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New South Wales Law Reform Commission
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RE: Anti-Discrimination Act review – preliminary submission

Dear Commissioner,

Thank you for your call for preliminary submissions for your review of the *Anti-Discrimination Act*.

My submissions concern psychological research on an issue central to discrimination in society, a legal-psychological construct known as 'implicit bias' (defined below). I will also briefly discuss the use of social science research in law reform more generally.

I have a strong interest in both of these topics, having detailed my work in these areas in two recent articles.[1] The article concerning research use in law reform drew support from former High Court Chief Justice Anthony Mason:

> The authors contend, correctly, in my view, that open science synthesis can make evidence gathering and synthesis processes more reliable and less susceptible to bias...[2]

I write from the perspective of a legal-scientific researcher interested in seeing law and policy guided by the most rigorous and applicable research. I am a former lawyer with a PhD in social psychology. Social psychology is the field that originally conceived of implicit bias. I teach law and psychology and evidence law at the Australian National University, College of Law. However, my views are my own.

To be clear, while I will be critical of the research behind implicit bias, I believe that disparities (race-based and otherwise) are one of the most serious problems facing the legal system and society more broadly. They are significant and your review has the potential to address some of

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[1] Jason M Chin, Alexander O Holcombe, Kathryn Zeiler, Patrick Forscher & Ann Guo, 'Metaresearch, Psychology, and Law: A Case Study on Implicit Bias' (forthcoming) *Connecticut Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360335> ('Implicit bias in law'); Jason M Chin, Malgorzata Lagisz & Shinichi Nakagawa, 'Where is the evidence in evidence-based law reform?' (2022) 45(3) *UNSW Law Journal* 1124 ('Evidence-based law reform').
[2] The Hon Sir Anthony Mason, 'Foreword' (2022) 45(3) *UNSW Law Journal* 918, 922.

them. It is for that reason that reliance on unreliable research is so dangerous. It distracts from real issues and consumes resources better spent elsewhere.

I believe my submissions inform several of your terms of reference, including:

> 4. whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination;

> 7. whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life;

> 10. the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination.

Implicit bias research

The term 'implicit bias' refers to the possibility that people act in discriminatory ways because of automatically activated mental associations about some social groups.[3] For instance, an implicit bias account for discrimination suggests that some people, through their upbringing, exposure to culture, and so on, automatically associate a vulnerable group with concepts such as 'aggressive' or 'dangerous'. So, when they encounter that group, those concepts are activated, and this affects their behaviour in ways they may not realise.

There are many sensible policy-based critiques that can be levied against the implicit bias account of discrimination. For example, it may make discrimination seem less culpable because it happens through automatic cognitive processes.[4] Similarly, an implicit bias account for discrimination may make the problem seem unrealistically easy to resolve – simply have people undertake implicit bias reduction training and discrimination has been solved.[5]

But there is a more fundamental problem. Much, possibly most, of the research underlying implicit bias is unreliable. It was conducted in a time in which psychological research was plagued by very small sample sizes and methods that allowed researchers to use unreported flexibility in their methods to find whatever effect they wanted (for example, by removing outliers after observing their effect on the results). About half of research conducted in this era appears to be a false positive finding and more than that is an exaggerated finding.[6]

This was indeed the case with the seminal study that implicit bias is based on. That study 'primed' participants with hostility related words and observed their reactions:

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[3] Chin et al, Implicit bias in law (n 1) 6.

[4] Natalie M Daumeyer, Ivuoma N Onyeador, Xanni Brown & Jennifer A Richardson, 'Consequences of attributing discrimination to implicit vs. explicit bias' (2019) 84 *Journal of Experimental Social Psychology* 103812.

[5] Ivuoma N Onyeador, Sa-kiera T J Hudson & Neil A Lewis Jr, 'Moving Beyond Implicit Bias Training: Policy Insights for Increasing Organizational Diversity' (2021) 8(1) *Policy Insights from the Behavioral and Brain Sciences* 19.

[6] Open Science Collaboration, 'Estimating the Reproducibility of Psychological Science' (2015) 349(6251) *Science* 943.

> They asked participants to unscramble sentences that either related to aggression or not, and then, in a separate task, judge whether a specific person was acting in a hostile way. They conjectured that exposure to hostility and aggression concepts would "prime" participants to perceive other people as aggressive. The authors found what appeared to be a large effect. Hostility-primed participants rated the person as more hostile by 3 points on average on a 0 (no at all hostile) to 10 (extremely hostile) scale. A meta-analysis of several similar studies seemed to confirm the effect's robustness. This general line of thinking–that automatic mental associations could fundamentally color our decisions in ways we were not aware of or paying attention to–would greatly influence the development of implicit measures in the study of racial bias going forward.[7]

The problem with this finding – and the reason why so much of implicit bias research is not safe to base law and policy on – is that it is a false positive finding. A 2018 study, including over 7,300 participants repeated the methods of the original and found no effect.[8]

This null finding cuts to the heart of the implicit bias account because it indicates that it is not that easy to simply activate a concept (such as hostility) and observe a behavioural effect. However, this is only the tip of the iceberg. My colleagues and I have detailed these findings elsewhere,[9] but additional threats to the usefulness of implicit bias research are: implicit bias studies are predominantly lab-based and use unrealistic methods,[10] there is little-to-no evidence that reducing measures of implicit bias has any effect,[11] and the entire field is plagued by publication bias (only studies where researchers find an effect are published).[12]

All of these findings strongly suggest that remedies aimed at reducing discrimination should focus on systemic discrimination and more overt forms of discrimination. That is, there should be no onus on members of society to test themselves for implicit bias or seek to reduce their implicit bias. Activities aimed at reducing disparities, increasing diversity, and regulating explicit bias are comparatively promising.

Social science research in law and policy

As I noted, the research above about implicit bias converges with a more general phenomenon, sometimes known as psychology's replication crisis.[13] In short, many seemingly robust findings cannot be replicated and, if they can, the resulting effects are substantially weaker. Much of the crisis can be attributed to researchers using opaque methods that allow them to portray their data as more convincing than it is.

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[7] Chin et al, Implicit bias in law (n 1) 32-33.

[8] Randy J McCarthy et al, 'Registered Replication Report on Srull and Wyer (1979)' (2018) 1 *Advances in Methods and Practices in Psychological Science* 321.

[9] Chin et al, Implicit bias in law (n 1).

[10] Patrick Forscher, 'Unconscious bias training is no way to solve ethnic disparities', *CapX* (online, 30 September 2020) <https://capx.co/unconscious-bias-training-is-no-way-to-solve-ethnic-disparities/>.

[11] Patrick S Forscher, Calvin K Lai, Jordan R. Axt, Charles R Ebersole, Michelle Herman, Patricia G Devine & Brian A Nosek, 'A Meta-Analysis of Procedures to Change Implicit Measures' (2019) 117 *Journal of Personality and Social Psychology* 522, 536

[12] Elizabeth Levy Paluck, Roni Porat, Chelsey S Clark & Donald P Green, 'Prejudice Reduction: Progress and Challenges' (2021) 72 *Annual Review of Psychology* 533, 538.

[13] Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report No 138, December 2021) 118.

As a result, law reform bodies (and others) should be careful when evaluating social science research. Again, I have provided more detailed guidance about this elsewhere.[14] However, suffice it to say that studies with larger samples and more transparently reported methods deserve more attention, all else being equal.

Beyond the accuracy of results, transparency aligns with the values of the justice system, including open justice.[15] The concept of open justice does not stop at the availability of legal materials and open courtrooms. Citizens and other scientists should be able to appraise basic aspects of the research that underlies the law. Conversely, reliance on opaquely reported research interferes with the democratic aspirations of evidence-based law reform.

The same principles apply to reviews of research conducted by law reform bodies.[16] These bodies, including your own, should be clear about how they identify research, how they evaluate it, and why they rely on some research over others.[17] There is excellent guidance for conducting transparent and rigorous research reviews produced by bodies such as the Cochrane Collaboration.[18]

Conclusion

Thank you again for your work and selection of such important legislation for review. I am eager to see how your review unfolds and, once again, encourage you to rely on the best and most transparently conducted research. Please be in touch if I can assist further.

Sincerely,

Dr Jason M Chin

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[14] Chin et al, Evidence-based law reform (n 1).
[15] New South Wales Law Reform Commission, *Open Justice. Court and tribunal information: access, disclosure and publication* (Final Report No 149, May 2022).
[16] Chin et al, Evidence-based law reform (n 1) 1137-38.
[17] Ibid 1147-51.
[18] Ibid 1145-47.