UNEQUAL REPRESENTATION IN THE AUSTRALIAN LEGAL PROFESSION: A BY-PRODUCT OF AN UNEQUAL SOCIETY

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In 1904, a time rife with anti-Chinese discrimination,[1] William Ah Ket signed the roll of the Victorian Bar and became Australia's first barrister of Chinese descent.[2] Though he was well regarded as a barrister – described by Sir Robert Menzies as a 'phenomenon at the Victorian bar'[3] – he was neither appointed silk nor a judge.[4] As Menzies observed, '[Ah Ket] would have been a very competent judge… [a] certain prejudice among clients against having a Chinese barrister to an extent limited his practice'.[5] Today, the Australian legal profession and judiciary are still lagging behind in cultural diversity. People of marginalised cultural (and/or ethnoracial)[6] backgrounds continue to be underrepresented, especially at more senior levels of the profession. For years, the Australian legal profession has grappled with the question of what changes could be made to the profession and/or judiciary to increase its cultural diversity. This question, while important, is somewhat limiting. It attends to the cultural diversity issue specifically within the profession, narrowing analysis to human resources aspects including recruitment strategy, workplace culture, professional training, promotion criteria and judicial appointment processes. Such analysis is both relevant and necessary but remains the disproportionate focus of discussions relating to cultural diversity in the legal profession.[7] Consequently, aspects of the cultural diversity issue that go beyond the confines of human resources management and the profession itself have been largely overlooked. This essay therefore aims to broaden the discussion, to include consideration of how society's institutions and structures shape the cultural make-up of the profession and influence justice outcomes more broadly.

Accordingly, Part I of this essay puts forward a theoretical framework of analysis that situates the cultural diversity issue in the Australian legal system within its broader context of settler colonialism. Part II considers the claim that increasing cultural diversity within the profession improves justice outcomes for

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1 Michael Kirby, 'Australian Racism: The Story of Australia's First and Only Black Premier and Chief Justice – Sir Francis Villeneuve Smith' (2019) (Summer) *Bar News: The Journal of the NSW Bar Association* 53, 53; Joseph Lee, 'Anti-Chinese Legislation in Australasia' (1889) 3(2) *The Quarterly Journal of Economics* 218, 218–224.

2 Andrew Godwin, 'William Ah Ket – Australia's first lawyer of Chinese descent', *Melbourne Law School News* (online, 23 June 2022) <https://law.unimelb.edu.au/news/MLS/william-ah-ket-australias-first-lawyer-of-chinese-descent>.

3 Robert Menzies, *The Measure of the Years* (Cassell Australia, 1970) 249.

4 Chief Justice Susan Kiefel, 'William Ah Ket's contribution to diversity in the legal profession' (Asian Australian Lawyers Association, William Ah Ket Scholarship Presentation, 9 October 2019).

5 Robert Menzies (n 3) 249.

6 See generally Yin C Paradies, 'Defining, conceptualizing and characterizing racism in health research' (2006) 16(2) *Critical Health Practice* 143.

7 See, for example: Sarah Webster, 'Unconscious Biases and Uncomfortable Truths: Reassessing Institutional Values and Professionalism in the Law' (Research Paper, William Ah Ket Scholarship Papers, Asian Australian Lawyers Association, 2021); Tienyi Long, 'Being the change: Towards diversity intelligence in the Australian legal profession' (Research Paper, William Ah Ket Scholarship Papers, Asian Australian Lawyers Association, 2019); Jing Zhu and Helen Tung, 'The Call for Asian Cultural diversity in the Legal Profession' (2016) 38(2) *Bulletin (Law Society of South Australia)* 22.

those of marginalised cultural backgrounds, and notes that increasing representation does little to achieve such an effect. Part III examines why this is the case and posits that the cultural diversity issue in the legal profession and the poorer justice outcomes faced by marginalised populations are both by-products of an unequal society structured around maintaining settler colonial relations. In doing so, Part III also highlights why narrowing discussion on the cultural diversity issue within a human resources framework overlooks important avenues of change. Part IV, in conceptualising a way forward, proposes moving towards a different social order that demands just power relations throughout the institutions and structures of society. It therefore identifies sites for unsettling settler colonialism throughout the legal institutions of Australia, including at law school, within professional development, and at the foundations of the legal system itself. Part V discusses the lack of political will as the most significant barrier to implementing change, and notes that this does not necessarily preclude the possibility for transformation. Overall, this essay concludes that 'the cultural diversity issue' in the legal profession is derivative of broader injustice; that increasing cultural diversity in the profession *and* improving justice outcomes for marginalised populations requires a fundamental shift towards a more just society.

I THEORETICAL FRAMEWORK

As Australia is a settler colonial state, it is remiss to discuss issues concerning race relations without situating them within the context of settler colonialism. While it is easy to attribute Ah Ket's lack of career progression solely to prejudice among individuals, his plight might be better understood as a natural outcome of the structural and institutional racism that shaped all systems of governance during his time. Ah Ket lived from 1876 to 1936 – during the Frontier Wars following the invasion, colonisation, and early nation-building of Australia.[8] He lived and practised law against the backdrop of the settler polity's growing commitment to a 'White Australia' legitimised through settler colonial ideology.[9] Settler colonialism is an ongoing set of social structures organised around the logic of land acquisition and occupation by settlers.[10] It is carried out through the settler state's elimination and erasure of Indigenous people,[11] and control over racialised (non-white) exogenous 'Others' – including indentured labourers, immigrants, and refugees – who are exploited for their labour or excluded at the border.[12] Racism therefore continues to play a dominant and specific role throughout the structures and institutions of Australian society. It operates to produce a series of distinctions relating to origin, kinship, and lineage; it propels a process of hierarchisation in order

8 Lynette Russell, 'The 'frontier wars': Undoing the myth of the peaceful settlement of Australia', *Monash University: Lens* (Article, 23 April 2021) <https://lens.monash.edu/@politics-society/2021/04/23/1382962/the-frontier-wars-undoing-the-myth-of-the-peaceful-settlement-of-australia>.

9 Michael Kirby (n 1) 53.

10 Yann Allard-Tremblay and Elaine Coburn, 'The Flying Heads of Settler Colonialism; or the Ideological Erasures of Indigenous Peoples in Political Theorizing' (2021) *Political Studies* 1, 3.

11 Patrick Wolfe, 'Settler colonialism and the elimination of the native' (2006) 8(4) *Journal of Genocide Research* 387, 387.

12 Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (Palgrave Macmillan, 2010); Yann Allard-Trembly and Coburn (n 10) 4.

to establish and legitimise colonial modes of governance and control.[13] Given the interdependent relationship of racism and settler colonialism, analysis of the cultural diversity issue in the Australian legal profession without considering the role of settler colonialism risks superficial analysis at best; at worst, it risks reproducing settler colonial relations by erasing Aboriginal and Torres Strait Islander people's experiences. This essay therefore draws from Aboriginal and Torres Strait Islander people's perspectives, as well as critical and postcolonial theories, both in examining the cultural diversity issue and conceptualising a way forward.

II THE CULTURAL DIVERSITY ISSUE

It is by now well established that people of marginalised cultural backgrounds are underrepresented, especially at more senior levels of the legal profession in Australia. In 2020, Aboriginal and Torres Strait Islander solicitors comprised 0.8 percent of all practising solicitors nationally,[14] which is disproportionately lower than the number of Aboriginal and Torres Strait Islander people comprising the national population.[15] It was only this year, on 13 June 2022, that Warramunga man Lincoln Crowley QC made history by becoming the first Indigenous Supreme Court Justice in Australia.[16] There are no other Aboriginal or Torres Strait Islander judges serving in any other state or territory Supreme Court, the Federal Court, or the High Court. People from other marginalised cultural backgrounds are also underrepresented, especially at more senior levels of the profession and within the judiciary.[17] In 2015, the Asian Australian Lawyers Association reported that only 1.6 percent of barristers and 0.8 per cent of the judiciary were of Asian descent.[18] Notably, no judge from a non-European background has ever sat on the High Court, even though non-Europeans constitute approximately one quarter of the Australian population.[19] Given the Australian population is becoming increasingly culturally diverse, it is often argued that the legal profession should mirror the diversity of the general population.[20]

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13 See generally Ronit Lentin, *Traces of Racial Exception: Racializing Israeli Settler Colonialism* (Bloomsbury Academic, 2018).

14 Urbis, *2020 National Profile of Solicitors* (Final Report, 1 July 2020) 2.

15 Australian Bureau of Statistics, 'Australia: Aboriginal and Torres Strait Islander population summary' (Web page, 1 July 2022) <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-people-census/latest-release>.

16 Australian Associated Press, 'Lincoln Crowley sworn in as nation's first Indigenous supreme court judge', *The Guardian* (online, 13 June 2022) <https://www.theguardian.com/australia-news/2022/jun/13/lincoln-crowley-sworn-in-as-nations-first-indigenous-supreme-court-judge>.

17 Australian Women Lawyers, 'President Leah Marrone and Board Member Jessica Sabapathy spoke about diversity in judicial appointments' (Web Page, 7 April 2022) <https://australianwomenlawyers.com.au/7-april-2022-president-leah-marrone-and-board-member-jessica-sabapathy-spoke-about-diversity-in-judicial-appointments/>.

18 Asian Australian Lawyers Association, *The Australian Legal Profession: A snapshot of Asian Australian diversity in 2015* (Report, 14 April 2015) 4.

19 Australian Human Rights Commission, *Leading for change: A blueprint for cultural diversity and inclusive leadership revisited* (Report, April 2018) 7.

20 Law Council of Australia, 'Strategic Plan 2021-2026' (Corporate Document, 9 July 2021) <https://www.lawcouncil.asn.au/resources/corporate-documents/strategic-plan-2021-2026>.

The Case for Cultural Diversity: Improving Justice Outcomes?

A justification frequently put forward for a culturally representative legal profession is that it enables the profession to better serve the community in which it exists. In launching the New South Wales Law Society's *Cultural Diversity Guidance*, President of the NSW Law Society Juliana Warne remarked that '[h]aving a diverse and inclusive legal profession puts us in a stronger position to serve our state's vibrant and diverse citizenry'.[21] In commenting on diversity in judicial appointments, Australian Women Lawyers' President Leah Marrone and board member Jessica Sabapathy explained that '[j]udges are expected to make their decisions with the attitudes and expectations of the community in mind so it is important to have people with diverse experiences of life on the bench to ensure that the judiciary is truly reflective of the community it serves'.[22] In the same vein, principal of Marrawah Law and Trawlwoolway woman Leah Cameron said that 'judges of a particular race or ethnicity will be better positioned to understand and take seriously views held within their own racial or ethnic community'.[23] These remarks implicitly recognise the well-known fact that people of marginalised cultural backgrounds experience unequal access to justice and poorer justice outcomes;[24] and assume that a culturally representative judiciary and/or profession will result in better justice outcomes for marginalised populations.

This assumption, however, is often at odds with reality and is not supported by empirical evidence. For example, the United States currently has the most culturally diverse Supreme Court judiciary in its history.[25] Nevertheless, on 7 February 2022, the Supreme Court allowed the state of Alabama to proceed with a congressional redistricting plan which is being challenged for illegal racial gerrymandering.[26] The District Court had earlier ordered the plan to be redrawn, finding that it violated section 2 of the *Voting Rights Act of 1965*,[27] for diluting the voting strength of the Black community.[28] Yet, the Supreme Court – with its diverse bench – stayed the District Court's order, allowing the plan to be used for the 2022 election.[29] Further, research has not proven that diversity in the judiciary improves justice outcomes for marginalised populations.[30] Josh Hsu's leading study on the impact of Asian American judges on justice outcomes did not find conclusive evidence that the judge's background had an impact on judicial opinion in migration

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21 Law Society of New South Wales, 'More effort required to make legal profession more culturally diverse' (Web Page, 2021) <https://www.lawsociety.com.au/more-effort-required-make-legal-profession-more-culturally-diverse>.

22 Australian Women Lawyers (n 17).

23 Ibid.

24 Wayne Martin, 'Access to Justice in Multicultural Australia' (Speech, Council of Australasian Tribunals National and New South Wales Joint Conference, 8 June 2017).

25 Amber Phillips, 'How Supreme Court Diversity has shaped American Life' *The Washington Post* (online, 11 February 2022 <https://www.washingtonpost.com/politics/interactive/2022/supreme-court-class-photos-diversity/>.

26 Elizabeth Wydra, Brianne Gorod and David Gans, 'Merrill v. Milligan and Merrill v. Caster' *Constitutional Accountability Centre* (Web Page, 2022) <https://www.theusconstitution.org/litigation/merril-v-milligan/>.

27 52 USC § 10101.

28 *Merril v Milligan* (21-1086) *Merill v Caster* (21-1087) 595 US (2022).

29 Amy Howe, 'In 5-4 vote, justices reinstate Alabama voting map despite lower court's ruling that it dilutes Black votes' *SCOTUSblog* (Blog Post, 7 February 2022) <https://www.scotusblog.com/2022/02/in-5-4-vote-justices-reinstate-alabama-voting-map-despite-lower-courts-ruling-that-it-dilutes-black-votes/>.

30 See generally Ervin Tanking, *Asian Australians and The Judiciary: Does Cultural Diversity Matter?* (2020) *University of New South Wales Law Journal Student Series* 30.

cases.[31] Kristine Avena's later study on ethnic minority judges in the United States found that the judges' ethnicity did not play a significant role in justice outcomes in equal protection cases.[32] Though well-intentioned, a blinkered pursuit of a culturally representative legal profession does not guarantee improved justice outcomes for people of marginalised cultural backgrounds, nor should it be expected to have such an effect.

The legal system itself – including laws, legal principles, and traditions – constrains justice outcomes in accordance with its foundational ideologies, irrespective of what impact a legal practitioner's background may have. For example, the concept of the 'rule of law' in the Australian legal system requires the law to be equally applied to all;[33] this generally leaves little room for decision makers to exercise discretion, even if the law or its application is unjust. As the Honourable Anthony Gleeson explains, 'the rule of law suggests that the outcome of… litigation should depend as little as reasonably possible upon the identity of the judge who hears the case'.[34] Notably, in Avena's study, she concludes that one of her most significant findings is that 'while racial diversity matters, the law matters more'.[35] Avena also identified that the judges considered their duty to faithfully apply the law as paramount,[36] and that adherence to precedent and the court hierarchy restricted certain outcomes.[37] Accordingly, recruiting a certain number of individual legal professionals or judges from marginalised cultural backgrounds does little to change patterns of justice outcomes. Taking a wider view of the cultural diversity issue and considering the context in which it occurs reveals that justice outcomes are reflective of institutional and structural factors, not just individual actors.

III INSTITUTIONAL AND STRUCTURAL INJUSTICE

Understanding the historical and current institutional and structural injustice which shape Australian society is critical to understanding both why marginalised populations experience poorer justice outcomes and why unequal representation persists within the profession. Since settler colonialism is a structure, not an event,[38] settler colonial ideologies are not the artefacts of a lamentable racist past, but are 'ongoing and supported by radically unequal political, social, economic, and legal institutions'.[39] This becomes clear when examining the role of Australia's legal institutions in producing, reproducing, and legitimising the unequal justice outcomes experienced by Aboriginal and Torres Strait Islander people and racialised exogenous Others. Relatedly, the consequence of Australia's institutions and structures entrenching settler colonial

31 Josh Hsu, 'Asian American Judges: Identity, Their Narratives, & diversity on the Bench' (2006) 11(1) *Asian Pacific American Law Journal* 92.

32 Kristine Avena, 'Judges of Color: Examining the Impact of Judicial Diversity in the Equal Protection Jurisprudence of the United States Court of Appeals for the Ninth Circuit' (2018) 46(1) *Hastings Constitutional Law Quarterly* 221.

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

34 Ibid.

35 Avena (n 32) 240.

36 Ibid 240.

37 Ibid 231.

38 Patrick Wolfe (n 12) 388.

39 Yann Allard-Tremblay and Elaine Coburn (n 11) 4.

relations in their operation is a deeply unequal society in which marginalised populations face significant barriers to entering the legal profession. It follows, then, that the poorer justice outcomes experienced by marginalised populations and the unequal representation within the profession should both be understood as by-products of broader institutional and structural injustice.

Legal Institutions v Marginalised Populations

Since invasion, Australia's legal institutions have facilitated the white settler polity's acquisition and occupation of land through the elimination, displacement, assimilation, and control of Aboriginal and Torres Strait Islander people.[40] For example, the legal principle of *terra nullius* provided a rationalisation for the theft and dispossession of Aboriginal and Torres Strait Islander lands.[41] Legislation and policies premised on 'protection' enabled governments to heavily regulate the lives of Aboriginal and Torres Strait Islander people by, inter alia, forcibly relocating them from their lands, removing their children, withholding wages, banning cultural rites and customs, and imposing imprisonment for breach of regulations.[42] These mechanisms of control continue in modern iterations. For instance, the Northern Territory Intervention legislation enabled the government to compulsorily acquire Aboriginal townships, withhold income support, and prohibit customary law and cultural practice considerations from criminal justice processes.[43] Also, current child removal policies enable the ongoing removal of Aboriginal and Torres Strait Islander children at disproportionately high rates.[44] The subjugation of Aboriginal and Torres Strait Islander people by Australia's legal institutions is particularly evident in their overrepresentation in the criminal justice system;[45] they are imprisoned at the highest rate of any people in the world.[46] By briefly considering the way in which the state has used (and continues to use) its legal institutions against Aboriginal and Torres Strait Islander people, it is apparent that these institutions perpetuate settler colonial relations, both in legitimising and producing unjust outcomes.

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40 See generally Elieen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy (2014) 47(2) *Australian and New Zealand Journal of Criminology* 276.

41 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

42 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld).

43 Castan Centre for Human Rights Law, 'What is the Northern Territory Intervention? *Monash University* (Web Page <https://www.monash.edu/law/research/centres/castancentre/our-areas-of-work/indigenous/the-northern-territory-intervention/the-northern-territory-intervention-an-evaluation/what-is-the-northern-territory-intervention>.

44 Sue-Anne Hunter et al, *The Family Mattesr Report 2020: Measuring trends to turn the tide on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care in Australia'* (Report, 2020).

45 Thalia Anthony, 'The Limits of Reconciliation in Criminal Sentencing' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation: Non-Indigenous People and the Responsibility to Engage* (Springer, 2016) 249, 249–255.

46 Thalia Anthony and Eileen Baldry,'FactCheck: are first Australians the most imprisoned people on Earth? *The Conversation* (online, 6 June 2017) <https://theconversation.com/factcheck-are-first-australians-the-most-imprisoned-people-on-earth-78528>; 'Aboriginal people in Australia: the most imprisoned people on Earth' *IWGIA* (online, 22 April 2021) <https://www.iwgia.org/en/news/4344-aboriginal-people-in-australia-the-most-imprisoned-people-on-earth.html>.

In relation to racialised exogenous Others, the state's legal institutions also operate to maintain their marginalisation within Australian society, through sanctioning their exploitation and exclusion. Fundamental to maintaining the settler colonial state is the exploitation of racialised labour; and the control over whom may be granted permanent and full membership into the white settler-colonial polity, through selective inclusion (assimilation) on a minoritarian basis.[47] Australia's legal institutions have been a driving force of these exploitative and exclusionary practices. For example, enacting legislation was the mechanism by which governments could prohibit Chinese naturalisation and limit Chinese immigration;[48] deport Pacific Islanders who had earlier been *blackbirded*, that is, kidnapped or deceived into indentured labour for the Australian sugar industry;[49] and establish the White Australia Policy.[50] Current examples include racially restrictive citizenship and immigration laws,[51] Pacific Islander labour schemes akin to modern slavery and indentured labour;[52] and exclusionary refugee and asylum seeker policies. Asylum seekers who attempt to come to Australia by boat face highly discriminatory laws, indefinite detention,[53] and no path to resettlement in Australia.[54] As the Honourable Michael Kirby noted, refugees 'face… serious burdens that appear left-overs from the earlier way that Australia addressed unwanted and unwelcome people (mostly people of colour) through dictation tests in unknowable languages; and prolonged incarceration…'.[55] Again, it is clear that the legal system is founded on racial logics that ensure the reproduction of settler colonial power relations.

Unequal Society: Unequal Representation

The effect of Australia's institutions and structures in entrenching the oppression of Aboriginal and Torres Strait Islanders and the marginalisation of racialised Others is a deeply unequal society, which is reflected in the cultural make-up of the legal profession. This effect is not a mistake or unintended consequence; maintaining an unequal society is foundational to the role of all institutions in a still-colonial state. As Tanganekald, Meintagk and Boandik woman and Professor Irene Watson argues, 'the foundation of the Australian colonial project lies within an originary violence… Inequalities and iniquities are maintained for

47 Lorenzo Veracini (n 13) 7.

48 See for example: *Chinese Immigration Act 1855* (Vic); *Chinese Immigration Restriction and Regulation Act 1861* (NSW).

49 *The Pacific Island Labourers' Act 1901* (Cth); Michael Kirby (n 2) 54.

50 See generally *Immigration Restriction Act 1901* (Cth).

51 See for example: *Singh v Commonwealth* (2004) 222 CLR 322.

52 Rayane Tamer, 'Pacific Islander farm workers demand justice after claims of 'modern slavery' *SBS News* (online, 6 February 2022) <https://www.sbs.com.au/news/article/pacific-islander-farm-workers-demand-justice-after-claims-of-modern-slavery/>; Emily Foley and Rebecca Starting, 'Labor's proposed Pacific labour scheme reforms might be good soft diplomacy but will it address worker exploitation?' *The Conversation* (online, 19 May 2022) <https://theconversation.com/labors-proposed-pacific-labour-scheme-reforms-might-be-good-soft-diplomacy-but-will-it-address-worker-exploitation-183119>.

53 *Al-Kateb v Godwin* (2004) 219 CLR 562.

54 Andrew & Renata Kaldor Centre for International Refugee Law, 'Australia's Refugee Policy: An Overview' *University of New South Wales Sydney* (Fact Sheet, 17 July 2020) <https://www.kaldorcentre.unsw.edu.au/publication/australias-refugee-policy-overview>.

55 Michael Kirby (n 2) 57.

the purpose of sustaining the life and continuity of the state'.[56] Settler colonialism therefore necessitates unequal power relations across Australian society, as seen in patterns of socio-economic disadvantage amongst Aboriginal and Torres Strait Islander people and racialised exogenous Others. It is no surprise, then, that unequal representation persists in the Australian legal profession. Those who are disadvantaged by the institutions and structures of society are more likely to experience significant barriers to entering the legal profession. These barriers include the high Australian Tertiary Admission Rank scores required for entry into law school, the significant cost and time burden of completing university studies, and the tendency of micro-class reproduction in the legal profession.[57] Relatedly, the availability of accessing the Higher Education Loan Program and obtaining a subsidy through a Commonwealth supported place is wholly dependent on citizenship or residency status,[58] enforcing the exclusion and marginalisation of racialised Others. While individual prejudices certainly contribute to the cultural diversity issue within the legal profession,[59] a more critical analysis also recognises the issue as symptomatic of social inequality.[60] Addressing the poorer justice outcomes experienced by marginalised populations and the unequal representation within the profession therefore requires intervention at an institutional and structural level.

IV INSTITUTIONAL AND STRUCTURAL JUSTICE: UNSETTLING SETTLER COLONIALISM

Improving justice outcomes for people of marginalised cultural backgrounds *and* increasing cultural diversity within the legal profession requires turning away from settler colonialism and turning towards a different social order that demands just power relations throughout the institutions and structures of society. As the reproduction of settler colonial structures is a permanent social, economic, and politico-legal feature of settler colonies, so are ideologies that naturalise and normatively sanction settler colonial relationships of oppression and domination.[61] Settler colonialism and its ideologies will not naturally dissipate; they are the fundamental justification upon which the Australian nation was created and still depends. Moving towards a more just society therefore requires actively unsettling settler colonialism and its ideologies. It is posited that there are opportunities for such change throughout Australia's legal institutions – including within undergraduate legal education, the legal profession, and the legal system as a whole.

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56 Irene Watson, 'In the Northern Territory Intervention: What is Saved or Rescued and at What Cost?' (2009) 15(2) *Cultural Studies Review* 45, 45.

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

58 'HELP loans', *Australian Government StudyAssist* (Web Page) < https://www.studyassist.gov.au/help-loans>.

59 Sarah Webster, 'Unconscious Biases and Uncomfortable Truths: Reassessing Institutional Values and Professionalism in the Law' (Research Paper, William Ah Ket Scholarship Papers, Asian Australian Lawyers Association, 2021) 1–5.

60 Lawrence Goodman, 'How diversity can blind us to society's underlying racism' *Brandeis NOW* (Web Page, 14 December 2020) <https://www.brandeis.edu/now/2020/december/diversty-race-mayorga.html>.

61 Yann Allard-Trembly and Coburn (n 11) 2.

Legal Education: Expand the Curriculum

Expanding the curriculum of undergraduate legal education presents an opportunity for institutional change. It is widely documented that students who hold socially idealistic goals upon entering law school often do not go on to practise law with the aim of achieving social change.[62] Critical legal scholars explain this phenomenon by analysing the content and pedagogy of legal education, contending that it would be 'politically inconvenient for those advantaged by the structure and operation of the law if law schools produced graduates who understand these structures and are motivated to change them'.[63] Some researchers observe that the 'Priestly 11' – the units of study required for admission to the legal profession – demonstrates a narrow focus within the law curriculum, in that it is based in more prestigious areas of private practice, and does not include units which offer critical analyses of the law and legal system.[64] Matthew Ball's study of undergraduate law programs found that the conceptual frameworks prescribed to students for understanding the law and approaching legal problem solving did not encourage them 'to recognise the social implications of legal problems or the social impact of the law'.[65] The narrow curriculum and doctrinal nature of legal education leave little opportunity for students to critically examine the law, presenting the law and legal system as ideologically neutral. In this sense, undergraduate legal education has the effect of legitimising unjust outcomes of the legal system, as well as reinforcing the current status quo.

It is therefore recommended that the legal education curriculum – specifically the Priestly 11 – be expanded to incorporate a compulsory unit that involves critical perspectives on the law. Conveniently, such units already exist. For example, the Queensland University of Technology offers *Theories of Law*, an elective unit which requires students to 'explain the major movements in legal philosophy and legal theory, including the historical, economic, political and social contexts in which these movements emerged'.[66] The University of Queensland similarly offers *Jurisprudence*, which 'offers an overview of some of the main historical, doctrinal and philosophical perspectives that have influenced the understanding of law as an institution, together with an introduction to key theoretical positions and interdisciplinary movements that provide critique and commentary on the role of law'.[67] Enabling law students to understand the ideological foundations of the law and explore alternatives could see legal education as an important site for unsettling

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62 See for example: Matthew Ball, 'Legal Education and the 'Idealistic Student': Using Foucault to Unpack the Critical Legal Narrative' (2010) 36(2) *Monash University Law Review* 80, 80–81; Tracey Booth, 'Student Pro Bono: Developing a Public Service Ethos in the Contemporary Australian Law School' (2004) 29(6) *Alternative Law Journal* 280, 281; Jeremy Cooper and Louise Trubek, 'Social Values from Law School to Practice: An Introductory Essay' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Ashgate Publishing, 1997) 1, 14; Debra Schleef, '"That's a Good Question!": Exploring Motivations for Law and Business School Choice' (2000) 73(3) *Sociology of Education* 155, 157.

63 Matthew Ball (n 63), 85.

64 Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537, 557; Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 77; Alan Hunt, 'The Case for Critical Legal Education' (1986) 20 *The Law Teacher* 10, 10-14.

65 Matthew Ball, 'A 'Deleterious Effect? Australian Legal Education and the Production of the Legal Identity' (PhD Thesis, Queensland University of Technology, 2008).

66 'LLH475 Theories of Law', *Queensland University of Technology* (Web Page) <https://www.qut.edu.au/study/unit?unitCode=LLH475>.

67 'Jurisprudence (LAWS3704)', *The University of Queensland* (Web Page) <https://my.uq.edu.au/programs-courses/course.html?course_code=LAWS3704>.

previously unchallenged settler colonial ideologies. Requiring study of a unit that involves critical perspectives on the law as a precondition to admission to the legal profession may also encourage graduates entering the legal profession to place greater importance on the role that legal professionals can play in overcoming institutional injustice.

The Legal Profession: Mandate Cultural Competency Training

Implementing compulsory cultural competency training as part of Continuing Professional Development (CPD) requirements also presents an opportunity for institutional change. Cultural competency includes both individual and institutional elements; as described by Universities Australia, it 'includes the ability to critically reflect on one's own culture and professional paradigms in order to understand its cultural limitations and effect positive change… [it] requires an organisational culture which is committed to social justice'.[68] Currently, legal practitioners are not required to undertake any cultural competency training as part of meeting their 10-hour annual CPD requirements. As lawyer Tienyi Long observes, this 'leaves skill development to a chance, or at the very least, to the initiative and goodwill of the individual practitioner'.[69] Since neither the legal education system nor the CPD requirements prescribe units or training involving cultural competency as essential for practice, this leaves legal professionals – and the legal profession generally – at risk of reproducing settler colonial relations in their engagement with people of marginalised cultural backgrounds.

It is therefore recommended that cultural competency training be mandated for legal practitioners through existing CPD requirements. Such a proposal is not novel – in 2018, the New York Bar implemented a similar proposal, requiring all attorneys to complete at least one hour on 'diversity, inclusion and the elimination of bias' every two years as part of their continuing legal education requirements.[70] If mandatory cultural competency for legal practitioners is implemented into the Australian context, it is critical that such training be designed to address both individual and institutional attitudes and practices which reproduce settler colonial relations. As Gomeroi-Kamilaroi woman and law lecturer Marcelle Burns notes, 'the most important aspect of Indigenous cultural competency programs is to unsettle white privilege in order to change attitudes and behaviours that may unwittingly perpetuate Indigenous disadvantage'.[71] Burns also notes that another critical element of cultural competency for legal professionals is the ability to examine how law as an academic discipline and profession has been central to colonisation and the dispossession of Aboriginal and Torres Strait Islander people.[72] Ensuring that legal practitioners receive cultural competency training

68 Universities Australia, *National Best Practice framework for Indigenous Cultural Competency in Australian Universities* (October 2011) 48.

69 Tienyi Long (n 8) 21.

70 New York State Continuing Legal Education Program Rules, 22 NYCRR §1500.22.

71 Marcelle Burns, 'Towards growing Indigenous culturally competent legal professionals in Australia' (2013) 12(1) *The International Education Journal: Comparative Perspectives* 226, 238.

72 Ibid 238.

as part of mandatory professional development requirements reflects a commitment by the legal profession to institutional change.

The Legal System: Fracture the Skeleton of Principle

Unsettling settler colonialism within the legal system itself is the greatest and most challenging site for institutional change. In its current form, the legal system is unable to recognise Aboriginal and Torres Strait Islander nations' ongoing assertion of sovereignty and self-determination, entrenching the injustice of settler colonialism. To date, all attempts to recognise Aboriginal and Torres Strait Islander nations' sovereignty have seen the courts declare it as non-justiciable.[73] As explained by former High Court Chief Justice Gerard Brennan in *Mabo v Queensland (No 2)*,[74] the Court cannot recognise the rights and interests in land of Aboriginal and Torres Strait Islander people without fracturing the 'skeleton of principle which gives the body of our law its shape and internal consistency'.[75] Since western legal tradition conceptualises state sovereignty in terms of centralised power and exclusive control over a defined territory,[76] the legitimacy of the state and its legal system depends on the exclusion of other law co-existing within the state's territory.[77] The legal system maintains this exclusion through characterising Aboriginal and Torres Strait Islander peoples' laws and systems of governance as incomplete and customary.[78] This is highlighted by Professor Penny Pether's analysis of the *Mabo* decision: '[it] recognised a law predating it and persisting alongside it, but always subject to subordination and indeed extinguishment by it'.[79] Given the current legal system is incompatible with contemporary notions of justice in that it precludes recognition of Aboriginal and Torres Strait Islander nations' sovereignty,[80] moving towards a more just society may require a 'fracturing' of the legal system.

Envisioning a fracturing of the legal system requires turning away from settler colonial ideologies and western legal traditions which limit how sovereignty is defined and recognised. As Professor Chris Cunneen explains: '[the] imagination falters when confronted with genocide and dispossession, and with peoples who demand that their radical difference, their laws and customs, their alterity to the west be recogni[s]ed'.[81] A postcolonial perspective, however, does not see sovereignty as static or absolute; rather, it

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73 *R v Lowe* [1827] NSWSupC 32; *R v Murrell* (1836) 1 Legge 72; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; William Jonas, 'Recognising Aboriginal sovereignty – implications for the treaty process' (Speech, ATSIC National Treaty Conference, 27 August 2002).

74 (1992) 175 CLR 1.

75 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 45.

76 Margaret Davies, *Asking the Law Question* (Law Book Company, 2nd ed, 2002) 277.

77 Paul Muldoon, 'The Sovereign Exceptions: Colonization and the Foundation of Society' (2008) 17(1) *Social and Legal Studies* 59, 65.

78 See generally Chris Cunneen and Melanie Schwartz, *Customary Law, Human Rights and International Law: Some Conceptual Issues* (Background Paper No 11, March 2005).

79 Penny Pether, 'Principles or skeletons? Mabo and the discursive constitution of the Australian nation' (1998) 4(1) *Law Text Culture* 115, 117.

80 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 39.

81 Chris Cunneen, 'Postcolonial perspectives for criminology' in Mary Bosworth and Carolyn Hoyle (eds), *What is Criminology* (Oxford University Press, 2011) 249, 250.

conceptualises sovereignty in terms of jurisdictional multiplicity and decentralisation of state power through the recognition of co-existing and shared modes of governance.[82] Indigenous perspectives also do not conceptualise sovereignty in terms of exerting state power over defined territory. Indigenous sovereignty has varied meanings but generally involves elements including ancestral connection to land, the right to self-determine and practice culture, and the ability to care for land and community.[83] By adopting alternative foundational perspectives, a legal system which recognises the legitimacy of both state sovereignty and Aboriginal and Torres Strait Islander nations' sovereignty becomes possible.

It is therefore proposed that a possible avenue for exploration is the radical restructuring of the legal system into one that is capable of dealing with multiple jurisdictions. In colonised countries like Bolivia and Colombia, the transformation in Indigenous-state relations has involved adopting a pluralist legal system, placing the states' legal systems and Indigenous legal systems on equal footing.[84] In comparing the implementation of legal pluralism in Bolivia and Colombia, Professor Donna Van Cott notes that 'the success of legal pluralism is determined by the outcome of repeated strategic interactions among [I]ndigenous people's organisations, the professional judiciary, and state institutions'.[85] Any restructuring of the legal system in Australia therefore needs to be made in consultation and together with Aboriginal and Torres Strait Islander peoples. This is also reflected in the sentiment of the Warlpiri Nation members' Yuendumu Community Statement of Demands: '[w]e demand our self-determination, our rightful decision-making authority, and our resources to be restored to us.… [State] and Commonwealth governments need to work with and respect the authority of senior decision-makers in our community…. These are our calls for justice and for a just future'.[86] Restructuring the legal system into one which enables the co-existence of multiple jurisdictions is both a possible and achievable avenue for unsettling settler colonialism and moving towards a more just society.

V LIMITATIONS

The lack of political impetus for transforming the status quo is the most significant barrier to unsettling settler colonialism at an institutional and structural level. Among the British-descended settler colonial states – including New Zealand, Canada and the United States of America – Australia remains the only country without any treaties between the state and Indigenous peoples.[87] For most of the 20th century, Australians

82 Ibid 255.

83 Rashwet Shrinkhal, '"Indigenous sovereignty" and the right to self-determination in international law: a critical appraisal' (2021) 17(1) *AlterNative: An International Journal of Indigenous Peoples* 72, 72; Natalie Cromb, 'How white privilege imposes on sovereignty' *NITV* (online, 8 June 2017); Marcia Langton, 'Understanding Sovereignty' *Agreements Treaties and Negotiated Settlements* (Essay) <https://www.atns.net.au/understanding-sovereignty>; William Jonas (n 73).

84 Donna Lee Van Cott, 'A Political Analysis of Legal Pluralism in Bolivia and Colombia' (2000) 32(1) *Journal of Latin American Studies* 207.

85 Ibid 209.

86 'Yuendumu Community Statement of Demands' *Karrinjarla Muwajarri* (Web Page, May 2022) <https://karrinjarlamuwajarri.org/statement-of-demands/>.

87 Lidia Thorpe, 'Australian government must negotiate a treaty with First Nations people', *Australian Strategic Policy Institute* (Blog Post, 25 January 2021) <https://www.aspistrategist.org.au/australian-government-must-negotiate-a-treaty-with-first-nations-people/>.

were taught about the 'peaceful settlement' of Australia, erasing the violence of invasion and colonisation. As Henry Reynolds explains, '[t]his had the convenient effect of hiding much of the domestic bloodshed, allowing the celebration of what came to be viewed as a uniquely peaceful history of settlement'.[88] Relatedly, there is a historical and political amnesia in relation to the impacts of settler colonialism and its role in shaping current social, economic, and politico-legal relations, particularly amongst those in positions to enact change. For example, Senator Pauline Hanson, in a recent speech to parliament, said that Aboriginal and Torres Strait Islander people should 'stop playing the victim… and start taking some responsibility for [their] own people'.[89] Even Australia's Race Discrimination Commissioner and lawyer Chin Leong Tan denies that Australia is a racist country, and refuses to use his position to receive complaints relating to racism.[90] Both major political parties show strong bipartisan support for racist immigration policies involving boat turnbacks, offshore detention and no possibility of resettlement in Australia.[91] With little political will to move towards a more just society, it seems there is little possibility of meaningful institutional and structural change.

The current lack of political will, however, does not preclude the possibility for transformation and should not act as a deterrence to taking action. In writing about representing victims of South African apartheid laws (which were modelled on Queensland legislation),[92] lawyer Angela Durbach recounts:

> 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.[93]

While the concept of a just society may at times seem out of reach, the permanency of the unjust ideologies foundational to Australia's legal institutions and its outcomes largely rely on uncritical passivity and inaction.

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88 Henry Reynolds, *The Forgotten War* (NewSouth Publishing, 2013) 16.

89 Matt Coughlan, 'Pauline Hanson again slammed for racism' *The Canberra Times* (online, 12 February 2020) <https://www.canberratimes.com.au/story/6628133/pauline-hanson-again-slammed-for-racism/>.

90 Patricia Karvelas, 'Racism 'alive and it's kicking': Indigenous commissioner challenges new race appointee's stance' *ABC News* (online, 7 October 2018) <https://www.abc.net.au/news/2018-10-07/racism-is-alive-and-kicking/10344522?>.

91 Paul Karp, 'Factcheck: is Labor's policy on asylum seekers and refugees any different to the Coalition's?' *The Guardian* (online, 19 April 2022) <https://www.theguardian.com/australia-news/2022/apr/19/factcheck-is-labors-policy-on-asylum-seekers-and-refugees-any-different-to-the-coalitions>.

92 Maxine Beneba Clarke, 'No singular revelation' *Right Now: Human Rights in Australia* (Essay, 6 October 2014) <https://rightnow.org.au/essay/no-singular-revelation/>; *Aboriginal Protection Act 1897* (Qld).

93 Andrea Durbach, 'Of Trials, Reparation and Transformation in Post-Apartheid South Africa: The Making of a Common Purpose' (2015) 60(2) *New York Law School Law Review* 345, 351–52.

VI CONCLUSION

For years, the Australian legal profession has grappled with the question of what changes could be made to the profession and/or judiciary to increase its cultural diversity. It is often argued that the Australian legal profession should mirror the diversity of the general population in order to remedy the poorer justice outcomes experienced by those from marginalised cultural backgrounds. Though well-intentioned, a blinkered pursuit of cultural diversity does not result in improved justice outcomes for those of marginalised cultural backgrounds, as patterns of justice outcomes do not rely solely on individual actors. This becomes clear when considering how Australia's legal institutions perpetuate and reproduce settler colonial relations in dealing with Aboriginal and Torres Strait Islander people and racialised exogenous Others. The poorer justice outcomes experienced by marginalised populations and the unequal representation within the profession are therefore better understood as by-products of institutional and structural injustice which maintain a deeply unequal society. Accordingly, addressing the poorer justice outcomes experienced by marginalised populations and the unequal representation within the profession requires a fundamental shift towards a more just society. This can be achieved through unsettling settler colonialism at various sites throughout Australia's legal institutions – including within undergraduate legal education, the legal profession, and the legal system as a whole. Given the lack of political impetus for moving towards a more just society, there may be little possibility of meaningful institutional and structural change. This does not, however, necessarily preclude the possibility for transformation; just as the current social order is built on and shaped by unjust settler colonial ideologies, so too can it be rebuilt and reshaped by alternative ideologies that demand just power relations throughout society.

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