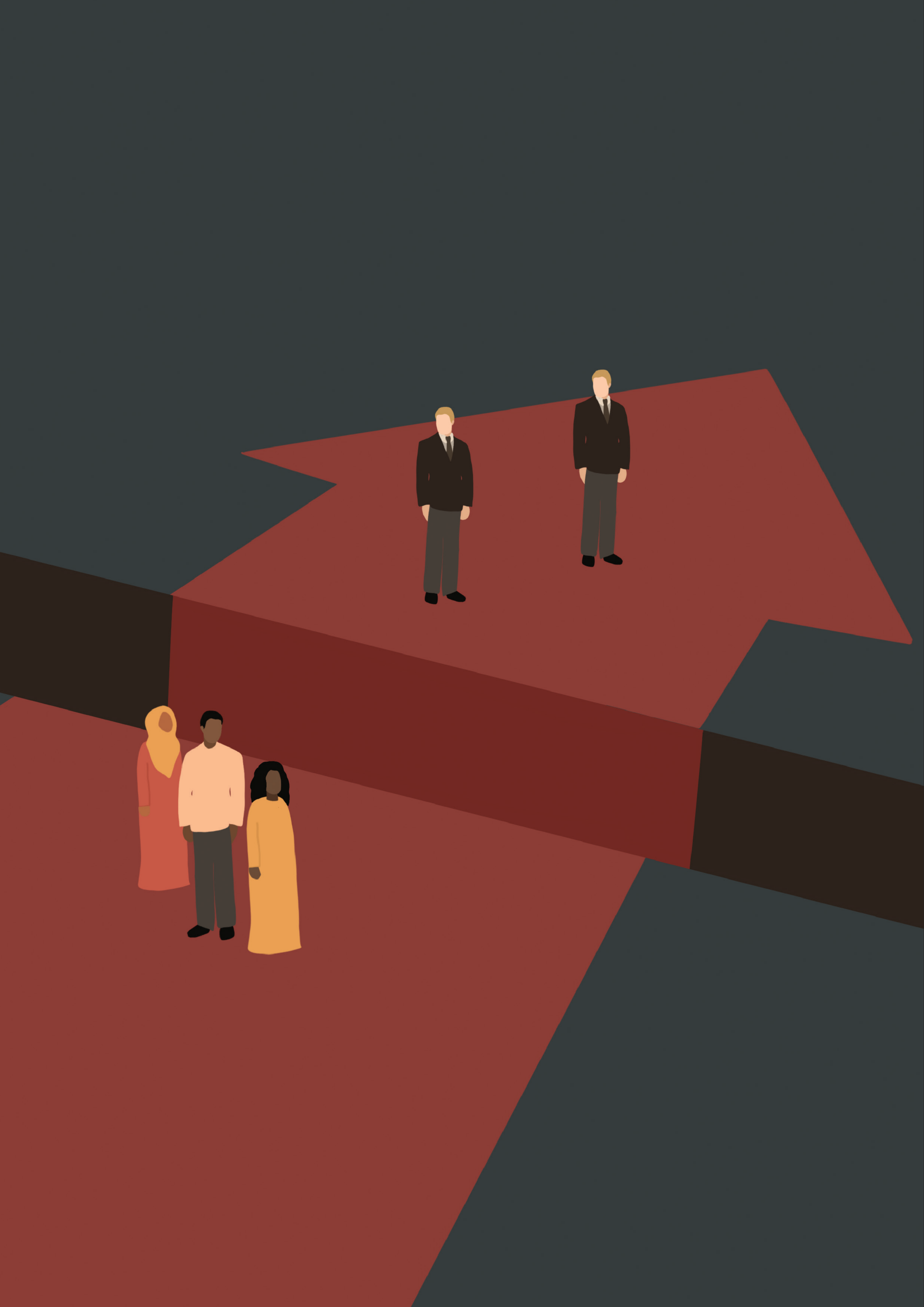

The Spectre of Institutional Bias in the Australian Democracy

William Wen Zhou, Reid Hou and James Morgan

William, Reid, and James are law students at the University of New South Wales and University of Sydney. The authors are members of the Asian Australian Lawyers Association, and are Australians whose family heritage are of Asian and European background.

The legitimacy of Australia's democracy and legal system depends upon its fairness. At its most basic, a democracy is a system of government in which the people can choose their representatives. These representatives then govern the state through policy and law-making in furtherance of its constituents. In Australia, the underlying system for making laws depends on the principles contained in the concept of the rule of law. The rule of law, in its simplest form, is achieved when the state's representatives and its electors are ruled by the law.[1] The rule of law is mechanically achieved through the separation of powers between the legislature, the executive, and the judiciary.[2] However, the spirit of the rule of law lies in its fairness to those who obey it — that is, the people of Australia. The Australian political and legal system is theoretically fair to the people who participate in it, and on paper, it is comparatively one of the most functional democracies in the world.[3] However, Australia has tended to be unfair towards minorities. Australia has a long history of making laws embedded with unfairness; laws that have purposefully disadvantaged minorities and encouraged racial discrimination. One of the greatest examples of unfair law making and racial discrimination are the laws that lead to the atrocities inflicted on the Aboriginal and Torres Strait Islander peoples.[4] Racial discrimination against Australian minorities is unfair and damages the legitimacy of democracy. Even if fairly elected representatives pass racist legislation with the support of their voters, this legislation undermines Australian democracy because of its unfairness. Such a conception of democracy based on the 'overall good' argument is not fair and goes against the core spirit of fairness in the Australian people and the rule of law.

This paper will examine some of the racial discrimination experienced by Asians and Chinese Australians perpetuated through legislation. This paper has been purposefully limited in scope to only contain discussion on superseded legislation and will not consider current legislation, due to the political nature of such discussion. The core argument of this paper is that Australia's law-making encourages racism against Asians and Chinese Australians, which is unfair and damaging to the Australian democracy. This paper will first examine a number of historic Australian laws and government policies which have either directly or indirectly perpetuated racial discrimination (or caused some detriment or unfairness) against minorities in Australian society (referred to as 'institutional bias'). This paper will focus on Australians or 'transitioning' Australians who come from an Asian or Chinese background (that is, people who identify as having an ethnic, cultural, or historic connection). It should be noted that the term 'Asian' can encompass a diversity of different ethnicities, each with a deep and important history in Australia. However, this paper will focus on the Chinese Australian population, who (as migrants) have had the longest history with direct and overt institutional bias.

The laws made specifically to discriminate against Chinese Australians have also been used against other Asian Australians. This forms the basis of this paper's discussion and argument. This paper's purpose is not to conduct a review of all possible forms of discrimination faced by Asian and Chinese Australians in Australian history, but to showcase how Australian 'law-making' (whether legislative or policy) has discriminated against Asians and Chinese Australians in a more insidious form. In discussing the concept of Australian democracy, this paper adopts the conception of a liberal democracy using the principles of liberty contained in *A Theory of Justice* by John Rawls[5] — one of the most renowned contemporary liberal philosophers.

I Historical Institutional Bias

Australian laws have historically and purposefully disadvantaged Asian and Chinese Australians. Since the first instances of Asian contact with colonial Australia, laws have been introduced to discriminate against Asian Australians. The mid-seventeenth century provides an early example of institutional bias, being the period when Chinese labourers arrived in Australia after leaving the Qing Empire, which had been destabilised by the Opium Wars.[6] During this period, large-scale migration to Australia occurred. It is estimated that there was a peak of 40,000 Chinese people present in Australia at that time.[7] Animosity by the European settlers built up against the Chinese during this period. The Chinese were perceived as 'cheap labour' and competition by workers of European descent and were not considered to be Australians who could benefit the Commonwealth.[8] Chinese labourers worked in the goldfields of Victoria and New South Wales, where they would mine in coordinated groups, making them more efficient than other miners. This furthered colonial perceptions of the Chinese as a threat to Anglo-Saxon (or white) European livelihoods.[9] The Victorian Parliament was the first to institutionalise such sentiments due to the political pressure from European miners and labourers, by introducing the *Chinese Immigration Act 1855* (Vic) (the '*Victorian Act*').[10] The Victorian Act imposed discriminatory restrictions of 'a rate of ten pounds for every such immigrant'[11] and introduced a limit on Chinese immigrants per tonnage of their respective ship.[12] The New South Wales Parliament then followed suit with its own *Chinese Immigrants Regulation and Restriction Act 1861* (NSW) (the '*NSW Act*'), which provided a similar limit of 'one [Chinese immigrant] to every ten tons of ship.'[13] Anglo-Saxon or European migrant miners were not affected by this legislation. While these Acts prevented Chinese Australians from entering Victoria, shipping companies instead landed hopeful miners in South Australia, who would then make the voyage overland to the Victorian goldfields.[14] Asian and Chinese migrants were seen as a 'problem' for Australia, and this stigma has been engrained in the Asian Australian psyche. This form of discrimination continued in other law-making practices, despite the first Asian and Chinese immigrants soon becoming Australians.

Racism enacted into law and advocated for by governments instilled in Australia a negative perception of Asian and Chinese Australians. The enactment of the *Chinese Immigration Act 1855* (Vic) and *Chinese Immigrants Regulation and Restriction Act 1861* (NSW) led to the support of racism against Chinese Australians. Over time, what began as displeasure towards a perceived competitor turned into deep seated racial resentment. Chinese migrants were perceived, among other things, as bringers of disease and smallpox, with newspapers at the time running inflammatory articles to this effect.[15] By the 1880s, anti-Chinese sentiment was strong in New South Wales, with then-Premier Henry Parkes stating, 'there can be no … intermarriage or social communion between the British and the Chinese'.[16] Parkes' government went on to pass the *Chinese Restriction and Regulation Act 1888* (NSW), which explicitly protected against the 'dangers of Chinese immigration'.[17] Parkes' government would further pass another Act in 1898 which required immigrants to write a passage in a European language.[18] This legislation would lay the framework for the 'dictation test' in the *Immigration Restriction Act 1901* (Cth) — the 'White Australia Policy',[19] borrowing elements from the test 'successfully' implemented in the British colony of Natal.[20] The dictation test was used discriminatorily against immigrants,[21] sometimes with a language purposefully chosen beforehand to ensure that the person sitting the test would fail, since the test could test knowledge of any European language.[22] This discriminatory exercise was aimed at Chinese immigrants,[23] but also affected Vietnamese, Japanese, Malaysian

and Singaporean immigrants.[24] The dictation test would also be used against British subjects, for example, Hong Kong immigrants who at the time were part of the British Empire.[25] The Commonwealth Parliament also (for racial reasons) relied on the immigration power in section 51(xxvii) of the *Constitution* to block entry of Hong Kong immigrants who were British subjects.[26] These government actions beg the question of what an 'Australian' looked like to law makers. This legislation would remain one of the most notorious forms of discrimination that Asian peoples faced, until having its final vestiges repealed by the Whitlam government in 1973.[27] The idea that Chinese immigrants, or anyone of Asian appearance, did not know the English language was ingrained by the White Australia Policy and the dictation test. This meant that many Asian and Chinese Australians who could communicate in perfect English faced racism due to the legislative and policy implications. This has had a generational impact on Chinese Australians and, in some circumstances,[28] separated Asian Australian families. This legislation would not be the end of historic discrimination by law makers.

Racism, turned into institutional bias, has harmed the economic prosperity of Australia. As the Chinese left the goldfields and regions to make livelihoods in the cities, they became successful furniture makers. At the height of the industry in 1911, the number of Chinese furniture craftsmen in Australia reached a peak of approximately 2,000.[29] European or 'white' Australian furniture makers petitioned the Victorian government, claiming that the Chinese businesses presented an encroachment on their own livelihood. This resulted in the *Factories and Shops Act 1896* (Vic) ('*Furniture Act*') which imposed harsher restrictions on Chinese workers. This included the definition that four Europeans working together would be a 'factory', whereas only one Chinese craftsman working alone would be a 'factory'.[30] This meant that Chinese workers would always be under greater scrutiny and regulation. As a consequence of this, and other factors such as the *Immigration Restriction Act 1901* (Cth), the number of Chinese furniture makers halved during World War I.[31] Only a few years after the enactment of White Australia Policy, Australia made a call to arms for World War I. Chinese Australians rose to action, with more than 200 Chinese Australians serving for Australia during World War I, 19 of whom won medals for bravery.[32] It is difficult to imagine that the furniture industry in Australia would have become more competitive after the *Furniture Act* was implemented. Basic labour market economic theories dictate that the exodus of skilled workers caused by such legislation would have increased the cost of furniture for Australian families and made the Australian furniture industry less competitive in international markets, stultifying innovation in the broader economy.[33] Institutional bias instilled in Australia the notion that Chinese Australians had to be regulated, watched, and monitored more than their white counterparts, and that they could not be trusted.

The treatment of Chinese and Asian Australians was again characterised by rampant and unfair discrimination. Law makers pointed fictitiously to the dangerous nature of Asian Australians (despite being the same Asian Australians who fought for Australia in World War I) and their status as low-cost workers undercutting white Australians, alleged bringing of maladies, threats to national security and allegiance, and questions of how to regulate their participation in Australian society. The economic, social, and psychological harm caused by generational discrimination against Asian Australians is immeasurable. To create a fair and just Australia, institutional bias should not be continued.

II The Detriment to Australian Democracy

It is rarely examined on a theoretical level 'why' racism and discrimination are bad or their damaging effects to a nation, such as Australia. This paper reasons that institutional bias perpetrated through discriminatory legislation and policies is damaging to the legitimacy of liberal democracies. As mentioned, the purpose of a democracy is to create a fair system to represent the people. However, when legislation is passed for the purpose of oppressing or encouraging discrimination against its people, it no longer (theoretically) serves its purpose of representing those people. Australia's strong promotion of the cultural focus on values of liberty is the reason why Australia's government is unique compared to other governments in the region.[34] However, popularity or simple 'majority' votes or utilitarian conceptions of democracy are not the core characteristics that promote a liberal

democracy[35] — such conceptions support the transition to authoritarian styles of government.[36] Arguments that support institutional bias for the purpose of the overall good (against the minority) will lead to the deterioration of the Australian democracy. If 'authoritarian' style laws are used to insidiously discriminate against minorities (whose preferences matter little to the political institutions) unopposed, it is the death knell for Australian democracy.[37] The spirit of Australian democracy is on the line if the Australian people are not being represented fairly.

This paper has examined Australia's brief history of institutional bias against Asian and Chinese Australians and has purposefully left open for discussion the question of contemporary laws. Institutional bias pervades Australian society. There are many ways to analyse why institutional bias (in the form of law, policy, or constitution) is immoral or evil in a nationwide context. For example, this could be shown by applying theological justifications such as natural law (restricting people's ability to pursue the good of life, or hurting the community), or liberal perspectives derived from social contract theory (individuals did not agree, in the democracy, to be subject to less freedoms than others), or criticising legal positivism using critical race theory (certain laws should not be upheld purely because they are law, as certain laws were made, fundamentally, from a discriminatory or biased perspective). Any of these philosophical lenses may be applied to explain how institutional bias could lead to the delegitimisation of the Australian justice systems, or the destruction of Australia's democracy through the inequality of its citizens. However, each of these arguments would require an individual paper in itself to fully explain and argue, and each would have flaws in its application. Nevertheless, in the context of the Australian liberal democracy, there is no simpler method to examine fairness other than to consider Rawls' conception of liberty.

This section describes Rawls' theory of 'justice as fairness' and examines it in the context of institutional bias. The concept of 'justice' (for the whole community) is critical in the creation and application (or enforcement) of laws because without justice, the legal system may lose its legitimacy.[38] The concept of fairness is a core value in policy and law-making in Australia and (if liberty and fairness are core to becoming an Australian) this is arguably the spirit of the Australian democracy.[39] John Rawls was an American political philosopher in the liberal tradition, and his theory of 'justice as fairness' describes a society of free citizens holding equal basic rights and cooperating within an economic system.[40] It is quite fitting to use one of the most famous and contemporary liberal theorists to examine Australia (a liberal democracy) and its institutional bias. The first statement of Rawls' two principles of justice reads as follows:

> First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[41]

The first principle deals with the social systems that define and secure the equal basic liberties, and the second principle specifies and establishes social and economic inequalities. In the context of this paper, the first principle is most relevant and, from Rawls' perspective, the highest priority for observance.[42] Each person who forms part of the Australian liberal democracy should be afforded basic liberties. A certain group should not be disadvantaged for 'economic' benefits by way of diminishing another's basic liberties. Australia has restricted the basic liberties of Asian and Chinese Australians (for example, the right to work in certain industries or with certain groups) for the benefit of 'white' Australians, despite the real economic benefit to Australia (for example, the less competitive Australian furniture market) being questionable. Further:

> Now it is essential to observe that the basic liberties are given by a list of such liberties … political liberty (the right to vote and to hold public office) and freedom of speech and assembly … freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold

> personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law. These liberties are to be equal by the first principle … These principles are to be arranged in a serial order with the first principle prior to the second. This ordering means that infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages.[43]

Australia, which touts itself as a leading liberal democracy,[44] has betrayed its very own principles of liberty through its law-making. From this paper's previous examples, the freedom from psychological oppression has been violated by law makers (who only represented the white 'constituency' of Australia) harassing the Asian Australian population. Lawmakers who should have been representing all of Australia's interests have instead supported foreign and derogatory views on Asian Australians. The right to hold personal property and freedom from arbitrary arrest and seizure has been historically breached, for example, indirectly through the *Furniture Act*. Values of freedom of speech are also damaged indirectly through the favouring of anti-Chinese debate. The opinion of Chinese Australians is also diminished through nationalistic anti-Chinese sentiments supported by some legislation. These are some examples of basic liberties (the most fundamental freedoms) of Asian and Chinese Australians being eroded in Australia. To this very day, law makers continue to pass legislation that may adversely affect the liberty of Asian and Chinese Australians, for example, the *Foreign Influence Transparency Scheme Act 2018* (Cth). Note that none of the basic liberties that ought to be afforded under a liberal democracy have anything to do with the English language, education level, intermarriage, or other discriminatory factors used in Australian legislation and policy. The second step in applying Rawls' theory would be to use a veil of ignorance argument to establish the rules of a fair, and thus, just society.[45] This paper is limited to discussion on superseded legislation, but in applying (to a basic extent) the first step of the veil of ignorance to the concept of institutional bias, if one were able to choose their racial or ethnic disposition prior to becoming 'self-aware' or (in practicality) a citizen of Australia, they would choose to be white. This is not fair to Asian Australians and to the Asian children of Australia, as the choice of embracing their Asian heritage becomes a detriment to them because of inherent biases against their 'non-European' or 'non-white' background.

III Discussion and Final Questions

The world has changed. No longer can Australia hide from the elephant in the law-making room. Although this paper has not directly discussed current unfair laws, it asserts that these laws are now blatantly clear to Asian Australians.[46] Asian and Chinese Australians have lived in Australia for generations. The historic laws that have been analysed in this paper have been discussed in the households of Asian Australians for decades, and the discriminatory features of institutional bias are clear to those that have had to experience it for generations. It is only through fear, and their love for their country, that Asian and Chinese Australians hesitate to point out something so obvious.[47] It is no longer appropriate to use Cold War propaganda strategies to spook the Australian population into distraction from harsh realities (such as COVID-19), imploring non-Asian Australians to discriminate against Asian and Chinese Australians.[48] Instead of looking outside of Australia, Australian law makers should consider their insecurities. They must ask themselves, who is Australia? Who are the children of Australia? And is Australia fair to them? The contemporary trend of institutional bias and authoritarian laws (under the guise of nationalism) is dangerous and unhealthy for the Australian liberal democracy. This paper calls for the establishment of a legal policy framework which should be used to examine whether proposed laws are reasonably fair to the basic liberties for all Australians, and do not promote unnecessary racial discrimination. This is in the national interest of Australia and is necessary for the Australian democracy. This paper hopes that the most basic freedoms can be respected for the benefit of the Australian democracy. It is difficult for Australia to maintain its position as a liberal, democratic leader in the free world if Australia's own law-making goes against the very principles of a liberal democracy.

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