ASIAN AUSTRALIAN LAWYERS ASSOCIATION

PROMOTING CULTURAL DIVERSITY IN THE LAW

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

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Review of Judicial Impartiality Inquiry 2021

Submission to

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THE ASIAN AUSTRALIAN LAWYERS ASSOCIATION

The Asian Australian Lawyers Association (**AALA**) is the first incorporated association in Australia to focus on the growing number of Asian Australian lawyers in the profession, as well as other lawyers with an interest in Asia. Our members hail from more than 10 countries in Asia and, between them speak almost 20 different Asian languages and dialects. We have members from all walks of legal life, including students, lawyers and principals from small, medium and large firms, barristers, in-house and government lawyers.

The objectives of the AALA include:

1. To bring together members of the legal profession of Asian heritage and cultural background and others with an interest in Asia;
2. To provide a cohesive professional network to advocate for, and provide support to, our members and to benefit from shared learning and experience;
3. To improve the capability and reputation of the members in the legal profession through raising public awareness and providing education;
4. To develop links with Asian legal associations and facilitate and promote access for members to Asian legal markets;
5. To promote and facilitate Asian cultural diversity in the senior ranks of the legal profession;
6. To promote a mutual understanding of Australian and Asian legal systems; and
7. Such other purposes as the association, by general meeting, may determine, as an independent, politically unaffiliated and religiously tolerant organisation.

Since our establishment in 2013, the AALA has been dedicated to furthering awareness of issues faced by Asian Australian lawyers. Our commitment to equal opportunity for Asian Australian lawyers is reflected in our program of professional legal education, networking and mentoring events, and in our support for the equitable engagement and briefing of culturally diverse lawyers.

In 2021 the Asian Australian Lawyers Association New South Wales (**AALA NSW**) Branch established a Data and Policy Subcommittee jointly with the Women Lawyers' Association of New South Wales (**WLANSW**) to consider issues of setting cultural

diversity targets and cultural diversity data collection for the legal profession. At present, members of the AALA NSW Branch Data and Policy Subcommittee and Foreign Qualified Lawyers Subcommittee are looking at questions for data collection on overseas experience and foreign qualifications specific to the legal profession. This work is ongoing and continuing to be developed.

CULTURAL DIVERSITY IN THE LEGAL PROFESSION

The Diversity Council of Australia report "Counting Culture" recently launched on 18 May 2021 aims to establish uniform cross-industry guidelines on data collection on cultural diversity. The following definition of "cultural diversity" is adopted in the "Counting Culture" report:

> Cultural diversity means having a mix of people from different cultural backgrounds – it can include differences in cultural/ethnic identity (how we identify ourselves and how others identify us), language, country of birth, religion, heritage/ancestry, national origin, and/or race and colour.[1]

The Diversity Council of Australia and Pride in Diversity report "Intersections at Work" based on research conducted in 2018 defines "cultural diversity" as:

> anyone with non-Anglo cultural origins, that is, anyone from a non-Main English Speaking Country cultural background (that is, countries other than Canada, Ireland, New Zealand, South Africa, United Kingdom, and the United States of America, and Australia). This definition recognises Australia's history of British colonisation, so culturally diverse includes people with European, Asian,

[1] Diversity Council of Australia, "Counting Culture," [Internet - https://www.dca.org.au/research/project/counting-culture?__cf_chl_jschl_tk__=ab4e2abc4954562269121f2fe64a7bc9d01546a6-1622157364-0-ATtc8eyuPksmDP75Y73kHFdllWWX6D66bI4WiZx_qPJm4w4_7BgVFBZGWcbtPkKk1TlgWI2ZoWAWOEW8jBTKQwO5VJFcYYrG5-jzfVQxfeaUmlP-rInaitD1xMvV6taLaSqLUd-tE9MTA58KyCPaIcJXVA6JvmcjSLavyvhDDwrZl4A-A9uSsH3uW7RFChYt7JMOfdGZZrSlrdB1kqMF40wBodU0gI-xYb9xndvboGlpicwrFQ0101f2WjEjh8FkbR7Ao2JQzC9u1osm47S2TFZumnV_XRosNw7jyGm00KYmC_uvl5uat5VtgSfOOzqncpjhnhUbr5XR9xgsJwUnYE7wiq8o_kAJH1ZuZwCY7ZZFvimqt66XGM8Z4NdWPYJyMbC8ieD4ZFS9hX4nSQjij4ySBFIs6tHOvuhWVAESfQZq6yV2-TivstqmtBWsZI3thgf. (Accessed 28 May 2021.)].

African, Middle Eastern, Latin American, and Pacific Islander cultural backgrounds.[2]

Neither the definition adopted by the "Counting Culture" report nor the "Intersections at Work" report includes Aboriginal and/or Torres Strait Islander people as "culturally diverse", to respect Aboriginal and Torres Strait Islander peoples' unique position as First Nations People.[3]

2021 is an integral year for the consideration of cultural diversity and cultural diversity data collection. The Australian census is due to take place in August 2021, and organisations such as Diversity Council of Australia and the Australian Bureau of Statistics have been reviewing standards for the collection of data on cultural diversity. The Australian census was last undertaken in 2016. The 2016 census data indicated that around 10 percent of the Australian population had an Asian background.

In 2017, 8 of the Managing Partners of Australia's leading law firms conducted a survey on cultural diversity, in which there were 4,675 participants. The survey revealed that, of those who completed the survey at participating firms:

- 71.5 percent of people were born in Australia;
- Of that 71.5 percent, 48 percent had one or both parents born overseas;
- 9.7 percent of people were born in Asia;
- 7.1 percent of people were born in Britain;
- 7.7 percent of lawyers who were partners were of Asian cultural background;
- 20.4 percent of lawyers who were non-partners were of Asian cultural background;
- 9.8 percent of business services managers were of Asian cultural background;
- 16.9 percent of business services non-managers were of Asian cultural background;

[2] Diversity Council of Australia and Pride in Diversity, "Intersections at Work," [Internet - https://www.dca.org.au/sites/default/files/intersections_at_work_online_final.pdf. (Accessed 15 December 2020).], at 7.
[3] Above, at 7.

- Over 25 percent of graduates were from an Asian cultural background;
- 1.1 percent of people identified as Aboriginal or Torres Strait Islander;
- 0.9 percent of legal staff identified as Aboriginal or Torres Strait Islander; and
- 1.4 percent of non-legal staff identified as Aboriginal or Torres Strait Islander.

According to the Law Society of New South Wales "NSW Profile of Solicitors 2016 Final Report", as at October 2016, 72.4 percent of solicitors practising in New South Wales were born in Australia, compared to 27.5 percent of solicitors born overseas.[4] Of solicitors who were born overseas, 16.5 percent were born in the United Kingdom or Ireland, 4.6 percent were born in North America, 11.2 percent were born in Oceania, 41.6 percent were born in Asia, 9.5 percent were born in Europe, 7.8 percent were born in Africa, and 5.2 percent were born in the Middle East.[5]

In 2018, the New South Wales Bar Association published data on cultural diversity at the New South Wales Bar.[6] Of 1,526 barrister respondents:

- 51.77 percent identified with a single ancestry;
- Of that 51.77 percent, 52.3 percent or 27.2 percent of the New South Wales Bar identified themselves as Australian;
- 22 percent nominated Australian and one other ancestry;
- 80.2 percent identified as English, Irish or Scottish;
- 16.3 percent identified as "Other"; and
- Approximately 17 percent of those born after 1978, who identified as having a single ancestry, nominated either Chinese or Indian as their cultural heritage.[7]

Out of 1,547 barrister respondents, 14.3 percent were born overseas compared to 34.5 percent of the New South Wales population.[8]

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[4] Urbis, "NSW Profile of Solicitors 2016 Final Report," [Internet – https://www.lawsociety.com.au/sites/default/files/2018-04/NSW%20PROFILE%20OF%20SOLICITORS%202016%20FINAL%20REPORT.pdf. (Accessed 15 December 2020).], at 8.
[5] Above.
[6] I Taylor and C Winslow, "Data on diversity: The 2018 survey," [2019] (Autumn) *Bar News* 39.
[7] Above, at 39-40.
[8] Above, n 6, at 40.

Less than 1 percent of respondents identified as being of Aboriginal or Torres Strait Islander descent, as compared to 2.9 percent of the New South Wales population as a whole.[9]

15.2 percent of the New South Wales Bar reported as having either an intermediate or advanced proficiency in a foreign language.[10] Women barristers in New South Wales were more likely than male barristers to report an ability to speak a foreign language.[11] Less than 3 percent of barristers in New South Wales reported an intermediate or high proficiency in an East Asian or South Asian language.[12]

The WLANSW Career Intentions Survey[13] administered each university semester from semester 1 2013 to semester 1 2015 confirmed that out of 1,403 final year university law students and College of Law students, 26 percent of participating law students were born overseas, with 25 percent of female students and 26 percent of male students born overseas. 32 percent of students who participated in the Career Intentions Survey spoke a language other than English at home, with Cantonese (23 percent) being the most common language spoken at home, followed by Mandarin (18 percent), Hindi (9 percent), Arabic (7 percent) and Italian (4 percent).

CONSULTATION QUESTION 1

Do the principles set out by the ALRC in the Consultation Paper provide an appropriate framework for reform?

The AALA generally agrees that the principles set out by the Australian Law Reform Commission in the Consultation Paper provide an appropriate framework for reform.

While not a case addressing the legal test of judicial bias, the decision of the High Court of Australia in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 highlights the importance of judicial impartiality and the institution of Australian courts

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[9] Above, n 6 at 40-41.
[10] Above, n 6, at 41.
[11] Above, n 6, at 41.
[12] Above, n 6, at 41.
[13] Women Lawyers' Association of New South Wales, Career Intentions Survey 2013-2015 Final Report, 17 June 2015 [Internet – https://womenlawyersnsw.org.au/wp-content/uploads/Career-Intentions-Survey-Final-Report-2015-FINAL-WEB.pdf. (Accessed 24 July 2017).].

in the context of separation of powers between parliament and the judiciary. At the time of this landmark constitutional law decision, it was thought that comparable circumstances of an "emergency", "war-time-like" political nature were unlikely to repeat themselves. The present COVID-19 environment and relevance of Australia-China international trade relations in this context, serve as a reminder of the importance of courts and the judiciary in upholding civil liberties and human rights, and the civil liberties and human rights dimensions of unconscious bias and in particular ethnocentric cultural bias. Courts and legal practitioners are presently operating in an environment where cross-border legal disputes feature in business and personal relations, and where Australia's longstanding ally, the United States of America has been considering draft legislation that would designate the Chinese Communist Party as a criminal organisation.[14] In Florida, HB 5: Civic Education Curriculum has recently been passed requiring public high schools to "include a comparative discussion of political ideologies, such as communism and totalitarianism, that conflict with the principles of freedom and democracy essential to the founding principles of the United States."[15]

One worrying example has recently emerged from the New York State Supreme Court. In *Shanghai Yongrun Inv. Mgt. Co., Ltd. v Kashi Galaxy Venture Capital Co., Ltd* NY Slip Op 31459(U) April 30, 2021,[16] in a decision to refuse recognition of a Chinese judgment, the Court began by citing Winston Churchill's comments about democracy, and relied exclusively on a report published by the executive branch of the United States government for the conclusion that Chinese court judgments are "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law".

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[14] I Van Brugen and J Phillip, "Rep. Perry: Designate CCP a Transnational Criminal Organization," *The Epoch Times*, 1 March 2021 [Internet – https://www.theepochtimes.com/rep-perry-designate-ccp-a-transnational-criminal-organization_3715367.html. (Accessed 11 May 2021).].

[15] M Nguyen Ly, "New Law Requires Florida Students to be Taught About 'The Evils of Communism'" The Epoch Times, 23 June 2021 [Internet - https://www.theepochtimes.com/mkt_breakingnews/new-law-requires-florida-students-to-be-taught-about-the-evils-of-communism_3870014.html?utm_source=newsnoe&utm_medium=email&utm_campaign=breaking-2021-06-23-1&mktids=5deeb93dc2a5910e21f28c34b1a1961f&est=nCTp%2BPAiOVDqAyQFV1tmUt8%2F%2FdKMBZWa01teswcdVD3IQHNdNiBKVyWmiC3nNZzPIg%3D%3D. (Accessed 24 June 2021).].

[16] Judgment can be assessed online, for example - https://law.justia.com/cases/new-york/other-courts/2021/2021-ny-slip-op-31459-u.html.

While this example may be a consequence of the legislative language of the relevant Court rules in New York, its relationship with judicial impartiality is particularly poignant – the executive branch of the government may have political differences with a foreign power, and as a result, litigants from the same geographical location of that foreign power may be treated or perceived as treated, as a group, as less (or sometimes more) credible, by the Court.

The heuristics of unconscious and intersectional bias and discrimination, and ethnocentric cultural bias in particular, are not only about the thinking and behaviour of individuals. In an Australian context, it is also about the "group think" of the predominantly Anglo-European senior leadership of monochromatic institutions. This is reflected in the tendency of those in positions of leadership and decision making roles to for example hire, recruit, and when it comes to the briefing of barristers brief, those who look and think like themselves. Accordingly, the perception of courts as an institution which continues to lack cultural and other aspects of diversity among the bench, in leadership and decision making roles, in addition to the perception of decisions of individual judges, needs to be considered.

In a family law parenting context the impact of the heuristics of ethnocentric cultural bias on decision making about arrangements for children has led child and family psychologist Stephen Ralph to notably observe that:

> Family assessment as employed generally by counsellors is steeped in the traditions of western psychology, with its emphasis upon the individual, and based upon modern Anglo-European notions of social and family organisation. The prominence of psychological theory and clinical practice based upon the study of small family groups and individual needs runs counter, however, to an effective understanding of the collectivist nature of Aboriginal family life. Of particular concern is the possibility that counsellors who have limited knowledge or experience in working with Aboriginal families may produce reports that do not adequately address the issue of the child's cultural identity and consequently the report may fail to attend to vital cultural issues affecting the child's best interests. This possible deficit in cross-cultural understanding is one of the issues that the court's cultural

awareness programme seeks to address both through the appointment of Aboriginal Family Consultants and through training of counsellors in this area. [17]

That ethnocentric cultural bias varies from cultural context to cultural context and country to country is illustrated by stories from ancient Chinese history of westerners visiting the palace of the Chinese Emperor with western style oil paintings. Legends tell of members of the court of the Chinese Emperor, schooled to think of artistic painting in terms of Chinese style ink and water colours, learning to embrace western oil painting as art.

CONSULTATION PROPOSAL 2

Each Commonwealth court should promulgate a Practice Direction or Practice Note setting out the procedures for making and determining applications for disqualification of a judge on the grounds of actual or apprehended bias, and procedures for review or appeal.

CONSULTATION PROPOSAL 3

Each Commonwealth court should develop and publish an accessible guide to recusal and disqualification ('Guide') for members of the public. The Guide should be easy to understand, be informed by case law and the *Guide to Judicial Conduct*, and refer to any applicable Rules of Court or Practice Directions/Practice Notes.

In addition to summarising procedures, the Guide should include a description of (i) circumstances that will always or almost always give rise to apprehended bias, and (ii) circumstances that will never or almost never give rise to apprehended bias.

[17] Ralph S 1998, 'The Best Interests of the Aboriginal Child in Family Law Proceedings', *Australian Journal of Family Law*, Vol 12, 1, at 4-5.

CONSULTATION PROPOSAL 5

The Commonwealth courts should (in coordination with each other) publicise on their respective websites the processes and structures in place to support the independence and impartiality of judges and mechanisms to ensure judicial accountability.

CONSULTATION PROPOSAL 8

The Federal Court of Australia, the Family Court of Australia, and the High Court of Australia should promulgate a Practice Direction or Practice Note to provide that decisions on applications for disqualification made in relation to a judge on a multi-member court should be determined by the court as constituted

The AALA supports Consultation Proposals 2, 3, 5, and 8.

"Plain English" fact sheets would assist self-represented litigants and members of the community including the multicultural and culturally and linguistically diverse community in better understanding the legal test for judicial bias.

Courts could work with community legal centres, such as the new Multicultural Legal Centre of the Western Sydney Community Legal Centre launched in March 2021, to develop plain English fact sheets and resources as well as fact sheets and resources in languages other than English. The location of such fact sheets on the Court websites or within various registries should be clear and identifiable.

Consultation Proposals 2, 3, 5 and 8 would be most effective if implemented in a judicial officer-led fashion. In this regard we refer to our response below in relation to Consultation Question 4.

CONSULTATION QUESTION 4

Would there be benefit in a judicial officer-led project to identify more comprehensively circumstances in which apprehended bias will and will not arise?

The AALA agrees that there would be benefit in a judicial officer-led project to identify more comprehensively circumstances in which apprehended bias will and will not arise.

A judicial officer-led project could engage judicial officers who are culturally and linguistically diverse and/or experienced in working with culturally and linguistically diverse communities.

This should happen hand in hand with continued education of the judiciary on unconscious bias and in particular unconscious ethnocentric cultural and intersectional bias.

CONSULTATION PROPOSAL 6

The Federal Circuit Court of Australia, the Family Court of Australia, and the Federal Court of Australia should amend their rules of court to require a judge sitting alone to transfer certain applications for the sitting judge's disqualification to a duty judge for determination.

Options for reform include requiring transfer:

Option A) when the application raises specific issues or alleges specified types of actual or apprehended bias; or

Option B) when the sitting judge considers the application is reasonably arguable; or

Option C) when the sitting judge considers it appropriate

CONSULTATION QUESTION 7

Should Commonwealth courts formalise the availability of an interlocutory appeal procedure for applications relating to bias before a single judge court?

The AALA agrees that Commonwealth courts should formalise the availability of an interlocutory appeal procedure for applications relating to bias before a single judge court.

The AALA believes that the answer lies in appeal processes (whether on an interlocutory or final basis), and not in first-instance decisions of applications for

recusal. More specifically, the AALA argues that the key solution will be the speediness of the appeal.

There are pros and cons to proposals requiring courts to amend their rules to require a judge sitting alone to transfer certain applications for the sitting judge's disqualification to a duty judge for determination. On 20 April 2021, the AALA NSW Branch hosted a pre-recorded webinar discussing some relevant aspects, "Judicial Impartiality and COVID 19: A Fireside Chat with Judge David Re" available for viewing on the AALA YouTube Channel at http://youtu.be/kYVTK6Bn0ck. Judge Re is Australia's longest serving international judge. He recently completed a term of appointment as a Presiding Judge of the Special Tribunal for Lebanon. During the webinar Judge Re shared his unique perspective and key insights on procedures for judicial disqualification in an international context, drawing on his experience as a prosecutor and judge working in hybrid civil and common law systems involving legal teams and judicial benches of lawyers from diverse cultural and linguistic backgrounds.

The AALA recognises that Option A is a rigid test which leaves very little discretion to the judge (subject of the recusal application), Option C is a flexible test which leaves large discretion to the judge, and Option B is somewhere in the middle. The AALA believes that none of Options A, B or C on their own provide a satisfactory solution.

The AALA believes that presently, the difference between Options A, B and C needs to be viewed in the context of the whole reform package, as well as considerations such as:

- Whether the sitting judge can continue to sit in the proceedings and the proceedings continue while the application for recusal is determined; and
- Whether there is a right of appeal of the determination of the application for recusal and how quickly the appeal hearing can be finalised.

There is a real question as to whether options involving a transfer genuinely address the issues of concern in constructive and practical terms when courts as an institution and not only individual judges are considered. A transfer to another judicial

officer from the same court who is familiar with the sitting judge might still feasibly be perceived to have a dimension of bias. Judge Re remarked in the AALA NSW webinar that a better model might possibly be to have a panel or plenary of judges sourced externally from the court in question decide applications for recusal.

Such a model would be resource intensive and potentially cause delay given it would depend on the availability of judges external to the court in question. Also, knowledge of the specialised area of substantive law involved in the proceedings could be relevant depending on the circumstances of the particular case. Perhaps a way of addressing this issue would be to have either the sitting judge or one judge from the same court who could be a duty judge and one or more judges external to the court in question decide an application for recusal as a panel or plenary.

If procedures for first instance applications for recusal in the Federal Circuit Court of Australia, the Family Court of Australia, and the Federal Court of Australia are to be reformed to involve a transfer process, one option would be for such transfer to be to a panel or plenary of judges rather than a duty judge only, where the sitting judge considers this appropriate, with issues of whether the application raises specific issues or alleges specified types of actual or apprehended bias, and whether the application is reasonably arguable, to be taken into account by the sitting judge.

The AALA is ultimately of the view that it is of little importance:

- Whether a recusal application ought to be transferred to a different judge; and
- If so, the threshold of such a transfer.

The AALA contends that, no matter the model at first instance, as long as it is expeditious, a better model for determination of an appeal against a decision to refuse an application for recusal, would be for the appeal to be determined by a panel or plenary of judges, involving at least one judge from the same court and two or more judges externally-sourced. The model proposed achieves the following objectives:

- Safeguarding against frivolous recusal applications by having the first-instance judge involved;

- Safeguarding against erroneous decisions of first-instance judges by having an expeditious and external appeal process;
- Ensuring that the knowledge of the specialised area of law of the first-instance proceedings is preserved and taken into account during the recusal process; and
- Ensuring public confidence in the court system and in the Court as an institution by involving externally-sourced judges.

CONSULTATION QUESTION 9

Should Commonwealth courts adopt additional systems or practices to screen cases for potential issues of bias at the time cases are allocated?

Ensuring relevant issues of cultural diversity are identified early and relevant expert evidence is obtained and/or supports and services put in place such as a culturally appropriate support person or an interpreter, would assist considerably to ensure that members of the multicultural community best receive access to justice.

CONSULTATION PROPOSAL 10

The Council of Chief Justices of Australia and New Zealand and the Law Council of Australia and its constituent bodies should coordinate reviews of Part 4.3 of the *Guide to Judicial Conduct*, and the

(i) **Legal Profession Uniform Conduct (Barristers) Rules 2015, rule 54; and**

(ii) **Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, rule 22.5**

(and equivalent rules applicable in any state or territory) (together the 'Professional Rules').

The AALA supports Consultation Proposal 10 and is prepared to be involved in any ongoing discussion and consultation about Consultation Proposal 10.

CONSULTATION QUESTION 11

Has the increased use of registrars for case management in family law cases in the Federal Circuit Court of Australia reduced the potential for prejudgment

and perceptions of bias associated with multiple appearances before the same judge under the docket system to arise?

The AALA highlights the importance of mechanisms for review and evaluation of such case management systems, particularly given the increased use of registrars is still new. Presently, the use of Registrars in the Federal Circuit Court is limited to financial matters only thus applying only to a portion of cases in this jurisdiction. The AALA notes that consideration of courts as an institution and not just individual registrars or judges are relevant to perceptions of bias.

Unconscious bias can impact on the decision making of registrars just as it can impact on the decision making of judges, which may lead to injustice for vulnerable clients, such as those who are in need of urgent listings and/or case management directions. This is likely to be exacerbated by the environment created by over-listed duty lists and overworked judicial staff.

As registrars are not required to preside over interim or final defended hearings, it follows that they are not burdened with the same workload as the Federal Circuit Court Judges. The AALA has collected anecdotal evidence that some practitioners have observed that registrars have taken more time and make a greater effort to understand and support litigants of culturally and linguistically diverse backgrounds.

It would appear that a key factor in mitigating the risk of unconscious bias pervading decision making as this new case management system is rolled out and developed, will be to ensure that workload is effectively taken away from judges while at the same time ensuring that registrars do not become overburdened.

CONSULTATION QUESTION 12

What additional systems or procedures can Commonwealth courts put in place to reduce the tension between the apprehended bias rule and the demands of efficient allocation of resources in court proceedings?

“Plain English” fact sheets would assist self-represented litigants and members of the community including the multicultural community in better understanding the

legal test for judicial bias, which may reduce Court time and judicial time that these litigants may occupy, thus reducing the stress on court resources. The development of such fact sheets is discussed in our response to Consultation Proposal 8.

Further, as stated in our response to Consultation Question 9 above, ensuring relevant issues of cultural diversity are identified early and relevant expert evidence is obtained and/or supports and services put in place such as a culturally appropriate support person or an interpreter, would not only assist considerably to ensure that members of the multicultural community best receive access to justice, but also to ensure that resources are most efficiently employed during court hearings. To identify such issues of cultural diversity effectively and efficiently, judicial and registry staff require the skills and education to do so. To that end, the AALA notes its support for Consultation Proposals 17, 18 and 20 (see below). It is important that court users are also aware of the supports and services available, which could be achieved by including clear information in respect of same on the court websites and relevant proforma court forms.

CONSULTATION PROPOSAL 14

The Australian Government should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community.

The AALA agrees that the Australian Government should commit to a more transparent process for appointing federal judicial officers that involves a call for expressions of interest, publication of criteria for appointment, and explicitly aims for a suitably-qualified pool of candidates who reflect the diversity of the community. This could involve consultation with bodies that represent diverse or multicultural lawyers, including via a consultation protocol as mentioned in the Consultation Paper.

CONSULTATION PROPOSAL 15

The Attorney-General of Australia should report annually statistics on the diversity of the federal judiciary, including, as a minimum, data on ethnicity, gender, age, and professional background

The collection and public reporting and disclosure annually of statistics on the diversity of the federal judiciary, including, as a minimum, data on ethnicity, gender, age, and professional background, will ensure awareness is raised and maintained on the progression of diversity and inclusion in the federal judiciary.

The AALA NSW Data and Policy Subcommittee and Foreign Qualified Lawyers Subcommittee are presently considering issues relevant to data collection on cultural diversity in the legal profession. In particular, the AALA NSW Data and Policy Subcommittee and Foreign Qualified Lawyers Subcommittee are presently considering standards for data collection on foreign or overseas experience and qualifications. This work is ongoing and continuing to be developed.

Knowledge or familiarity with foreign law and foreign affairs is becoming increasingly relevant in cases before the courts involving cross-border issues. In a family law context for example this arises in property cases where assets are located in a foreign jurisdiction, parenting cases involving international travel, and parenting cases involving international child abduction.

The Diversity Council of Australia “Counting Culture” guidelines provide a relevant framework for data collection on cultural diversity across industries. The “Counting Culture” guidelines identify (1) cultural background or ancestry, (2) foreign language skills, and (3) country of birth as “core measures” for cultural diversity data collection. The “Counting Culture” guidelines identify (4) religious affiliation and (5) global experience or overseas experience and qualifications, as “additional measures” for cultural diversity data collection.

CONSULTATION QUESTION 16

What should be done to increase diversity in the legal profession and to support lawyers from sections of the community that are traditionally underrepresented in judicial appointments to thrive in the profession?

It is important that diversity and inclusion in the legal profession is considered not only from the skills, experience, qualifications, lens and perspective of gender diversity and inclusion, but also from the considerably broader aspect of facets of a diverse and inclusive legal profession outside of the category of gender only. The development of a diverse community in the legal profession in the aftermath of COVID-19, will fail to achieve its potential, stagnate, and run the risk of perpetuating and developing inequality in the legal profession particularly between the various grounds of diversity and inclusion (gender, culture, LGBTI, disability, age and metropolitan or rural, regional and remote location), if an approach that focuses on gender diversity only is adopted.[18]

The 2020 Board Diversity Index was released in May 2020 by Watermark Search International and the Governance Institute of Australia. This was a survey of 296 companies making up the ASX 300 conducted on gender diversity, cultural diversity, skills diversity, age diversity, and tenure. The 2020 report found that while gender imbalance on boards was continuing to positively lessen, more is needed on the cultural diversity front.[19] In 2020 women filled 561 of the 2,004 board seats on the ASX 300, which was 28 more than in 2019.[20] In 2020 the number of boards that had 30 per cent or more women on them rose from 113 in 2019 to 121 in 2020.[21]

[18] African American Policy Forum, "(Part 1) Under the Blacklight: The Intersectional Vulnerabilities that COVID Lays Bare," 28 March 2020 *African American Policy Forum*, [Internet - https://www.youtube.com/watch?v=OsBstnmBTaI. (Accessed 28 March 2020).]; Haymarket Books, "Intersectionality Matters: A Conversation with Kimberle Crenshaw," 6 May 2020 *Haymarket Books*, [Internet - https://youtu.be/otload6iBhA. (Accessed 6 May 2020).].

[19] J Doraisamy, "Board gender diversity improving while cultural diversity lessens," 19 May 2020 *Lawyers Weekly*, [Internet - https://www.lawyersweekly.com.au/biglaw/28355-board-gender-diversity-improving-while-cultural-diversity-worsens, (Accessed 19 May 2020).].

[20] Watermark Search International and Governance Institute of Australia, "2020 Board Diversity Index," May 2020 *Watermark Search International* [Internet - https://www.watermarksearch.com.au/2020-board-diversity-index (Accessed 31 May 2020).].

[21] Watermark Search International and Governance Institute of Australia, "2020 Board Diversity Index," May 2020 *Watermark Search International* [Internet - https://www.watermarksearch.com.au/2020-board-diversity-index (Accessed 31 May 2020).].

The 2020 Board Diversity Index report found that the number of board directors from non-Anglo-Celtic cultural backgrounds dropped to just 5 per cent from 2019 to 2020,[22] and that 71 per cent of women non-executive directors who are not from Australia are from North America, New Zealand and the UK.[23]

Insurance company Allianz adopted both a target of 40 percent female leadership team by 2020, and an interim target of at least 14 percent of its leadership team being non-European by 2020.[24]

The 2018 Australian Human Rights Commission report "Leading for change: a blueprint for cultural diversity and inclusive leadership revisited," established that while 24 percent of the Australian population were from a non-European or Indigenous background, of those who occupied 2490 of the most senior posts in Australia, 75.9 per cent had an Anglo-Celtic background, 19.0 per cent had a European background, 4.7 per cent had a non-European background and 0.4 per cent had an Indigenous background.[25]

The legal profession and relevant professional associations and workplaces should adopt programs and initiatives to support the equitable briefing of culturally diverse barristers, recruitment and employment of culturally diverse law graduates and lawyers, mentoring and career progression of culturally diverse law graduates and lawyers. Talent should be identified early and "express mentored and sponsored" through the ranks of the legal profession.

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[22] Watermark Search International and Governance Institute of Australia, "2020 Board Diversity Index," May 2020 *Watermark Search International* [Internet - file:///C:/Users/saw/Dropbox/Application%20for%20SC/2021%20Application/WTM0018_Board_Diversity_Index_2020_FINAL_WEB.pdf (Accessed 31 May 2020).], at 7.
[23] Watermark Search International and Governance Institute of Australia, "2020 Board Diversity Index," May 2020 *Watermark Search International* [Internet - file:///C:/Users/saw/Dropbox/Application%20for%20SC/2021%20Application/WTM0018_Board_Diversity_Index_2020_FINAL_WEB.pdf (Accessed 31 May 2020).], at 7.
[24] A Priestly, "Targets for diversity? Great. But making inclusion the priority is even better," 12 March 2019 *Women's Agenda* [Internet - https://womensagenda.com.au/latest/targets-for-diversity-great-but-making-inclusion-the-priority-is-even-better/, (Accessed 12 March 2019).].
[25] Australian Human Rights Commission, "Leading for change: a blueprint for cultural diversity and inclusive leadership revisted,"April 2018 *Australian Human Rights Commission* [Internet - https://humanrights.gov.au/sites/default/files/document/publication/Leading%20for%20Change_Blueprint2018_FINAL_Web.pdf, (Accessed 30 April 2018).], at 7.

State wide and national multicultural community legal centres employing, developing and training the skills of solicitors, barristers and law students with bilingual and multilingual skills, should be funded and established with proper resources to better service the multicultural community.[26]

Guidelines should be developed for multilingual advocates who, while being on their feet, hear or suspect that materials are not being faithfully or satisfactorily translated.

CONSULTATION PROPOSAL 17

Each Commonwealth court should commit to providing all judges newly-appointed to judicial office with the opportunity to take part in a court-specific orientation program upon appointment, as specified under the *National Standard for Professional Development for Australian Judicial Officers*, and report on the orientation program in their Annual Report.

CONSULTATION PROPOSAL 18

Each Commonwealth court (excluding the High Court) should circulate annually a list of core judicial education courses or other training that judges are encouraged to attend at specified stages of their judicial career, and ensure sufficient time is set aside for judges to attend them.

Core courses in the early stages of every judicial career should comprehensively cover (i) the psychology of decision-making, (ii) diversity, intersectionality, and comprehensive cultural competency, and, specifically (iii) cultural competency in relation to Aboriginal and Torres Strait Islander peoples.

CONSULTATION QUESTION 19

What more should be done to map, coordinate, monitor, and develop ongoing judicial education programs in relation to cultural competency relevant to the

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[26] LM Saw, "In search of the crazy rich Asians: multiculturalism in Australia post-COVID 19" (2021) (Autumn) *Bar News* 9, [Internet - [In Search of the Crazy Rich Asians: Multiculturalism in Australia Post COVID-19 | BarNews (nswbar.asn.au)](nswbar.asn.au). (Accessed 3 June 2021).].

federal judiciary, and to ensure that the specific needs of each Commonwealth court are met? Which bodies should be involved in this process?

CONSULTATION QUESTION 21

What further steps, if any, should be taken by the Commonwealth courts or others to ensure that any implicit social biases and a lack of cultural competency do not impact negatively on judicial impartiality, and to build the trust of communities with lower levels of confidence in judicial impartiality? Who should be responsible for implementing these?

CONSULTATION QUESTION 20

Should more structured systems of ethical and other types of support be provided to assist judges with difficult ethical questions, including in relation to conflicts of interest and recusal, and in relation to issues affecting their capacity to fulfil their judicial function? If so, how should such systems be developed and what should their key features be? What role could a future Federal Judicial Commission play in this regard?

The AALA supports Consultation Proposals 17, 18 and 20.

Knowledge or familiarity with foreign law and foreign affairs is becoming increasingly relevant in cases before the courts involving cross-border issues. In a family law context for example, this arises in property cases where assets are located in a foreign jurisdiction, parenting cases involving international travel, and parenting cases involving international child abduction.

Education and training should also focus on relevant and up to date areas of foreign law and foreign affairs, and where possible involve judges with international qualifications and experience. Education and training could also employ specialist diversity and cultural awareness consultants, including those involved in the training and education of the legal profession, large law firms and in house and government lawyers on cultural diversity and intersectional diversity issues. Relevant bodies in relation to the education and training of the judiciary would be the Judicial College, Judicial Commissions and potentially the Diversity Council of Australia.

In 2019 *Lawyers Weekly* reported that:

> An Australian-first survey of the wellbeing of judges and magistrates has revealed a judiciary at risk of burnout or trauma from having to constantly deal with high workloads and the harrowing details of serious crimes.[27]

It is critical that ethical, other supports and education and training for judges address wellbeing and mental health aspects including vicarious trauma. A notable feature of advancement in the legal profession is that outstanding achievement is most often rewarded with increased responsibility. A sustainable, properly role modelled profession means that overworked judges who are more prone to make errors impacting on judicial impartiality and unconscious bias, must be adequately supported and supervised from a wellbeing and mental health perspective.

Education and training on unconscious bias and especially unconscious cultural bias issues and how to raise an issue of unconscious cultural bias when appearing in court should extend to solicitors and barristers including young lawyers and law graduates who may find it challenging to confidently raise such issues in court. Relevant bodies to ensure that education of the legal profession is undertaken include state and territory law societies and bar associations, the Law Council of Australia, specialist professional legal associations, and Continuing Legal Education and Continuing Professional Development providers.

State wide and national multicultural community legal centres employing, developing and training the skills of solicitors, barristers and law students with bi-lingual and multi-lingual skills, should be funded and established with proper resources to better service the multicultural community.[28]

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[27] H Bennett, "Australian judges and magistrates experience high rates of stress, study finds", 6 May 2019, [Internet - https://about.unimelb.edu.au/newsroom/news/2019/may/australian-judges-and-magistrates-experience-high-rates-of-stress,-study-finds. (Accessed 6 May 2019).].

[28] LM Saw, "In search of the crazy rich Asians: multiculturalism in Australia post-COVID 19" (2021) (Autumn) *Bar News* 9, [Internet - In Search of the Crazy Rich Asians: Multiculturalism in Australia Post COVID-19 | BarNews (nswbar.asn.au). (Accessed 3 June 2021).].

Section 72 of the *Evidence Act 1995* (Cth) provides:

> **72 Exception: Aboriginal and Torres Strait Islander traditional laws and customs**
> The hearsay rule does not apply to evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group.

Section 78A of the *Evidence Act 1995* (Cth) provides:

> **78A Exception: Aboriginal and Torres Strait Islander traditional laws and customs**
> The opinion rule does not apply to evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group.

Given the increasing relevance of traditional laws and cultural and religious practices of culturally diverse communities other than Indigenous communities, sections equivalent to sections 72 and 78A of the *Evidence Act* 1995 (Cth) regarding cultures other than Indigenous cultures should be introduced into the *Evidence Act 1995* (Cth).

CONSULTATION PROPOSAL 22
Commonwealth courts should collect and publish aggregated data on reallocation of cases for issues relating to potential bias.

CONSULTATION PROPOSAL 23
Commonwealth courts should introduce methodologically sound processes to seek structured feedback from court users, including litigants and practitioners, about their satisfaction with the court process, in a way that allows any concerns about experiences of a lack of judicial impartiality to be raised.

CONSULTATION QUESTION 24

Are the measures that are already in place in Commonwealth courts to collect feedback from, and measure satisfaction of, court users sufficient and appropriate

The AALA supports Consultation Proposals 22 and 23.

Publication of data in sufficiently aggregated form can be essential in maintaining the privacy of individuals involved in specific cases, which is critical in cases involving family violence and the need to protect children and vulnerable people from risk of harm. In some regional communities for example, reporting the location of the regional community and an individual involved as being a woman member of a particular culturally diverse group, might effectively mean that such individual is readily identifiable without the name or other personal details of the individual being disclosed. In this instance rather than disclosing the particular culturally diverse group the individual belongs to, the individual could simply be recorded as “culturally diverse” as opposed to “Chinese Buddhist” or “Indian Hindu”.

Consideration should also be given to the type of data to be collected from feedback, to the extent that it is useful and relevant to understanding judicial impartiality, balanced against the ease of collecting such feedback and court resources.

The AALA understands that Commonwealth courts currently collect feedback via court users’ forums where there are representatives from for example the Law Society of New South Wales and NSW Bar Association Family Law Committees. In order to have more feedback from culturally diverse court users, representatives from the Law Society of New South Wales Diversity and Inclusion Committee, NSW Bar Association Diversity and Equality Committee and culturally diverse professional legal associations such as the AALA, who are in a position to collect feedback from court users of these culturally diverse sectors, should be invited to participate. It would appear that the current method of collecting feedback does not completely capture the experiences of all court users and legal representatives, in particular those from culturally diverse backgrounds.

Ensuring that more is done to capture and implement input from culturally diverse court users, interpreters, and support persons will better measure the satisfaction of all court users and provide a key source of ongoing data relevant to judicial impartiality and related issues of unconscious bias.

CONSULTATION QUESTION 25

What other data relevant to judicial impartiality and bias (if any) should the Commonwealth courts, or other bodies, collect, and for what purposes?

Data about the diversity of judges only presents one part of the picture in terms of individuals interacting in court disputes. Data about the diversity including cultural diversity of legal practitioners and litigants appearing before the courts is relevant to understanding the complete picture of how all individuals engaging in the court process influence judicial impartiality and bias.

The Victorian Family Violence Data Collection Framework sets guidelines for data collection of family violence related data by Victorian Government department agencies and service providers. The Framework document observes that:

> the RCFV [Royal Commission into Family Violence] found that there are serious gaps in our knowledge about the characteristics of victim survivors and perpetrators, and about how systems that respond to family violence are working. This is particularly with respect to people from priority communities.[29]

The Victorian Family Violence Data Collection Framework identifies people from a culturally and linguistically diverse background coming into contact with the family violence system as a priority community in the collection of data that might be relevant to family violence. The Framework document acknowledges that:

[29] Victoria State Government, Victorian Family Violence Data Collection Framework, December 2019, [Internet - https://content.vic.gov.au/sites/default/files/2019-11/Family-Violence-Data-Collection-Framework-October-2019.PDF (Accessed 21 January 2021).], at 11.

> The consistent collection of cultural and linguistic diversity information from people coming into contact with the family violence system is vital for a number of reasons. Firstly, anecdotal evidence and research surrounding family violence and people from CALD communities in Australia indicates that this group should be considered as a priority in future responses to family violence, due in part to the unique barriers these communities face when trying to report abuse and access services. Additionally, CALD information is necessary for operational reasons. Collecting information about a person's primary language and whether they need an interpreter, for instance, often satisfies an operational requirement when providing a service. Finally, there are gaps in our present understanding of how family violence impacts people from CALD communities. In particular, there is limited evidence collected in surveys and administrative data which can be used to make informed decisions about service use, intervention strategies and risk assessment targeting family violence in CALD communities. In order to better understand the range and impact of family violence in these communities, effort needs to be directed at improving the consistency and comparability of data collection practices within Victoria.[30]

Data about the cultural diversity of barristers appearing before courts and the length of appearances and speaking roles, would assist in the setting of targets for the purposes of expanding the Law Council of Australia Gender Equitable Briefing Policy to apply to cultural diversity and not only gender. Historically courts have assisted with the collection of such data as it pertains to gender of barristers appearing before courts, to support the development of the Law Council of Australia Gender Equitable Briefing Policy.

The UK Bar Standards Board November 2020 report "Income at the Bar - by Gender and Ethnicity"[31] utilised the term "Black and Minority Ethnic" (BAME) barristers. It found that for the 2018 income year:

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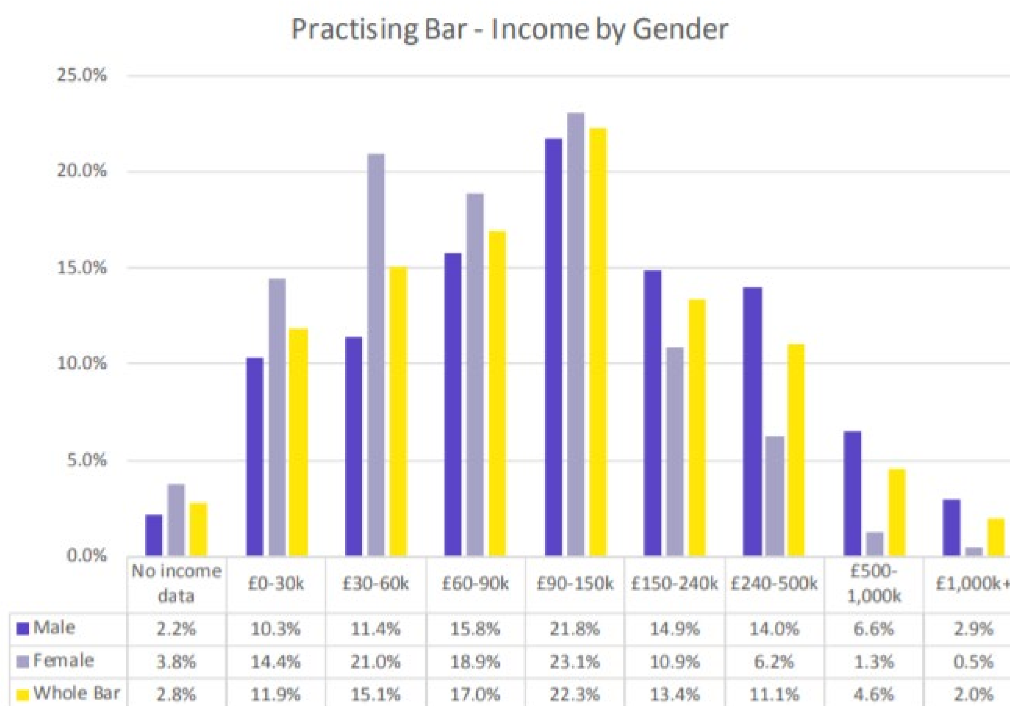
[30] Above, at 89-90.

[31] Bar Standards Board, Income at the Bar – by Gender and Ethnicity Research Report, November 2016 [Internet – https://www.barstandardsboard.org.uk/uploads/assets/1ee64764-cd34-4817-80174ca6304f1ac0/Income-at-the-Bar-by-Gender-and-Ethnicity-Final.pdf. (Accessed 21 January 2021).].

- As shown in Figure 1 below, a notably higher proportion of female barristers are in the lowest two income bands than male barristers, and a lower proportion are in the highest four income bands. For the highest income bands the difference is particularly stark – less than half the proportion in the 240-500k income band, and less than a quarter the proportion in the £500-£1 million and £1m+ income bands. Of particular note is the higher proportions of female barristers who are in the two lowest income bands – more than one in three (35.4%) of the female Bar had an income of £60k or less, compared to slightly over one in five (21.7%) of male barristers.[32]

Figure 1



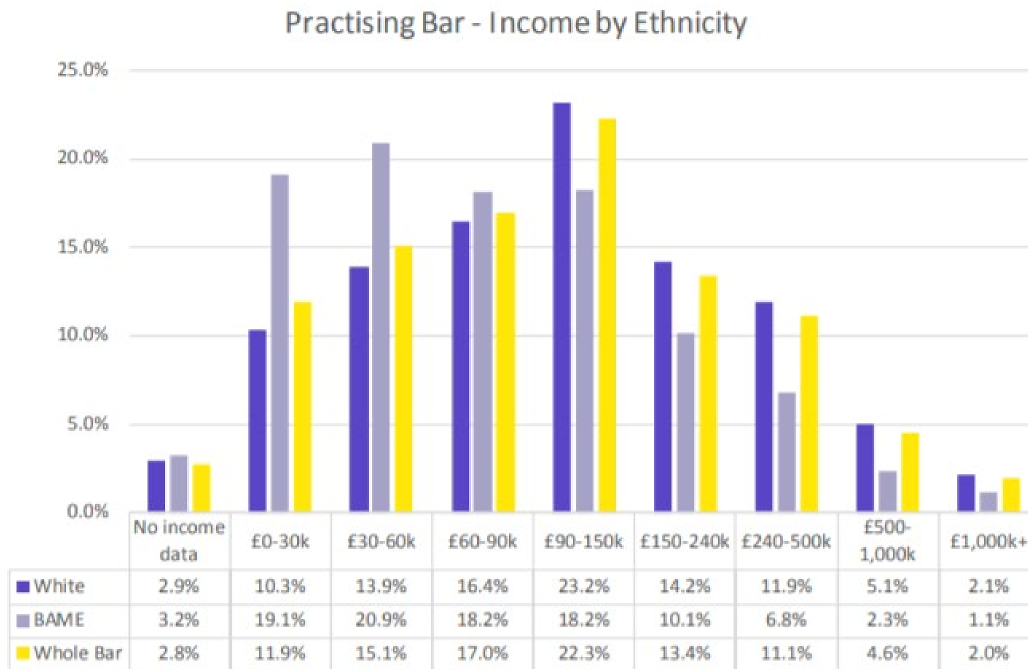
	No income data	£0-30k	£30-60k	£60-90k	£90-150k	£150-240k	£240-500k	£500-1,000k	£1,000k+
Male	2.2%	10.3%	11.4%	15.8%	21.8%	14.9%	14.0%	6.6%	2.9%
Female	3.8%	14.4%	21.0%	18.9%	23.1%	10.9%	6.2%	1.3%	0.5%
Whole Bar	2.8%	11.9%	15.1%	17.0%	22.3%	13.4%	11.1%	4.6%	2.0%

- As shown in Figure 2 below, a notably higher proportion of barristers from minority ethnic groups are in the lowest two income bands compared to White barristers, and a lower proportion are in the highest five income bands. For the highest income bands the difference is less notable than that for gender, although still reflects a notable difference – slightly over half the proportion of

[32] Above, at 9.

BAME barristers are in the 240-500k income band (6.8% compared to 11.9%), and around half the proportion are in the £500-£1 million and £1m+ income bands. As with gender, of particular note is the minority ethnic barristers who are in the two lowest income bands – two in five (40%) of the BAME Bar had an income of £60k or less, compared to around one in four (24.2%) of White barristers.[33]

Figure 2

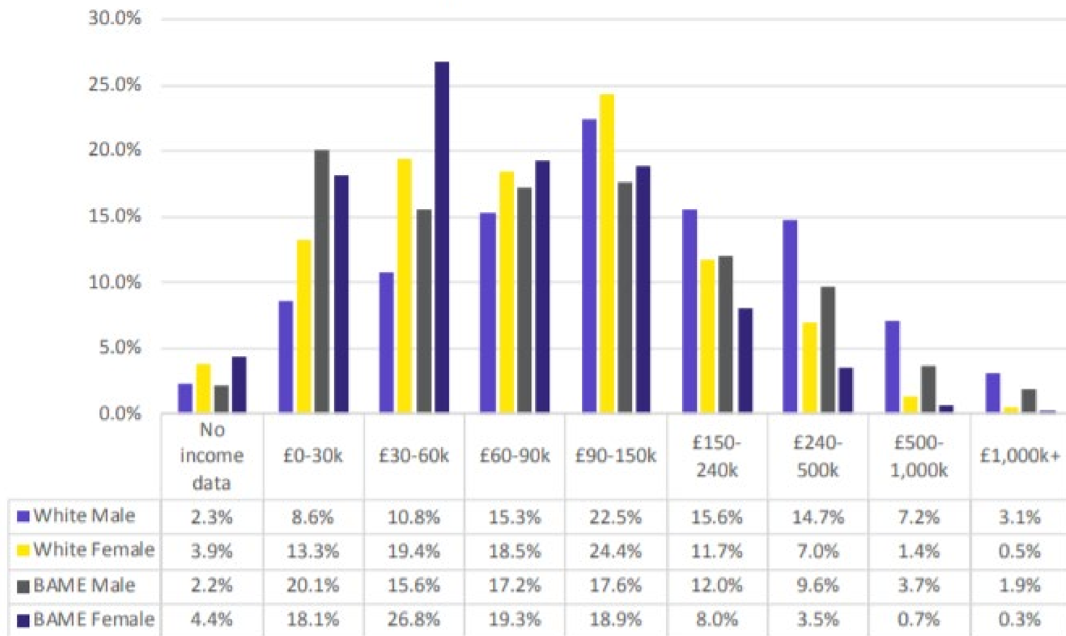


	No income data	£0-30k	£30-60k	£60-90k	£90-150k	£150-240k	£240-500k	£500-1,000k	£1,000k+
White	2.9%	10.3%	13.9%	16.4%	23.2%	14.2%	11.9%	5.1%	2.1%
BAME	3.2%	19.1%	20.9%	18.2%	18.2%	10.1%	6.8%	2.3%	1.1%
Whole Bar	2.8%	11.9%	15.1%	17.0%	22.3%	13.4%	11.1%	4.6%	2.0%

- As shown in Figure 3 below, for female barristers from minority ethnic groups, 44.9% are in the lowest two income bands – this is more than double the proportion of White male barristers (19.4%). Conversely, less than one in twenty female barristers from minority ethnic groups (4.5%) earn £240k and over, compared to one in four (25%) of White male barristers, 15.2% of BAME male barristers, and 8.9% of White female barristers.[34]

[33] Above, n 28, at 10.
[34] Above, n 28, at 10-11.

Figure 3



	No income data	£0-30k	£30-60k	£60-90k	£90-150k	£150-240k	£240-500k	£500-1,000k	£1,000k+
White Male	2.3%	8.6%	10.8%	15.3%	22.5%	15.6%	14.7%	7.2%	3.1%
White Female	3.9%	13.3%	19.4%	18.5%	24.4%	11.7%	7.0%	1.4%	0.5%
BAME Male	2.2%	20.1%	15.6%	17.2%	17.6%	12.0%	9.6%	3.7%	1.9%
BAME Female	4.4%	18.1%	26.8%	19.3%	18.9%	8.0%	3.5%	0.7%	0.3%