



ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION INTRODUCTORY GUIDANCE AND STRATEGIES FOR THE LEGAL PROFESSION



THE LAW SOCIETY
OF NEW SOUTH WALES

FOREWORD

The Law Society of NSW acknowledges the Traditional Owners of the lands and waterways across NSW and pays its respects to Elders past, present and emerging. We recognise the distinct and continuing impact of racism and discrimination on Aboriginal and Torres Strait Islander people.

This Guidance has been prepared with input from the Law Society's Diversity and Inclusion Committee, which includes lawyers from ethnically and culturally diverse communities. We hope that it will advance an ethos of eliminating racism in the workplace as a step towards achieving substantive equality for people of all backgrounds across the legal profession.

It does not suffice to be non-racist or simply 'against racism'. Rather, the task of addressing racism requires a proactive stance to oppose racist beliefs, systems and practices. Lawyers and legal professionals have an important role to play, as they are well-equipped to critically consider and challenge laws, institutions, and policies that may entrench racism.

Responding to racism enlivens the ethical obligations of all lawyers to uphold principles of fairness, justice and equality across all aspects of their practice of the law, including the way in which they behave in the workplace, and deliver services to clients from diverse communities. The law can be a vehicle for social change that empowers otherwise culturally and racially marginalised professionals and communities and promotes equality in the law.

We recognise that legal practices, organisations and in-house teams are at different stages of considering these issues, and we encourage respectful discussion and the sharing of ideas, so the profession can continue to refine its thinking and support the journey towards greater diversity and inclusion.



EXECUTIVE SUMMARY

The *International Convention on the Elimination of All Forms of Racial Discrimination* was adopted by the General Assembly of the United Nations in 1965, entered into force in 1969, and was ratified by Australia in 1975. Apart from setting out Australia's obligations, entered into voluntarily, under international law, the instrument provides a useful scaffolding for lawyers to consider concepts of racial equality and non-discrimination as they have evolved within the discourse of international law.

Eliminating racism, however, is not simply an academic exercise. Studies have demonstrated that racism can have significant and detrimental impacts on, among other things, physical and mental health outcomes both at an individual and population level.¹ Furthermore, racially inequitable policies and attitudes diminish society as a whole by inhibiting the full realisation of all persons' fundamental human rights. The legal profession can contribute to eliminating racism by employing a practical rights-based approach to identify, challenge, and address racism, racial inequality and racial discrimination in our workplaces and beyond.

It is widely acknowledged that 'race' is a social construct and that 'biological categories of race do not exist'.² Racist ideas and beliefs that endure are contrary to the values and standards of modern-day legal practice. Creating a truly inclusive profession requires all lawyers, law firms and other legal organisations to take proactive steps to understand the many facets and impacts of

racism, and collectively work towards ending all forms of racism in a meaningful and sustained way.

This Guidance offers practical steps that legal practices and professionals can take to ensure the workplace and other professional settings are free of racism. Law firms and legal organisations may also use the Guidance to supplement internal policies or training materials.

The Guidance encourages legal practices, organisations and in-house teams to publicly commit to the following six actions:

- **Action 1:** Express in organisational policies that racial discrimination, harassment and vilification are unlawful and contrary to the ethical and professional duties of solicitors;
- **Action 2:** Build racial literacy through evidence-based training;
- **Action 3:** Motivate lawyers to identify structural discrimination and systemic racism and use their sphere of influence to advocate for change;
- **Action 4:** Hire, promote and ensure sponsorship for culturally and ethnically diverse staff;
- **Action 5:** Empower staff members to support other employees experiencing racism in the workplace and be effective allies;
- **Action 6:** Create mechanisms of accountability and observe best practice responses to racism in the workplace.

The work of eliminating racism is not limited to a one-off action, policy or event. It requires organisations and individuals, through ongoing self-reflection, to consciously make 'frequent, consistent, equitable choices daily'.³ In particular, individuals must become aware of their own biases and those biases embedded within the systems where they work and operate, given that recognition of these factors represents a first step to addressing them.

1. See, for example, Harvard University, Centre on Developing Child, 'How Racism Can Affect Child Development' (Web Page) and VicHealth, 'Racism and its links to the health of children and young people' (Webpage/Fact Sheet).
2. Australian Human Rights Commission, 'Racism. It Stops with Me – Key Terms' (Webpage).
3. National Museum of African American History and Culture, 'Being Antiracist' (Webpage).

A BRIEF INTRODUCTION TO RACISM AND RELEVANT TERMINOLOGY

The Australian Human Rights Commission (AHRC), as part of its Racism. It Stops With Me campaign, defines racism as follows:

Racism is the process by which systems and policies, actions and attitudes create inequitable opportunities and outcomes for people based on race. Racism is more than just prejudice in thought or action. It occurs when this prejudice – whether individual or institutional – is accompanied by the power to discriminate against, oppress or limit the rights of others.⁴

Interpersonal racism (including covert racism):

In order to identify and actively oppose racism, it is necessary to understand the different forms that it can take. Arguably the most obvious form of racism is interpersonal i.e., racism that takes place between individuals. This can include negative comments, name-calling, bullying, social exclusion or even harassment and physical violence.

A subtype of interpersonal racism is sometimes referred to as ‘covert’ racism. This can occur during everyday interactions, where racist comments or microaggressions may be downplayed or normalised, thereby creating unsafe spaces for people in the workplace and in the course of their professional interactions.

Systemic/structural Racism

Systemic or structural racism refers to the way in which ‘cultural norms, laws, ideologies, policies and practices of a particular society, organisation or institution result in inequitable treatment, opportunities and outcomes’.⁵ As noted by Australia’s former Race Discrimination Commissioner, Dr Tim Soutphommasane, systemic racism can assume the ‘face of respectability’ and arise in the context of narratives of fairness and equal treatment.⁶ In simple terms, it has been described as ‘a way of thinking about racism as a system, rather than just as an individual’s bias or prejudice’.⁷

Systemic racism can mean that policies and laws that appear neutral in fact result in discriminatory



4. Australian Human Rights Commission, ‘Racism. It Stops with Me – Commit to learning’ (Webpage).

5. See definition in ‘Racism. It Stops with Me – Key Terms’ (above n 2).

6. Calla Wahlquist, ‘“Racism can appear with face of respectability” – Tim Soutphommasane’, The Guardian (Online, 1 November 2017).

7. Alison Whittaker, ‘Aboriginal woman Tanya Day died in custody. Now an inquest is investigating if systemic racism played a role’ The Conversation (online, 28 August 2019).

outcomes for certain groups of people based on race. The historical antecedents of systemic racism were emphasised in the National Report arising from the Royal Commission into Aboriginal Deaths in Custody published over thirty years ago:

The relations between Aboriginal and non-Aboriginal people were historically influenced by racism, often of the overt, outspoken and sanctimonious kind; but more often, particularly in later times, of the quiet assumption that scarcely recognises itself. What Aboriginal people have largely experienced is policies nakedly racially-based and in their everyday lives the constant irritation of racist attitudes. Aboriginal people were never treated as equals and certainly relations between the two groups were conducted on the basis of inequality and control.⁸

Sources of racism

The sources of racism are multifaceted. Systemic racism can arise from and coexist with other forms of social disadvantage, for example the intersection of race and gender or race and disability. Racism may be overt or occur as a result of unconscious/implicit bias, namely where a person has an automatic preference or attitude towards a certain group based on learned stereotypes, without being conscious of that preference.⁹ Unconscious biases can also have structural/institutional impacts, so that “the way things are done around here” is not critically evaluated and reformed.

The scholarship and language around racism is not static but rather evolving in light of changing societal, political and cultural movements and concerns. Some of the language that has arisen from the academic study of racism to provide relevant contextual background to the discussions in this Guidance is set out below. For a more comprehensive glossary, refer to the Key Terms page prepared by the AHRC.¹⁰

Anti-racism – Active and deliberate steps taken by individuals and organisations to combat racism and racial injustice, including advocating for changes to institutions and norms that perpetuate racism.

Allyship – A form of solidarity provided by someone who is not a member of a marginalised group, but who wishes to support that group. An ally recognises systemic inequality and seeks to work for a more equal society.

Intersectionality – Actions to eliminate racism should take an intersectional approach, which acknowledges that overlapping aspects of a person’s identity may lead them to experience combined or compounded prejudice. Social characteristics that make up a person’s identity include, but are not limited to, gender, sex, sexual orientation, gender identity, age, disability, ethnicity, colour and nationality but can also incorporate other, perhaps less obvious, characteristics, such as migration or visa status, housing status, socioeconomic status and medical or criminal record. It is the way in which this mixture of characteristics interact with social structures that may compound the discrimination or exclusion experienced by the individual.¹¹

Microaggression – Everyday interactions (insensitive statements, questions, or assumptions) that carry biased, demeaning or stereotypical messages about marginalised groups.¹²

Privilege – Privilege refers to the ‘advantage or protection that is only (or only notably) available to some people, or groups of people’.¹³

Racial Literacy – The ability to recognise and understand the concept of race and its impact on society.

8. Royal Commission into Aboriginal Deaths in Custody, National Report (Volume 1) accessed here.

9. See commentary on research regarding an implicit negative bias against Indigenous Australians in Siddharth Shirodkar, ‘Bias against Indigenous Australians: Implicit Association Test Results for Australia’ (2019) Vol 2, Issue 3-4 Journal of Australian Indigenous Issues 3-34.

10. Australian Human Rights Commission, ‘Racism. It Stops with Me – Key Terms’ (above n 2).

11. See Victorian Government, ‘Understanding Intersectionality’ (Webpage), and the Diversity Council of Australia’s Explainer on Intersectionality here.

12. See further examples in Action 6.

13. Australian Human Rights Commission, ‘Racism. It Stops with Me – Key Terms’ (above n 2).



THE RELEVANCE OF ELIMINATING RACISM TO THE PRACTICE OF LAW

The work of eliminating racism is particularly relevant to the legal profession. When lawyers are admitted to legal practice, they become officers of the court with a professional responsibility to ensure the efficient and proper administration of justice. They should also strive to uphold the rule of law principles on which our democracy rests, and to use their training and skills to challenge those laws and systems which enable the conditions for injustices to go unchecked.

To bring an anti-racist perspective to the practice of law is to recognise that many of the institutions and systems which underpin the administration of justice in this country have been shaped by the history and ongoing impacts of dispossession and colonisation on Aboriginal and Torres Strait Islander people. As former High Court Justice Kirby summarised in an address delivered in 2003:


Not until 1967 was the constitutional discrimination against [Aboriginal and Torres Strait Islander people] removed by a referendum. Not until 1983 were all remaining discriminatory provisions removed from Australia's electoral laws. Not until 1992, in the Mabo decision, was the law that denied Indigenous land rights swept away by the High Court.¹⁴

Racist laws and policies were not only directed to Aboriginal and Torres Strait Islander people, but extended to other minority groups. As Benjamin Jones points out: 'Immediately following Federation in 1901, policies were designed to keep Australia white and British', for example through the provisions contained in the *Immigration Restriction Act*, *Pacific Island Labourers Act* and the *Post and Telegraph Act*.¹⁵ These policies collectively became known as the White Australia Policy.¹⁶

14. The Hon. Justice Michael Kirby AC CMG, 'More Indigenous Lawyers – Making a Difference' (Speech, UNSW, 31 January 2003).

15. Benjamin T Jones, 'Australian politics explainer: the White Australia policy', *The Conversation*, 10 April 2017.

16. See explanation of the White Australia Policy at National Museum of Australia, 'White Australia policy', (Webpage).



While the introduction of landmark legislation such as the *Racial Discrimination Act 1975* (Cth) sought to herald a new chapter in addressing the discrimination experienced by minority groups, there remains a long path ahead to ensure equality before the law. Systemic factors, for example, have been identified as one of the drivers that has led to the vast overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.

The recently released Productivity Commission's Review of the National Agreement on Closing the Gap, for example, noted that 'the Commission heard from many Aboriginal and Torres Strait Islander people that racism and institutional racism remains a serious and widespread problem, particularly in the criminal justice, child protection and health systems'. In this context, the Commission commented:

*Governments' efforts to identify and eliminate racism have been narrowly focused on offering cultural capability training... and on employment initiatives. Government organisations have given comparatively little, or no, attention to their commitment to identify and call out institutional racism and unconscious bias, and specifically to address features of systems that cultivate institutionalised racism.*¹⁷

Another example of continuing disadvantage arising from interpersonal and systemic discrimination over time is the impact on the career opportunities, earning capacity and progression of minority groups in Australia. A 2009 large-scale study to measure labor market discrimination across different minority groups in Australia conducted by researchers from the ANU found 'economically and statistically significant differences in callback rates, suggesting that ethnic minority candidates would need to apply for more jobs in order to receive the same number of interviews'.¹⁸ Further, one study estimated around 95 per cent of senior leaders in Australia across all industries have an Anglo-Celtic or European background, despite those with non-European and Indigenous backgrounds making up 24 per cent of the Australian population.¹⁹

Systemic inequality and biases in society at large have been reflected in the legal profession itself. In an address to the Law Society in 2022, for example, Justice Dhanji of the Supreme Court of NSW drew a link between Australia's colonial legacy and the feeling of exclusion experienced by people from diverse backgrounds who are in or may wish to enter the profession. His Honour said:

*Every day, the courtrooms we sit in, the wigs and robes we put on and the legal jargon we use are all reminders of our colonial history and British legal inheritance. As the legal system we inherited was one run by predominantly privileged Anglo-Saxon men, these structures and customs have become not only markers of exclusivity, but reproducers and reinforcers of exclusivity.*²⁰

The structures that have historically underpinned the legal profession have meant that people from culturally and racially marginalised communities have faced unique hurdles entering the profession and progressing to its highest ranks. As the Chief Justice of NSW has acknowledged, diversity has begun to permeate not only the profession but also the judiciary, but this must be encouraged so that "all people who become involved in our justice system can (and feel that they can) be properly heard and fairly engaged with by a system reflective of our broader community."²¹

As lawyers, we occupy a privileged position because of the education that we have received and our understanding of how laws and the legal system operate. It is therefore important to commit to eliminating racism through our conduct and work.

The goal of eliminating racial discrimination in all its forms and manifestations requires a commitment to personal, organisational and structural unlearning. We invite you to use this document as a starting point.

17. Productivity Commission, Review of the National Agreement on Closing the Gap (Study Report, Volume 1), January 2024, 59.

18. Alison L Booth, Andrew Leigh and Elena Varganova, 'Does Ethnic Discrimination Vary Across Minority Groups? Evidence from a Field Experiment' (2012) Oxford Bulletin of Economics and Statistics 74(4) 547.

19. Diversity Australia, 'Leading for Change A blueprint for cultural diversity and inclusive leadership revisited' (Blog Post, 14 March 2022)

20. The Hon. Justice Hammet Dhanji, 'Cultural Diversity in the Law: It is not a revolution, but we are going to occupy the buildings' (Speech, Law Society of New South Wales, 27 September 2022) at [27].

21. The Hon. Chief Justice Andrew Bell SC, Opening of Law Term Dinner Address 2023 (Speech, Sydney, 1 February 2023) at [11].

ACTION 1: EXPRESS IN ORGANISATIONAL POLICIES THAT RACIAL DISCRIMINATION, HARASSMENT AND VILIFICATION ARE UNLAWFUL AND CONTRARY TO THE ETHICAL AND PROFESSIONAL DUTIES OF SOLICITORS

Legal practices are encouraged to expressly state in their workplace behaviour policies that racially-based discrimination, harassment or bullying is inconsistent with the professional and ethical standards demanded of legal practitioners and could constitute a professional conduct issue.

The *Australian Solicitor Conduct Rules 2015* (Rules) set out the fundamental duties of legal practitioners, including:

- the ethical duty of being honest and courteous in all dealings in the course of legal practice (**Rule 4**);
- a standard of conduct which requires practitioners not to engage in conduct, in the course of legal practice or otherwise, which:
 - demonstrates that the solicitor is not a fit and proper person to practise law, or
 - is likely to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice, or bring the profession into disrepute (**Rule 5**);
- not to, in the course of or in connection with legal practice or their profession, engage in conduct which constitutes discrimination, sexual harassment, any form of harassment or workplace bullying (**Rule 42**).



“Discrimination” under the Rules refers to unlawful discrimination under applicable state, territory or federal anti-discrimination or human rights legislation. NSW legal practitioners must observe prohibitions under the:

- *Anti-Discrimination Act 1977* (NSW) – Under this Act, race is defined under section 4 as ‘colour, nationality, descent and ethnic, ethno-religious or national origin’. Racial discrimination is defined under section 7 as follows:
 - (1) A person (**the perpetrator**) discriminates against another person (**the aggrieved person**) on the ground of race if the perpetrator—
 - a) on the ground of the aggrieved person’s race or the race of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of a different race or who has such a relative or associate of a different race, or
 - b) on the ground of the aggrieved person’s race or the race of a relative or associate of the aggrieved person, segregates the aggrieved person from persons of a different race or from persons who have such a relative or associate of a different race, or
 - c) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons



not of that race, or who have a relative or associate not of that race, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

- (2) For the purposes of subsection (1) (a) and (b), something is done on the ground of a person's race if it is done on the ground of the person's race, a characteristic that appertains generally to persons of that race or a characteristic that is generally imputed to persons of that race.
- *Racial Discrimination Act 1975* (Cth) – Under this Act, racial discrimination is defined under section 9 as follows:
 - (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
 - (1A) Where:
 - (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and

- (b) the other person does not or cannot comply with the term, condition or requirement; and
- (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

- (2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

In addition to setting out the obligations on lawyers, it may also be helpful if legal practices include examples of what constitutes racial discrimination and racism in their policies, to provide their employees with contextual understanding of the issue.



ACTION 2: BUILD RACIAL LITERACY THROUGH EVIDENCE-BASED TRAINING

There may be a lack of awareness within your organisation around what constitutes racism and racist behaviour. Regular training is one way to build racial literacy among your employees.

It is important that training introduces key concepts as well as practical strategies to identify and counter racism when it does occur. Ideally, training should be context specific. In Australia, for example, awareness of Aboriginal and Torres Strait Islander histories and experiences is central, as well as an understanding of contemporary efforts to address injustices and human rights issues in a practical way, for example through consideration of the Uluru Statement from the Heart and the National Agreement on Closing the Gap.

While meaningful training is important, it should be part of a wider strategy rather than simply a ‘tick and flick’ exercise. As noted by the Productivity Commission in its *Review on the National Agreement on Closing the Gap* in the context of government departments and organisations:

The most discernible way in which government organisations are addressing cultural safety is through offering cultural capability training or similar initiatives to their staff. While such training can play a role in improving government organisations, the experience of Aboriginal and Torres Strait Islander people and organisations (and the available academic research) demonstrates that while training is often necessary, it is rarely sufficient to drive cultural change.²²

The suggestions below should therefore be considered as preliminary groundwork to underpin future action, rather than ends in themselves.

Actions that your firm or organisation could take include:

1. Training on eliminating racism: While unconscious bias and cultural diversity or cross-cultural awareness training is readily available, it may also be beneficial for firms to engage training

providers that unpack and examine racial privilege, racism and racial discrimination as part of their professional development offering.

The DCA has noted that the training should challenge thinking and behaviours around racism. It should be facilitated by people with lived experience and occur in ‘spaces where racially marginalised people feel psychologically and racially safe’.²³ The DCA also suggests that, to maximise the impact of such training, it is preferable to use ‘multiple sessions that are longer, organisation-wide, and linked to broader organisational change’.²⁴

Research has shown that ‘it is possible to help people recognise racial privilege in a constructive way’.²⁵ While for some colleagues, these conversations may be initially uncomfortable, particularly in light of common perceptions that advancement in a workplace is only merit-driven, there are multiple teaching tools that unpack concepts such as racial privilege and serve as a call to action to address the impact of race on culturally and racially marginalised colleagues’ opportunities within a workplace setting.²⁶

- 2. Training on how to be an effective ally:** Some suggestions on how to be an ally are outlined in Actions 3 and 5, which cover ways organisations and individuals might address systemic inequities, as well as support persons who are subject to racism in a workplace setting.
- 3. Familiarise yourselves with efforts to combat racism in the Australian context:** Examples of relevant and significant policy work include the National Agreement on Closing the Gap.
- 4. Update the firm’s intranet with relevant material:** A firm’s intranet can be a useful space, not only to make the firm’s policies on anti-discrimination and harassment clear and accessible, but also to gather resources on other aspects of diversity and inclusion practice, including strategies to address racism. This may prompt staff to reflect on their own professional attitudes and behaviour.²⁷

22. Productivity Commission, Review of the National Agreement on Closing the Gap (Study Report, Volume 1), January 2024, 60.

23. Diversity Council Australia Racism at Work: How organisations can stand up to and end workplace racism (Report, 2022), 33.

24. Ibid.

25. Anyi Ma, Sean Fath, and Ashleigh Shelby Rosette, Research: People Can Learn to Recognize Their Racial Privilege, Harvard Business Review (15 August 2022).

26. Ibid.

27. Ashurst, for example, has created a global Anti-Racism Hub which is intended as an educational space for staff to learn about the history and implications of anti-racism. See here.



ACTION 3: MOTIVATE LAWYERS TO IDENTIFY STRUCTURAL DISCRIMINATION AND SYSTEMIC RACISM AND USE THEIR SPHERE OF INFLUENCE TO ADVOCATE FOR CHANGE

Lawyers occupy a privileged position in the community, as they are trained to understand the way in which laws and, by extension, power operates in society. Every lawyer, from the most junior to the most senior, has a sphere of influence in which to effect transformation to the status quo.

Allies must first undertake the “groundwork” of eliminating racism through acknowledgement of the problem of racism; reflection on their own biases and behaviours; listening to those from culturally and racially marginalised backgrounds who are impacted by the problem; and committing to further education on the subject.²⁸

28. Amnesty International Australia, How to be an Anti-Racism Ally (Guidance Document, May 2021).

As an employee of a law firm or organisation, there is then scope to undertake meaningful action, particularly in relation to structural discrimination and systemic racism.

The suggestions listed below are starting points on how to raise awareness and spread the word on the structural/systemic aspects of racism. Lawyers can identify who is in their sphere of influence and what the identified people/organisations can influence. Reconciliation Australia has provided some useful guidance and an activity to brainstorm a sphere of influence, including on the individual, organisational, community and societal levels. See [here](#).

Ways to create opportunities to start the work of dismantling any systemic racism include:

- 1. Raise awareness about possible drivers of systemic racism in the workplace:** Create a working group to look at how systems and processes within the workplace might be structured or applied in a way that entrenches systemic racism. Such a working group should be comprised of people of different levels of seniority across the workplace and centre the lived experience of employees from culturally and racially marginalised backgrounds. At the same time, it is important that work undertaken does not fall exclusively on these employees, who are often more junior and will bear the labour, including emotional labour, for this work. Engaging an external consultant from a culturally or ethnically diverse background to feed into and review the findings from such an evaluation may therefore be appropriate.

A possible resource is the World Economic Forum's self-assessment tool to support the design of a robust racial and ethnic equality strategy. See [here](#). It is important that any strategy encompasses implementation, monitoring, evaluation and improvement mechanisms.

In addition, law firms should also consider creation and implementation of a reconciliation action plan or RAP which is intended to bring about substantive

change and support the self-determination of Aboriginal and Torres Strait Islander peoples. See more information from Reconciliation Australia [here](#).

- 2. Empower members of the working group to propose recommendations to the partnership/senior management:** Following the process of identification and evaluation set out at [1], the working group should be empowered to propose recommendations to effect the changes that will assist in dismantling processes/systems that may entrench and uphold systemic racism. Such recommendations can feed into an action plan as described below at Action 5.
- 3. Spread the word on eliminating all forms of racism beyond the workplace:** Beyond their own workplaces, lawyers can assist their corporate and government clients to address systemic racism, for example proactively advising on ways to engage with suppliers from culturally diverse communities (see, for example, the NSW Indigenous Business and Employment Hub Yarpa); giving employment advice on policies within a business aimed at eliminating racism; and encouraging their clients to retain culturally diverse barristers, experts and specialists.
- 4. Facilitate pro-bono work and/or volunteering in relation to culturally and ethnically diverse initiatives:** Workplace and employment policies could be developed to actively support and encourage this work, such as providing special leave to employees who volunteer as part of initiatives to eliminate racism.

ACTION 4: HIRE, PROMOTE AND ENSURE SPONSORSHIP FOR CULTURALLY AND ETHNICALLY DIVERSE STAFF

A focus on the recruitment, retention and promotion of ethnically and culturally diverse staff is important. Aside from moral arguments, the economic case for diversity in all its forms is compelling and is outlined in the Law Society's Diversity and Inclusion in the Legal Profession: The Business Case.

While employing more culturally and ethnically diverse people can enhance an organisation's appreciation of diverse cultures, it may not directly address racism or unconscious bias. Culturally safe workplaces need to be actively fostered and racism needs to be identified and eliminated, particularly through an embedded approach that takes account of the different, intersectional life experiences of employees. Therefore, undertaking an exercise in identifying any systemic racism within an organisation in order that gaps in policies and procedures can be addressed and clear accountability measures put in place is important: see Actions 3 & 6. This will help to ensure that persons recruited will not be negatively impacted by pre-existing policies characterised by racial or ethnic biases.

Actions that your firm or organisation could take include:

- 1. Initiate an outreach program:** It is important to engage with culturally and ethnically diverse staff as early as possible in their legal careers. One way to show your commitment to diversity and inclusion is to encourage and facilitate culturally and ethnically diverse staff to participate in paid paralegal and/or clerkship programs.
- 2. Gather and analyse data:** Good quality, accurate,



and disaggregated information around recruitment and retention of culturally, linguistically and ethnically diverse staff can help to identify gaps at the recruitment stage and serve as a useful way to monitor rates of career progression and/or retention. It is important that data is gathered in a consistent way.

- 3. Ensure a targeted approach to recruitment:** This is important from the early stages of recruitment, including if you use an algorithmic hiring system and/or psychometric testing in your recruitment processes. It is possible that the design of these systems has been “trained” on data sets that inadvertently embed bias.²⁹

While the evidence on the efficacy of deidentified recruitment (i.e., recruitment which blanks out names, high schools and universities) is mixed, it is possible that contextualised recruitment, often enabled by purpose-built software, will better assist recruiters to understand the external factors (such as socio-economic status and carers responsibilities) that may have impacted a candidate's professional experiences and grades. See further information from the Law Society of Scotland [here](#).

29. James Manyika, Jake Silberg, and Brittany Presten, 'What Do We Do About the Biases in AI?' Harvard Business Review (25 October 2023).



An intersection between low socio-economic status and race means that opportunities that are sometimes valued highly by employers, particularly for entry level jobs, may be out of reach for some candidates. Examples can include unpaid internships, further study, or time to devote to extra-curricular pursuits. Further, requiring certain grades to be considered for graduate/internship programs might create barriers for some candidates. Whatever form of initial recruitment your firm undertakes, it is important that shortlists contain diverse candidates and, equally, that the panel make-up is as diverse as possible. Those who are involved in shortlisting/interviewing candidates, should have received relevant unconscious bias and/or anti-racism training (See Action 2 above).

4. **Set targets and evaluate progress:** As recognised by the Workplace Gender Equality Agency, gender targets around recruitment, retention and promotion can positively influence an organisation by clarifying accountabilities and imparting a competitive advantage against industry peers.³⁰ Similarly, targets for other underrepresented groups

will assist in ensuring a workforce that promotes diversity in all its facets. Just as commentators have unpacked the “myth of meritocracy” and the way in which recruitment without gender quotas can result in an uneven playing field skewed towards males, the same logic could be applied to the impacts of racial privilege on applicants from culturally and racially marginalised backgrounds.³¹

In order to address disparities, such as an “ethnicity pay gap”, it is particularly helpful to set targets at key stages in the talent pipeline, including at the senior staff level.

5. **Establish structured mentoring and sponsorship programs:** While mentoring involves a relationship where a more senior employee shares experiences and advice, a sponsor puts their ‘reputation and professional branding’ behind more junior employees to advocate for their promotion and success. Sponsorship can assist in improving the talent pipeline of your business as well as with succession planning.³² It is helpful if mentors and sponsors undergo anti-racism training to assist in properly equipping them for the role.

30. Australian Government, Workplace Gender Equality Agency, Targets and Quotas – Perspectives Paper (2016).

31. Rainbow Murray, Merit vs Equality? The argument that gender quotas violate meritocracy is based on fallacies, LSE Blog (7 December 2015).

32. Harvard Business Review (Janice Omadeke), What’s the Difference Between a Mentor and a Sponsor?, 20 October 2021.

[illegible]

any reporting mechanism in the workplace. Further, you may consider it more judicious to have a quiet discussion with the instigator of the racist incident at a later moment and let them know of their inappropriate behaviour.

5. Document– Make a contemporaneous record of the incident, with as much detail as possible, including the people and bystanders involved in the incident.

The value of listening to people who are subject to racial discrimination is vital. It is important that those with lived experience are heard and that their complaints are not dismissed as trivial or not requiring a response (see Action 6 on Accountability Mechanisms).

On an organisational and profession-wide level, we must also strive to support those employees who are brave enough to speak up about their experiences of racial discrimination and harassment, and who may even experience unlawful victimisation in response to their disclosure. We collectively benefit from their lived experience, which can assist in shaping policies and procedures around discrimination and psycho-social safety in the workplace.

on' (Webpage).

5. Document– Make a contemporaneous record of the incident, with as much detail as possible, including the people and bystanders involved in the incident.

The value of listening to people who are subject to racial discrimination is vital. It is important that those with lived experience are heard and that their complaints are not dismissed as trivial or not requiring a response (see Action 6 on Accountability Mechanisms).

On an organisational and profession-wide level, we must also strive to support those employees who are brave enough to speak up about their experiences of racial discrimination and harassment, and who may even experience unlawful victimisation in response to their disclosure. We collectively benefit from their lived experience, which can assist in shaping policies and procedures around discrimination and psycho-social safety in the workplace.

on' (Webpage).

SPOTLIGHT ON MICROAGGRESSIONS

Microaggressions are everyday interactions (insensitive statements, questions, or assumptions) that carry biased, demeaning or stereotypical messages about marginalised groups. These remarks, which can be intentional or unintentional, may appear positive on the surface. However, they are indicative of bias, may offend or distress the receiver and even have ‘macro-level’ impacts in reinforcing the barriers faced by marginalised people in the workplace.

Consider sharing and discussing the following examples with your staff:

- *“For an Asian lawyer, you have a great command of the English language”* – Complimenting a person on their ability to speak English simply because you have assumed that they were not born in Australia and English is not their first language signals that you possess preconceived stereotypes about what a non-Anglo-Saxon person should sound like.
- *“Can I just call you Bill?”* – Abbreviating a person’s name, or giving them a nickname without their permission for the sake of convenience, is disrespectful. If you are unable to pronounce someone’s name, ask them to teach you and make an effort to pronounce it correctly.
- *“As a woman, I completely understand the challenges you face as a racial minority.”* – A statement like this suggests that there are no differences between discrimination based on gender and on race. It also ignores the intersectionality of the experience of racially diverse women who often experience combined prejudice.

How to respond if you have caused a microaggression: Microaggressions are tied to, and are often an expression of, unconscious or implicit biases. As a result, we might not realise that our behaviour is harmful. It can be difficult to understand when or why we have committed a microaggression.

If you are told that you have committed a microaggression, your first instinct may be to defend your behaviour. A constructive way to handle the situation would be to take a moment to pause and realise you have an opportunity to listen, learn, and make your workplace safer and more equitable. Helpful ways to respond include:

- If unclear, ask for clarification as to why your behaviour caused offence, recognise the bias (unconscious or otherwise) behind the microaggression, and take responsibility for it;
- Apologise sincerely for the offence or distress you may have caused; and
- Reflect on your unconscious biases and the stereotypes reinforced by the microaggression, and commit to not making the same remark on future occasions.³⁴

34. For a comprehensive database of microaggressions, including advice on how to avoid, respond and be accountable, consult The Micropedia <https://www.themicropedia.org/>.

ACTION 6: CREATE MECHANISMS OF ACCOUNTABILITY AND OBSERVE BEST PRACTICE RESPONSES TO RACISM IN THE WORKPLACE.

It is important that when the partnership or governance body of your organisation commits to eliminating racism, it also creates mechanisms of accountability in relation to that commitment.

Accountability strategies include the following:

- 1. Make the commitment to eliminating racism public** – To progress the conversation on racial equality, legal practices could make a public commitment to become an anti-racist legal practice and communicate the importance of necessary structural reforms as a priority with their clients.³⁵ It is also possible that in some contexts, it may be incumbent upon a lawyer as part of their professional obligations to advise clients of the risks of not addressing racism, for example in a workplace context.
- 2. Engage in the work of eliminating racism in a visible and informed way** – Within the legal practice/organisation, appointing an anti-racism champion at the senior partnership/management level can help drive cultural change and create a space for conversations on race, racism and racial discrimination. The DCA notes that D&I champions can serve not only a symbolic but also an ‘active strategic role’ in terms of contributing to the development of workplace culture and action plans and galvanising the support of other senior leaders.³⁶

An advisory committee, comprised of ethnically and culturally diverse employees and allies, can assist to provide independent advice to senior managers and/or the partnership on ways to further conversations on race in the workplace. Ideally, this committee/network should be given a budget and an executive sponsor.



35. An example of a public commitment is that made by Victorian Legal Aid in March 2022, which was underpinned by its updated Cultural diversity and Anti-racism Plan.

36. See Diversity Council Australia, D&I Champions (Online Article).

37. An example of an action plan can be seen in Herbert Smith Freehill's 10 actions for change on ethnic diversity (4 September 2020) (Online Article).



3. **Establish an action plan/strategy** – An action plan with time-bound and measurable targets can assist in focusing the work of a legal practice/organisation to eliminate racism by identifying priority areas, the ways in which they will be addressed and who will be assigned responsibility for obtaining progress. The action plan should cover ways that the organisation will respond to the individual impacts of racism as well as its structural/systemic implications.³⁷
4. **Monitor and report on progress on your action plan** – Ensure robust data collation and analysis around recruitment and retention of ethnically diverse lawyers, including trends identified in promotion rounds and exit interviews. Reporting on these figures ensures additional accountability, including ensuring that key actions and milestones are reached. The International Bar Association's Diversity and Inclusion Toolkit for Lawyers provides useful guidance on how to check the efficacy of an action plan through implementation and monitoring activities.³⁸
5. **Reward partners/senior executives for progressing D&I initiatives** – Establish KPIs for partners and senior executives around D&I targets, including for cultural diversity and the work of eliminating racism, and make contributions to D&I part of the assessment and bonus process. Such an assessment can contain metrics that are both quantitative (e.g. number of ethnically diverse staff in leadership positions) and qualitative (e.g. support/mentoring offered to ethnically diverse staff).³⁹
6. **Ensure reporting channels that are procedurally fair, safe, accessible and transparent** – Those who manage staff need to know how to appropriately manage complaints and the expectations of their workplace in relation to racism and other discriminatory conduct. Managers should be trained to respond to complaints in a way which ensures to the greatest extent possible the psychological and cultural safety of the complainant. They should also be aware of appropriate health services to refer employees for support due to isolation and the risk

of victimisation as a result of making a complaint. See the Law Society's Workplace Guide and Model Discrimination and Harassment Policies here.

7. **Engage in broader advocacy and law reform work** – Legal practitioners and practices could consider publicly supporting efforts to eliminate racism by engaging in advocacy for the reform of areas of the law which adversely impacts Aboriginal and Torres Strait Islander people and other culturally and racially diverse groups e.g., the criminal justice and child protection systems. It may also be possible for law firms to develop meaningful partnerships with advocacy organisations which work on eliminating racism and promoting cultural diversity in order to amplify the voice and reach of these organisations.

38. An example of reporting on an action plan can be seen in Deloitte's Diversity, Equity, and Inclusion (DEI) Transparency Report, which shares workforce data on progress around goals.
39. See discussion in Euan Black, Why executives are getting more bonuses for hitting diversity targets, AFR (8 June 2023).

APPENDICES

APPENDIX A – WHERE TO SEEK FURTHER HELP

The experience of racism is distressing for an individual and their community.

The Australian Human Rights Commission has compiled a list of support services here for those persons who may seek to access formal support channels. The list includes services specific to Aboriginal and Torres Strait Islander peoples as well as multicultural health services.

NSW solicitors can access up to three hours free counselling sessions per financial year and 24/7 crisis support with a registered psychologist by calling the Solicitor Outreach Service (SOS) on 1800 592 296. Further information can be found [here](#).

APPENDIX B – HOW TO MAKE A COMPLAINT ABOUT RACIST CONDUCT IN OR OUTSIDE THE WORKPLACE

Apart from reporting racist incidents internally in line with your legal practice's policies and procedures, there are other channels available to you.

If you have been subjected to, witnessed or have knowledge of discrimination, sexual harassment or workplace bullying by someone in a law practice, the following resources are available:

- Contacting the Office of the NSW Legal Services Commissioner (**OLSC**) to discuss making a formal complaint under the *Legal Profession Uniform Law* (NSW). See details [here](#).
- Solicitors are also able to make an informal complaint to the OLSC regarding inappropriate personal conduct by a lawyer or someone working in a law practice or barristers' chambers. This is facilitated through the OLSC's online platform, Elker. See details [here](#).

Other options include:

- Making a complaint to the Australian Human Rights Commission about behaviour contrary to the *Racial Discrimination Act 1975* (Cth) or other federal anti-discrimination legislation. See details [here](#).
- Making a complaint to the NSW Anti-Discrimination Board in relation to unlawful behaviour pursuant to the *Anti-Discrimination Act 1977* (NSW). See details [here](#).
- Making a complaint to the Fair Work Commission and/or the Federal Court in relation to adverse action taken because of race or national extraction pursuant to section 351 of the Fair Work Act, 2009 (Cth). See details [here](#).

Community-led initiatives include:

- Call it out – This register established by the Indigenous Law and Justice Hub in collaboration with the National Justice Project intends to provide a 'simple and secure way for people to report or 'call out' incidents of racism and discrimination towards First Nations Peoples'. See details [here](#).

ACKNOWLEDGEMENTS

The Law Society expresses particular thanks to the following members of its Diversity and Inclusion and Indigenous Issues Committees who provided input to this Guidance:

- Zac Armytage
- Zaahir Edries
- Sarah Ibrahim
- Lynda Holden
- Iona Luke
- Sifa Mtango
- Christina Wu
- Alexia Ereboni Yazdani

The Law Society is also grateful to the following organisations and individuals that generously volunteered their time to offer comments on an earlier draft of this publication:

- Asian Australian Lawyers Association
 - Diverse Women in Law
 - Muslim Legal Network NSW
 - NSW Aboriginal Land Council
 - The Pacific Legal Association of NSW Inc.
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