Is there a bamboo ceiling preventing Chinese Australians from achieving their share of Australian leadership positions in the legal profession?

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Introduction

The 2011 Australian Census states that 4.3% of Australia’s population or approximately 866,200 people identified as having Chinese ancestry. Chinese people are considered to be the oldest continuous immigrants to Australia outside of those from Great Britain.

Notwithstanding, anecdotally at least, it would appear few have achieved leadership ranks within the legal profession. This paper seeks to explore and discuss some of the issues as to whether there is a cultural or “bamboo” ceiling preventing Chinese Australians from achieving their share of Australian leadership positions in the legal profession?

Some might say that there is no bamboo ceiling or a ceiling only exists if one thinks it does. While few Chinese Australians have reached the pinnacle of their vocation there are many stories, across generations of Chinese Australians, of striving and struggling to achieve greater heights particularly in their career and public life and specifically in this case, the legal profession. In exploring the issues, it is important to consider the context and contributions of Chinese Australians.

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3 This paper is prepared for the “Piercing the Bamboo Ceiling” National Conference of the Chinese Community Council of Australia held in Melbourne on 12 September 2015.

4 For example, Trevor O’Hoy was the President and CEO of Foster’s Group and was voted by his peers as BRW magazine’s most admired new Chief Executive Officer of 2005. O’Hoy’s family has been in Australia since 1863. The late Dr Victor Chang, AC pioneered the modern era of heart transplantation and was responsible for the establishment of the National Heart Transplant Unit at St Vincent’s Hospital. In 2000, he was named Australian of the Century by the people of Australia.
Chinese in Australia

It has been theorized that earliest Chinese contact with Australia was in the 1400s. Chinese sources refer to a 1477 map that shows the outline of the Australian continent.  

One of the earliest recorded Chinese born free settlers in Australia was Mak Sai Ying who arrived in Sydney around 1818. He was a carpenter and subsequently became the publican of the Lion Inn in Parramatta. Chinese settlers started arriving to Victoria as indentured labourers prior to 1850 and increased in large numbers during the gold rush. By 1861, the Chinese community made up nearly 7% of the Victorian population.

Chinese in the Legal Profession

It would seem that few Chinese pursued the study of law as most Chinese settlers had cultural transition difficulties, language barriers and experienced racial discrimination. The early Chinese worked as shepherds, farmers, hawkers, shopkeepers, cooks, artisans, boatmen, fishermen, miners, cabinet-makers, restaurateurs, launderers, market gardeners, miners and general labourers.

In those days, it was a strange thing to see a Chinaman enter the legal profession anywhere in the Western world. In his welcome speech on the admission of Dr Wu Tingfang as a barrister, Hong Kong Chief Justice John

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8 Dr Wu Tingfang was the first ethnic Chinese barrister in history. He was born in the Straits Settlements and schooled in China and Hong Kong. He later studied law at University College London and was called to the bar at Lincoln’s Inn in 1876. See <http://www.ipfts.org/blog/dr-wu-ting-fang-and-history-theosophical-society-china>. [4 September 2015].
Smale said, “In England every office becomes open to talent without favour of affection. A distinguished American statesman has become, and now is an ornament of the English bar, and all the Bar will gladly hail the time when a Chinaman shall distinguish himself as much as the eminent counsel whom I refer. I have seen stranger things happen.”  

The first Australian born Chinese barrister in Victoria was William Ah Ket. He matriculated in 1893 and after completing a single subject at the University of Melbourne, he undertook the articled clerk’s course at Maddock & Jamieson. Ah Ket was admitted to practice in the Supreme Court of Victoria in May 1903. He then read with Sir Stewart McArthur and signed the Bar roll in June 1904.

This trail blazing story is similar in other States of Australia. In New South Wales William Jangsing Lee became the first Chinese barrister when he was admitted to the New South Wales Bar on 27 May 1938. Claudia Cream, OAM was the first Asian woman to graduate in law in South Australia in the early 1980s.

When I signed the Victorian Bar roll on 26 May 1988, there were no other barristers of Chinese heritage practising at the Victorian Bar since the passing of William Ah Ket in 1936. There are now approximately 40 barristers of Asian heritage at the Victorian Bar.

It was only a couple of years ago that my fellow distinguished speaker Reynah Tang was elected as the President of the Law Institute of Victoria. There were no other Presidents of Chinese heritage appointed prior to that time considering that the first President of the Law Institute of Victoria was appointed in 1859.

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More recently, our moderator Attorney-General Martin Pakula announced the appointment of Charles Leng Tatt Tan as a Magistrate in the State of Victoria.\(^\text{12}\) This marked a historic occasion for the Chinese community in Victoria. Tan was a member of the Victorian Bar for 18½ years and is the first overseas born Chinese Australian to be appointed to the Magistrates’ Court of Victoria. There are, however, no judges of Chinese heritage presiding in any intermediate or superior courts in Australia.

**Asian experience**

In her timely book *Breaking the Bamboo Ceiling. Career Strategies for Asians*, leading executive coach Jane Hyun writes of the effect of cultural values on one’s career development in the American experience. She suggests that Asian Americans do face obstacles in the workplace and asserts that there are cultural barriers that play a role in impeding career advancement. However, she observes that while there might be biases in the workplace, the ceiling is not always imposed by others. She suggests that Asians should acknowledge that barriers could also stem from self-limiting cultural influences on their behavior, attitude, and performance in various social and professional settings.\(^\text{13}\)

This is, of course, not just an Asian American experience. It applies equally to Chinese Australians. In most of the countries where migrant Chinese settled, they started out isolated, stereotyped, and were often held back through a systematic unconscious bias towards their perceived lack of assimilation into mainstream society.

I can personally attest to teaching more students of Chinese heritage undertaking the Juris Doctor law degree at Monash University Law School but it seems that many of these law students do not make it to leadership

\(^{12}\) Tan was sworn in by Chief Justice Warren on 30 July 2015.  
roles within the first tier law firms, the legal public service sector, or pursue a career as a barrister. 14

Whilst appointments to superior courts may come from the ranks of solicitors 15 such appointments have traditionally and primarily come from the ranks of barristers practising at the independent Bar generally from the pool of senior members of the Bar, i.e. Queen’s Counsel or Senior Counsel.

There is currently no Chinese Queen’s Counsel or Senior Counsel in Victoria or any other States of Australia. Thus the pipeline for judicial appointments to a superior court from the Chinese community would appear at present non-existent or at least unlikely in the absence of positive intervening action or alternative processes.

Despite the large number of students of Asian background graduating with a law degree, there are far fewer of them persevering to the top of the legal profession. Perhaps, there are no role models for the younger generation to draw inspiration from or the road to partnership or advancement is simply too difficult as so few make it. There is therefore arguably a need to review processes and appointments to ensure not only the best candidate for the role but that such appointments reflect and represent the community which such roles and positions serve.

14 There are approximately 40 barristers of Asian heritage at the Victorian Bar but only 40% of whom have a Chinese heritage.
15 The number of appointments to the superior courts from the rank of solicitors albeit small are, however, encouraging. For example, Justice Bernard Teague, who retired in 2008, was the first solicitor directly appointed to the Supreme Court of Victoria in 1987. He was formerly the chief litigation solicitor at Corrs Westgarth Chambers and a former President of the Law Institute of Victoria. Justice Emilos Kyrou, a former partner of Corrs and Mallesons Stephen Jaques, was appointed in 2008. He was the first Greek-born judge to have been appointed to the Supreme Court. Justice Anne Ferguson was the first practising female solicitor and in 2010 was the third solicitor appointed directly to the Supreme Court. She was a former partner at Allens Arthur Robinson. Justice Joanne Cameron, the former Partner in Charge of the Melbourne office of Mallesons was appointed in 2014. Other former solicitors appointed to the Supreme Court include Justice Rita Zammit and Associate Justice Mary-Jane Ierodiaconou. The only academic to be appointed to the Supreme Court in its history was Justice Marcia Neave. She was appointed to the Court of Appeal division of the Supreme Court in 2006.
Finding our voice

There is a Chinese saying when everyone collects firewood, the flames rise higher. It is by working together in unity, each generation supporting the next, that we will bring about change.

In his candid book The Accidental Asian: Notes of a Native Speaker, Eric Liu talks about the shifting frames of ethnic identity and cautions that “without a unitary voice … there can never be maximum leverage in the bargaining for benefits. There can be no singular purpose for the Professional Asian … no stable niche in the marketplace of identities. It will grow ever harder to speak of ‘the race’.”

Asian Australian lawyers have now formed an association to unite their voices. The Asian Australian Lawyers Association was set up in 2013 with the purpose of promoting cultural diversity in the legal profession. This singular act of uniting the broader Asian community of lawyers is already having a positive impact in empowering the Asian Australian legal profession to rise up and promote meritocracy and equality within the legal profession.

The Asian business community could also play an important role by offering Asian Australian lawyers a chance to work on their matters. These opportunities would afford those who are willing and able a much-needed boost in their career development and advancement prospects.

Unless we take a pro-active approach in identifying, mentoring and sponsoring talented candidates, we will struggle to develop capable Asian Australian lawyers into leadership roles. The consequence will likely be fewer Asian Australians aspiring to greater heights in the legal profession. It is for this reason that we need to support associations like the AALA which is able to facilitate a structured, systematic and collaborative approach and programs to encourage willing and able Asian Australian talent into leadership roles.

**Power of Yes**

We can also change the language of engagement. *No* is often a fear response. It is often a way to *rationalise* an inconvenient or uncomfortable truth. The problem with *no* is that over time it polarises and creates barriers. The consequence of frequent *no’s* leads to apathy, suppresses creativity and collaboration, spiralling those who might have otherwise been *willing and able* to embrace challenges of leadership to become discouraged, distrusting the system they are forced to endure.

By contrast, *yes* is affirmative, creating trust and confidence. It allows for excellence and fuels innovation. It generates renewal and builds a pathway for achievement.

Earlier this year Premier Andrews, in his opening speech at the state ALP conference in Melbourne, demonstrated the power of *yes* by committing to better gender equality in the appointments to the Courts and major public boards. I am sure that the Premier’s comments about *greater diversity* include those from a culturally and linguistically diverse background.

When our leaders champion culturally and linguistically diverse backgrounds to consider taking leadership roles, it is also incumbent on those who are *willing and able* to rise up to the challenge. Our community must therefore continue to work hard to encourage talented lawyers to improve their skill sets and persevere despite being stereotyped or unsuccessful in their advancement prospects.

While the pipeline of potential candidates for advancement or judicial appointments might seem small at present, if we do nothing it would only get smaller.

In order to harness the potential of an increasingly diverse legal profession, leaders from Government and the legal profession could implement measureable strategies based on values of fairness, opportunity and inclusion. This could include having affirmative policies dealing with the cultural differences of ethnic minority candidates rather than adopting the *one*
box fits all approach. While I do not believe that the system is broken it could be redesigned to take into account our changing demographics.

Leaders in the United Kingdom have taken positive steps to include Black, Asian or Minority Ethnics so as to encourage diverse representations in the legal profession including the judiciary. A structural change is probably long overdue to better reflect community expectations.

Conclusion

There is another Chinese saying: Nothing is Impossible. But Everything is Difficult. While it is not quite the same as the Australian saying she’ll be right, mate! there must be a balanced approach. It is not all or nothing.

The answer to the question posed for discussion at this conference is therefore not a simple Yes or No. To achieve true diversity of thought in the higher echelon of the legal profession, there must, first, be a greater resolve from the Asian Australian legal profession to unite their voices and rise up to promote meritocracy and equality of Asian Australian lawyers. But, secondly and perhaps more importantly it requires leadership from both Government and the branches of the legal profession to lead by example. I am pleased to say that in Victoria at least there have already been positive and encouraging outcomes for Asian Australian lawyers but we cannot be complacent as more could be done.

The Asian Australian Lawyers Association is therefore continuing its proactive engagement in high-level advocacy to promote equality and diversity in the legal profession. It is also developing its own programs to assist Asian Australian lawyers to develop their soft-skills, and provide a meaningful mentoring and effective sponsoring program.

However, true structural change will only occur from the top down. It might just be time to review the old structure of advancement and appointments and consider a new paradigm of engagement with the talent pool of Asian Australian lawyers. Change will not occur quickly but the courage of saying Yes will empower willing and able Asian Australian lawyers
with chances for advancement and leadership. Innovation will surface when there is creative destruction.