-minded’.

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<sup>33</sup> Nelson et.al, above n 30, 25.

<sup>34</sup> Nelson J et al, above n 30, 20.

<sup>35</sup> Nelson J et al, above n 30, 23.

<sup>36</sup> Nelson J et al, above n 30, 22.

<sup>37</sup> Ibid .

3. Describe how a racist comment or joke makes you feel. For example, 'It makes me uncomfortable to hear that'.
4. Take a respectful, rather than self-righteous, approach.<sup>38</sup>

## Conclusion

In conclusion, I will share a story. Some of you may be familiar with Professor Raimond Gaita's book *Romulus, My Father*, based on his childhood. Professor Gaita was born in Germany and, like my father, migrated with his family to Australia when he was four years old. The following scene takes place at Frogmore, the farmhouse in central Victoria where Professor Gaita is residing with his father. His father's close friend, Pantelimon Hora, sometimes resides there too.

When Hora was at Frogmore he and my father often talked into the early hours of the morning, the kitchen filled with cigarette smoke and the smell of *slivovitz* [brandy]. They talked to each other in Romanian, which I understood reasonably, but could not speak. To me they spoke in German until my teenage years when, to accommodate my foolish embarrassment, they spoke to me in English. Their individuality was inseparable from their talk – it was revealed in it and made by it, by its honesty. I learnt from them the connection between individuality and character and the connection between these and the possibility of 'having something to say', of seeing another person as being fully and distinctively another perspective on the world. Which is to say that I learnt from them the connection between conversation and Otherness.<sup>39</sup>

Professor Gaita concludes this memory with the following reflection.

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<sup>38</sup> Ibid .

<sup>39</sup> Raimond Gaita, *Romulus, My Father* (Text Publishing, 1998, 2007 edition) 72-73.

The philosopher Plato said that those who love and seek wisdom are clinging in recollection to things they once saw. On many occasions in my life I have had the need to say, and thankfully have been able to say: I know what a good workman is; I know what an honest man is; I know what friendship is; I know because I remember these things in the person of my father, in the person of his friend Hora, and in the example of their friendship.<sup>40</sup>

Each of you is a role model. Your skills give you much influence. Ultimately the only enduring power is influence. Use it – to do good.

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<sup>40</sup> Ibid, 74.