

# Intersectionality: The future of diversity at the NSW Bar

by Lee-May Saw

It is remarkable how appropriately the title of a seminal text on intersectional diversity, *All the Women Are White, All the Blacks Are Men, But Some of Us Are Brave*,<sup>1</sup> captures what it is like to be a woman of colour at the NSW Bar.

In a section titled 'New v Old' in their book *New Women, New Men, New Economy: How Creativity, Openness, Diversity and Equity are Driving Prosperity*, Narelle Hopper & Rodin Genoff capture current forces transforming Old to New in contemporary business and society.<sup>2</sup>

These forces symbolise a context in which New Law is a rapidly growing feature of the legal services market. A context in which the complete complexity of diversity is becoming better and better accommodated and understood.

The NSW Bar Association Diversity and Equality Committee formed a new Cultural Diversity Subcommittee in October 2017. The Subcommittee is committed to furthering cultural diversity at the NSW Bar. A key area of focus for the Subcommittee in the coming year will be intersectional diversity.

## What is intersectionality?

Intersectionality refers to the way in which different aspects of diversity, such as gender, cultural identity, sexuality, age and disability, are interconnected and cannot be separated from one another. The theory of intersectionality was first named in the 1980s in the work of Kimberlé Williams Crenshaw. The concept of intersectionality itself in fact existed for decades before this, originally deriving from the work, history and experiences of African American feminists and developing through the work, history and experiences of other women of colour.

## Why does intersectionality matter for the NSW Bar?

The traditional approach to issues of diversity in Australia and New South Wales has been to address aspects of diversity independently of



each other. It is this approach which ultimately led to the inception of intersectional theory by key African American feminists who have criticised traditional one-dimensional approaches to diversity for rendering individuals who experience multiple aspects of diversity simultaneously 'invisible'.

The sentiments behind the introduction of



intersectionality are captured in the words of Mohawk lawyer and activist Patricia Monture-Angus who said:

Some Aboriginal women have turned to the feminist or women's movement to seek solace (and solution) in the common oppression of women. I have a problem with perceiving this as a full solution. I am not just woman. I am a Mohawk woman. It is not solely my gender through which I first experience the world, it is my culture (and/or race) that precedes my

gender. Actually if I am object of some form of discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture. My world is not experienced in a linear and compartmentalized way. I experience the world simultaneously as Mohawk and as woman. It seems as though I cannot repeat this message too many times. To artificially separate my gender from my race and culture forces me to deny the way I experience the world. Such denial has devastating effects on Aboriginal constructions of reality.<sup>3</sup>

In the leadership sphere it is increasingly being acknowledged that intersectionally diverse leaders are ambitious, capable, resilient, innovative and well positioned to contribute

to both the success of their organisation and their own individual success in the 21st Century.<sup>4</sup> The Diversity Council of Australia have found that companies in the top quartile of racial/ethnic diversity in leadership teams are 35% more likely to have financial returns above their national industry median,<sup>5</sup> and that companies in the top quartile of gender diversity in their leadership teams are 15% more likely to have financial returns above their industry median.<sup>6</sup>

In a legal services environment which is global and crosses international borders, the business case in favour of the Bar, as leaders of litigation and dispute resolution teams,

embracing the benefits of intersectional diversity, has never been stronger.

## Lessons that can be learned from the global context – USA v Australia

When the history of women's rights is considered, there is well-founded support for looking internationally in a search to identify how and where to begin when it comes to harnessing the benefits of intersectionality. Given that Australia continues to be a country in which

the number of appointments of lawyers of an Asian background to the bench above the level of Magistrate remains minimal if any, is there anything we might learn from our learned friends in places like the United States of America or the United Kingdom?

It is possibly less surprising to an Australian than an American that similarities between the USA and Australia are often more superficial than precise. Historically the USA had an exclusion policy which was the equivalent of the White Australia Policy. Cultural groups in the USA and their history and composition differ to those in Australia with Australia lacking the influential Hispanic and African American communities that populate the USA.

The USA legal system lacks the distinction between solicitors and barristers that persists in the Australian legal system, and is somewhat notable like all things American for its larger scale and more prolific resourcing. The impact of these factors being that there are larger professional structures for ambitious culturally diverse lawyers to scale in any attempt to rise to the top.

A consideration of similarities and differences does little to explain how it was that in 1959 when USA exclusion policy was still very much at its forte, the first Chinese American judge to be appointed in the USA, Delbert E Wong who became a Judge of the Superior Court of the Municipal Court of the Los Angeles Judicial District, came to be appointed. Or how it is that numbers of women Asian judges including Jacqueline Hong-Ngoc Nguyen appointed as a Judge of the United States Court of Appeals for the Ninth Circuit by Barrack Obama on 14 May 2012, have come to be appointed.

However, in an age where Australian diversity and inclusion advocates have been touting the 'tipping point' at which diversity and inclusion currently stands in Australia, with more than 50% of solicitors now being women,<sup>7</sup> it is perhaps a key point in time for the NSW Bar to play its role in furthering and developing the present unique opportunities in New South Wales for intersectionality, diversity and inclusion.

### **Will focusing on foreign language skills be enough to ensure cultural diversity at the NSW Bar?**

A common thread across international bound-

aries when it comes to supporting individuals from culturally diverse backgrounds is the capitalisation of foreign language skills of culturally diverse professionals. It is necessary for significant debate and discussion to take place about the pros and cons of focusing on the foreign language skills of culturally diverse barristers. The traditional role of barristers is distinguishable from that of solicitors who are a first point of call for client management and client relationships. Barristers and leading counsel appearing before New South Wales courts are engaged to and expected to do so in English, not a foreign language.

Not all culturally diverse barristers have foreign language skills. But all barristers who identify as culturally diverse will have to varying extents cultural competence skills and cultural knowledge which could be utilised in informing advice, litigation and dispute resolution. Given that the growing number of culturally diverse barristers at the NSW Bar continue to be concentrated among the junior ranks, is it fair and equitable to expect and place pressure on culturally diverse junior counsel to have skills not only as lawyers and advocates, but also as interpreters and translators? To what extent would this entrench culturally diverse barristers among the junior ranks of the Bar rather than supporting a progression of talented culturally diverse barristers into leadership roles? Would this simply perpetuate at the Bar the equivalent of the phenomenon of culturally diverse professionals as valued junior employees instead of leaders at a partnership or executive level?

### **The future of the NSW Bar and where intersectionality will take the NSW Bar**

The NSW Bar, like other branches of the legal profession is undergoing an inevitable transformation under the influence of digital disruption. Like the impact of digital disruption on the legal profession, the complete effects of intersectionality on the NSW Bar will only be fully appreciated in retrospect rather than prospectively.

In 2010, the American Bar Association Presidential Initiative Commission on Diversity stated that:

Properly designed approaches to diversity and inclusion do not run afoul of contemporary jurisprudence on colorblindness,

gender-blindness, or reverse discrimination. Courts have frequently found that considerations of identity – and commitments to diversity – are permissible so long as they do not one-dimensionally and categorically equate a single, overbroad definition of identity (e.g., non-white) with a particular outcome.

Diversity proponents must research and prepare clear statements on how their diversity initiatives consider race, ethnicity, color, sex, gender, sexuality, age, ability, accent and economic status among other factors in holistic, multi-dimensional ways that differ fundamentally from the forms of affirmative action (e.g., quotas and set-asides) which courts have prohibited.<sup>viii</sup>

As the evidence base for intersectionality extends its reach, the role of intersectionality in channelling and transforming Old to New at the NSW Bar will become more and more apparent. It is in the interests of members of the Bar as leaders of litigation teams, legal practitioners, and business operators, to have an understanding of this.

### **END NOTES:**

- 1 Crenshaw K, 'Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum*, vol 1989, iss 1, article 8, at 139.
- 2 Hooper N, Genoff R & Pettifer S 2015, *New Women, New Men, New Economy: How Creativity, Openness, Diversity and Equity are Driving Prosperity*, The Federation Press, Sydney, at 4.
- 3 Monture-Angus P 1995, *Thunder in My Soul: A Mohawk Woman Speaks*, Fernwood, Halifax, Nova Scotia, at 177-178.
- 4 Diversity Council of Australia 2017, *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century*, Diversity Council of Australia Limited, at 8; Rodgers-Healey D 2017, 'What is different about minority women's leadership?' <<https://womensagenda.com.au/leadership/different-minority-womens-leadership/>>
- 5 Diversity Council of Australia 2017, above, at 6.
- 6 Diversity Council of Australia 2017, above.
- 7 NSW Law Society 2017, *Practising Solicitor Statistics* <<http://www.lawsociety.com.au/cs/groups/public/documents/internetregistry/1348330.pdf>>
- 8 American Bar Association Presidential Initiative Commission on Diversity April 2010, *Diversity in the Legal Profession: The Next Steps*, American Bar Association, at 48.