



**Council of Australasian Tribunals National and  
New South Wales Joint Conference**

*Access to Justice in Multicultural Australia*

address

by

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## **Introduction**

I am greatly honoured to have been invited to address this conference of the Council of Australasian Tribunals for a number of reasons. However, before identifying some of those reasons, given the theme of my address, it is more than usually important that I commence, as I always do, by acknowledging the traditional owners of the lands on which we meet - this morning the Gadigal people of the Eora nation. I pay my respects to their elders past and present and acknowledge their continuing stewardship of these lands and their enormous contribution to the heritage and culture of the country we call Australia. I will touch upon the particular needs and interests of indigenous people, and indigenous women in particular, when they intersect with the justice system later in this paper.

## **The formation of COAT**

Amongst the reasons I am particularly honoured to address this conference is the fact that I was present at the conception and birth of COAT, 15 years ago, in my capacity as a member and then President of the Administrative Review Council. It was that Council which hatched the idea of forming a body which could represent the interests of the burgeoning administrative tribunals around Australia and provide a forum for the exchange of skills and experience gained in the increasingly important work performed by administrative tribunals. I was engaged in the communications to and between the heads of the major tribunals at that time and was very pleased to see the enthusiasm with which they embraced and enhanced the idea, creating an international peak body representing administrative tribunals throughout

Australia and New Zealand in 2002. I have taken a degree of modest paternal pride in the many achievements of COAT over the last 15 years.

***The importance of administrative tribunals in the justice system***

A chronicle of the many developments in the field of administrative tribunals over the 15 years since this organisation was created would be a distraction from this paper. However, it is relevant both to the theme of this conference "Tribunals: enablers of justice", and to the theme of my paper, to note that administrative tribunals in Australia and New Zealand are a vital component of the structures for the administration of justice in each of those countries. The issues presented to and resolved by administrative tribunals include issues of the utmost importance to the very lives and existence of the people whose cases are determined by those tribunals - including, for example, in the immigration jurisdiction, the capacity to remain in the country in which a person wishes to live, or in the residential tenancies jurisdiction, the capacity to retain suitable accommodation. The exponential growth in the jurisdiction of administrative tribunals has meant that administrative tribunals are, for many people, their most frequent point of contact with the justice system. For many people, an administrative tribunal is their pathway to justice, which is why the theme of this conference is so apt.

***The Judicial Council on Cultural Diversity***

This is also why the Council of Chief Justices has recognised that administrative tribunals should be represented on the Judicial Council on Cultural Diversity, which I presently have the honour of chairing. COAT has a nominee on that council, currently Ms Anne Britton, and each of the Australian umbrella tribunals has been invited to nominate a member to act as a "champion" for cultural diversity within that tribunal,

and to act as a conduit for information passing between their tribunal and the Judicial Council. I will return to the work of the Judicial Council a little later in this paper, after some general observations with respect to the significance of multiculturalism and the nature of equality.

### **The significance of multiculturalism**

Unless you have been living in a cave for the last 50 years or more, the increasingly multicultural character of the population on both sides of the Tasman will have been obvious. There are various ways in which the increasing extent of multiculturalism can be expressed demographically or statistically. Because the growth of multiculturalism is so apparent, I will not descend to the data, but I will express some words of caution in relation to the data most frequently cited, which draws upon the percentage of residents born overseas.

### ***Some words of caution on demographic data***

First, the fact that a person was born overseas does not necessarily mean that he or she has different cultural characteristics to what might loosely be called mainstream Australia. The two largest proportions of Australian residents born overseas were from the United Kingdom and New Zealand (just over one quarter of all Australians born overseas).<sup>1</sup> When account is taken of migrants from other English speaking countries, it is likely that one-third or more Australian residents who were born overseas speak English as their first language and come from a culture which is not markedly different to the dominant culture of Australia.

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<sup>1</sup> See, for example, Australian Bureau of Statistics, *Migration, Australia, 2015-16* (Cat No 3412.0) (2017).

The second important note of caution relating to reliance upon statistics of persons born overseas is that, of course, those numbers do not include indigenous people. For those of us not of indigenous descent, statistical distinctions between those who were born overseas and those who were born in Australia, only serve to distinguish between those who were born overseas and those whose parents or earlier ancestors were born overseas.

The third note of caution I would provide in relation to reliance upon demographic data expressed numerically is that numbers do not necessarily provide a reliable guide to the significance or magnitude of the issues pertaining to a particular cultural group. So, for example, in my State of Western Australia, although Aboriginal people comprise only approximately 3.75% of the population, they make up about 40% of the adult prison population and between 70% and 80% of those in juvenile detention. To take another obvious example from the field of administrative tribunals, whatever the proportion of persons born overseas within the community as a whole, they will generally comprise 100% of the people exercising the immigration jurisdiction of an administrative tribunal.

### **How well does the justice system respond to increasing multiculturalism?**

The rapid growth in the multicultural character of our communities raises the question of the extent to which our justice systems respond appropriately to the increasingly multicultural components of the communities served by that system. It is very difficult to provide a general or single answer to that question for a number of reasons, including the significant lack of data and research in the area, and the multifaceted character of the various components which together

comprise the justice system, and the many and diverse characteristics of those who together comprise the group generically described as Cultural and Linguistically Diverse (CALD).

However, to the extent that there is research data available, and the work undertaken by the Judicial Council to which I will refer shortly, both suggest that there is significant room for improvement in the relationships between the various components of the justice system and the CALD community.<sup>2</sup>

Social surveys have consistently shown that those who have migrated to Australia tend to have greater confidence in police than in the courts.<sup>3</sup> Surveys also show that migrants who arrived in Australia more than 10 years ago have less confidence in the courts of the country than those who arrived more recently.<sup>4</sup> As far as I am aware, there is no equivalent survey data reporting the confidence of indigenous people in police and courts. However, for obvious reasons I think it would be naively optimistic in the extreme to believe that indigenous people have any greater confidence in the courts than migrants. To the contrary, there is every reason to think that indigenous people are likely to have very limited confidence in a justice system which has resulted in their significant over-representation in prisons on both sides of the Tasman.

The major projects undertaken to date by the Judicial Council, and to which I will shortly refer, also show that there is significant room for improvement in the ways in which Australian courts and tribunals use interpreters to provide linguistic access to justice for those who do not speak English. Our work has also shown significant room for

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<sup>2</sup> Including, of course, indigenous people.

<sup>3</sup> For example the 2013 Scanlon Foundation survey found immigrants' level of trust in police was between 10% and 15% higher than their level of trust in the legal system (Prof Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2013* (2013) 50).

<sup>4</sup> Ibid.

improvement in the accessibility of Australian courts and tribunals to Aboriginal and Torres Strait Islander women and migrant and refugee women.

### **The nature of equality**

Understandably, discourse on the manner in which the law and the courts respond to a particular class or group within our society is often replete with reference to equality of treatment. Both the courts and community regard equality before the law as a principle of paramount importance. As French CJ, Crennan and Kiefel JJ observed:

"Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. It was characterised by Kelsen as "the principle of legality, or lawfulness, which is immanent in every legal order". It has been called "the starting point of all other liberties".<sup>5</sup>

However, equality can be an elusive notion. It can lie, like beauty, in the eye of the beholder. It can and often does mean different things to different people and it seems likely that lawyers and judges apply a meaning to the term which is rather different to that applied by sociologists.

### ***Formal equality***

When lawyers and judges refer to equality, they apply the notion of formal equality attributed to Aristotle - that "things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unalikehood".<sup>6</sup> In legal terms, this:

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<sup>5</sup> *Green v The Queen; Quinn v The Queen* [2011] HCA 49; 244 CLR 462 [28].

<sup>6</sup> Aristotle, *Ethica Nichomachea* (Trans W D Ross) (1925) Book 3 at 1131a-1131b, as summarised by Prof Peter Weston, "The Empty Idea of Equality" (1982) 95(3) *Harvard Law Review* 537, 543.

requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in *Wong v The Queen*:

Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect. [emphasis in original]<sup>7</sup>

So, application of the legal principle of equality depends critically and fundamentally upon the identification of all the characteristics that are relevant to the legal outcome. In *Bugmy v The Queen*<sup>8</sup> the High Court confirmed that Aboriginality was irrelevant to the sentencing process, although circumstances of social deprivation often associated with Aboriginality were relevant to that process. So, applying Aristotle's notion of formal equality does not require Aboriginal offenders to be sentenced differently to non-Aboriginal offenders, but it does require offenders who have suffered extreme social deprivation to be sentenced differently to those who have not experienced such circumstances, and it requires all those who have suffered such experiences to be treated alike, irrespective of whether or not they are Aboriginal.

### *Substantive equality*

On the other hand, sociologists are more inclined to assess the outcomes of any process for the purpose of ascertaining whether the process provides substantive equality to all who are subjected to it. As Professor

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<sup>7</sup> Per French CJ, Crennan and Kiefel JJ in *Green v The Queen*, n 5 above.

<sup>8</sup> [2013] HCA 37; 249 CLR 571.



Catharine MacKinnon has pointed out in the field of gender equality, even though most western democracies have had laws prohibiting discrimination on the ground of gender (in the legal sense) for many decades now, women in those societies remain significantly under-represented in most areas of leadership. This suggests that the structures and processes which allocate leadership roles within those societies disadvantage women and to that extent do not provide substantive equality to women. A sociologist might take the same view of a justice system in which 40% of the prison population come from 3.75% of the general population. A lawyer and a sociologist might well arrive at different conclusions as to whether the justice system is treating that group equally.

***When is culture legally relevant?***

Because the legal notion of equality turns upon the identification of characteristics that are "relevant" to the legal outcome, there have been cases in which attention has been given to the question of whether a person's cultural background is "relevant" in this sense. One of those cases is *Bugmy* to which I have already referred. There are two decisions of the High Court relating to the defence of provocation to a charge of murder which, if not excluded by the prosecution, means that the accused is not guilty of murder but guilty of manslaughter. Given the Judicial Council's work in the area of access to justice for CALD women, and which significantly involved domestic violence, these cases provide a convenient means of analysing the law's approach to the relevance of the cultural characteristics of an alleged violent offender or his or her victim.

Provocation has two components - the first relating to the nature of the conduct which is said to have provoked the accused, and the second

relating to the loss of self-control by the accused. It is well established in Australia that the second limb requires an objective test to be applied by reference to the likely reaction of an "ordinary person" and that the only personal characteristic which can be attributed to that hypothetical person is age. In *Masciantonio v The Queen*,<sup>9</sup> McHugh J considered that in addition to the characteristic of age, the characteristics of race, culture and background should be attributed to the hypothetical "ordinary person". In his view:

Without incorporating those characteristics, the law of provocation is likely to result in discrimination and injustice. In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar.

... unless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.

If it is objected that this will result in one law of provocation for one class of persons and another law for a different class, I would

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<sup>9</sup> [1995] HCA 67; 183 CLR 58.

answer that that must be the natural consequence of true equality before the law in a multicultural society when the criterion of criminal liability is made to depend upon objective standards of personhood.<sup>10</sup>

This approach raises interesting and difficult questions. If cultural background is relevant to the legal outcomes, is the law condoning cultural characteristics which might be regarded as improper, such as the subordination of females? Do laws of that character discriminate against victims from that cultural background, by providing them with unequal protection against offences?

The difficulties inherent in these issues are neatly illustrated by differing views expressed with respect to the decision of the High Court in *Moffa v The Queen*,<sup>11</sup> which was also a case concerning provocation, in which the High Court recognised that the ethnic and cultural background of the accused could be taken into account in assessing the first limb of the defence - namely, the limb concerned with the character of the provoking conduct. Justice Michael Kirby commented favourably on the decision extracurricularly.<sup>12</sup> However, others were less laudatory:

In Moffa's case, an Italian male was partly excused for the killing of his wife because of his ethnically linked hot bloodedness.<sup>13</sup>

Associate Professor Bird condemns the decision because it embeds "stereotypes in the law which are profoundly racist" and also because the

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<sup>10</sup> Ibid, 73, 74.

<sup>11</sup> [1977] HCA 14; 138 CLR 601.

<sup>12</sup> The Hon Justice M D Kirby "The 'Reasonable Man' in Multicultural Australia" (Ethnic Communities Council of Tasmania, Cultural Awareness Seminar, Hobart, 28 July 1982) 7, 8.

<sup>13</sup> Associate Professor Greta Bird "Power politics and the location of 'the other' in multicultural Australia" (1995) 5.

"inclusion of male versions of ethnic characteristics and belief systems into a structure that is already male further disadvantages women".<sup>14</sup>

### **Is the legal system monocultural?**

The interesting issue which we have just considered in the context of provocation raises a broader issue with respect to the extent to which the substantive law administered by a legal system must be monocultural, or whether the law can and should apply legal standards drawn from the culture of the participants in the legal process. Taking that issue one step further raises the question of whether more than one legal order can inhabit the same physical territory. In Australia that further question has been considered in the context of the recognition of Aboriginal customary law,<sup>15</sup> and on each such occasion the notion of pluralistic legal systems existing alongside each other has been rejected. However, there are other jurisdictions in which pluralistic legal systems are well established, such as those countries in which a system of religious courts operates alongside a system of secular courts, often with co-extensive or at least overlapping jurisdiction, and it is to be remembered that a system of ecclesiastical courts operating alongside secular courts was well established in medieval England.

Associate Professor Luke McNamara has suggested that Australia's embrace of multiculturalism as official government policy has not been associated with any significant impact upon Australia's laws or legal

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<sup>14</sup> Ibid.

<sup>15</sup> See, for example, Australian Law Reform Commission, *Recognition of Aboriginal Customary Law* (Report No 31, 1986); Law Reform Commission of Western Australia, *Aboriginal Customary Laws* (2006).

institutions. He refers to the gap between a polyethnic population and a monocultural legal system.<sup>16</sup> He cites Alastair Davidson, who observed:

It is not flippant to say that a multicultural Australia incorporated souvlaki and dragon dances, but not the legal, political and ethical voices of its myriad NESB [non English speaking background] newcomers ... [I]n the realm of legal and political arrangements ... the monocultural Anglo-Celtic past did not disappear when multiculturalism became state policy in Australia.<sup>17</sup>

These are difficult questions. The point made by McHugh J in his *cri de couer* in *Masciantonio* and by those who propose that multiculturalism should bring about change in substance, not just in form, are well made. On the other hand, Associate Professor Bird's observations with respect to the risk of cultural stereotyping and the entrenchment of gender disadvantage, and the risk that a law which takes account of cultural background might discriminate against victims from that cultural background are also powerful considerations. These are important issues of public policy which I respectfully suggest might attract the attention of the legislature. However, unless and until there is legislative change, legal recognition of cultural diversity can only be accommodated through the common law. The common law of Australia has and will continue to change over time, in response to changing social conditions including the impact on Australian society of different cultures and ethnic groups.<sup>18</sup> While the evolution of the common law is iterative, it is also limited: legal pluralism - the substantive recognition of other legal systems as law in Australia - is simply a "bridge too far"

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<sup>16</sup> L McNamara, "Equality before the law' in polyethnic societies: the construction of normative criminal law standards" (2004) 11(2) *Murdoch University Electronic Journal of Law* 18.

<sup>17</sup> Ibid, citing A Davidson, "Multiculturalism and citizenship: silencing the migrant voice" (1997) 18(2) *Journal of Intercultural Studies* 77, 77, 82.

<sup>18</sup> See Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 1992) 187.

and must appropriately remain a matter for the legislatures and not the courts.

### **The Judicial Council on Cultural Diversity**

No doubt the reason I have been asked to address this topic despite my monocultural background is that I have the honour to represent the Council of Chief Justices as the inaugural Chair of the Judicial Council on Cultural Diversity (the Council). The Council was formed under the auspices of the Council of Chief Justices at the suggestion of the Migration Council of Australia (MCA), which generously provides secretariat resources and support to the Council, although the Council remains independent of the MCA and reports to the Council of Chief Justices.

Essentially the Council is an independent body established to provide advice and recommendations for the assistance of Australian courts and tribunals, judicial officers and tribunal members, administrators, and judicial educators to enable us all to respond positively to evolving community needs arising from Australia's increasing cultural diversity.

The Council comprises representatives from all Australian geographical jurisdictions and all levels of court. Unlike me, many of the judicial officers serving on the Council come from diverse cultural backgrounds. Those resources are augmented by additional members with particular expertise and experience in issues associated with cultural diversity, and who are not judicial officers or tribunal members.

It is important to emphasise that the Council's area of interest is not restricted to cultural diversity arising from recent migration, but extends to and includes the issues associated with the cultural diversity of Aboriginal and Torres Strait Islander communities, being issues which

have a profound effect upon the justice systems of this country. To that end, the Council also has an Aboriginal member, and has amongst its membership a number of judicial officers who, like me, have a particular interest in this area.

### **The work of the Council**

The Council has completed a number of projects, including a detailed submission to the Productivity Commission's inquiry into access to justice arrangements, and a scoping study of all Australian jurisdictions identifying the systems, resources and information available to assist court users from culturally diverse backgrounds which has been published on the Council's website. An online training program on cultural diversity for judicial officers, developed under the auspices of the Council, is about to be launched. The Council is also well advanced on the publication of a practice note for the assistance of courts and tribunals dealing with the matters appropriately considered when an issue arises with respect to clothing worn by a witness or party to proceedings which obscures or partly obscures their face. However, the two items of work completed by the Council which I think are likely to be of greatest interest to those attending this conference are the Council's work with respect to the use of interpreters, and the Council's work on access to justice for women from CALD backgrounds.

### **Interpreters**

The outcome of the Council's work on the use of interpreters in courts is to be the subject of a detailed session later in this conference. I will not pre-empt or duplicate the matters to be addressed in that session by reporting in detail on the outcomes of the Council's project, but it is

nevertheless appropriate to describe the general nature of the project and its objectives.

The primary objective of the project was to identify and encourage the implementation of best practice standards relating to the use of interpreters in and in connection with court hearings and court processes. Although the project was conducted with particular reference to the use of interpreters in courts, as you will see tomorrow, many of the best practice standards identified in the course of the project are equally applicable to the use of interpreters in tribunal hearings, or in connection with tribunal hearings.

The project was overseen by a subcommittee of the Council chaired by Justice Melissa Perry of the Federal Court of Australia, who was ably assisted by judicial officers from other jurisdictions. At the risk of invidiously singling out particular contributors, I would make particular mention of the very substantial contribution made by Justice Francois Kunc of the Supreme Court of New South Wales. The subcommittee's work was very substantially assisted by two consultants with special expertise in the field, including Professor Sandra Hales, who will be addressing the conference tomorrow, and the Honourable Dean Mildren AM RFD QC, former justice of the Supreme Court of the Northern Territory.

The project involved extensive consultation with stakeholders, including various groups and organisations involved in the provision of interpreter services and a member of the National Accreditation Authority for Translating and Interpretation (NAATI) served as a member of the subcommittee. Through our consultations we soon learned that current practices in Australia with respect to the area of interpreters in courts and tribunals fall well short of best practice in a number of respects.



It quickly became clear to the subcommittee, and to the Judicial Council, that there were so many variables relating to the use of interpreters that it would be impossible to promulgate prescriptive standards to be applied in all situations and circumstances. The number and availability of trained interpreters differs widely from language to language, as do the resources available for the engagement of interpreters, as do the facilities available for the accommodation and placement of interpreters in hearing rooms. As a consequence, the practice standards developed in the course of the project have, of necessity, a degree of flexibility, and have been specifically designed to encourage the use of the best practices that can be attained in the relevant circumstances. So, for example, the standards expressly recognise that the same standard of qualifications and experience cannot be expected of an interpreter of an Aboriginal language spoken by a relatively small group of people as might be expected of an interpreter of Mandarin or Cantonese. The standards also expressly recognise that in the case of languages spoken by a small group, the same characteristics of impartiality and disinterest might not be achievable as in the case of the interpretation of a language widely spoken.

Publication of the standards, with annotations explaining how they are intended to operate and some practical guidance, together with model rules and a model practice direction has been authorised by the Council of Chief Justices and will occur both in hard copy and on the website of the Judicial Council in the near future. There will also be a formal launch of the project within the next month or so.

### **Access to justice for women from CALD backgrounds**

The Judicial Council has recently completed a project relating to access to justice for women from CALD backgrounds, including both

indigenous women and migrant and refugee women. As with the interpreter project, the project was undertaken primarily by reference to courts, although many of the issues identified in the course of the project, and the framework for the improvement of access to justice developed as the product of the project are equally applicable to tribunals.

Although the issues arising in relation to access to justice for indigenous women are in many respects similar to the issues which arise in connection with access to justice for migrant and refugee women, there are also significant differences. In light of those differences, separate processes of consultation, and separate discussion papers were prepared in relation to indigenous women on the one hand, and migrant and refugee women on the other.

Those consultations established that all women from CALD backgrounds encounter very substantial barriers in the path of access to justice in Australia. The papers published by the Judicial Council summarising the outcomes of those consultations<sup>19</sup> record the multifaceted nature of those barriers in areas such as:

- arriving at court - including the need for better signage
- waiting times
- safety at court - including the need for safe waiting areas
- difficulties understanding forms, orders and decisions
- the need for improved case co-ordination
- dynamics within the hearing room
- judicial attitudes and actions
- the need for cultural competency training

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<sup>19</sup> The papers are available at [jccd.org.au](http://jccd.org.au).

- the risk of abuse of processes
- limited opportunities for referrals to men's behavioural change programmes
- improving engagement with CALD communities
- the need for more information about CALD court users and their experiences
- the recruitment of CALD personnel to work in courts

### **A National Framework**

The commonality of many of the issues identified in the course of the project allowed for a single (national) framework to be developed, applicable to both indigenous and migrant and refugee women.<sup>20</sup> I would make the point however that this single framework is also to a degree the result of constraints on courts and tribunals with reference to the kinds of measures they can implement. For example, indigenous women might prefer indigenous sentencing courts aimed at integration of indigenous community members in the court process, rehabilitation of the offender and restoration of the family rather than a purely punitive criminal justice response.<sup>21</sup> But without government resourcing and support of those facets of the justice system beyond the courts such measures are difficult to sustain over time.<sup>22</sup>

The framework which reflects the outcomes of the project has just been finalised and will shortly be distributed to heads of Australian courts and tribunals, and to the cultural diversity "champions" on each court and tribunal. What follows is a necessarily incomplete summary of the

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<sup>20</sup> Judicial Council on Cultural Diversity, *National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women* (2016).

<sup>21</sup> Olsen A & Lovett R, *Existing knowledge, practice and responses to violence against women in Australian Indigenous communities: State of knowledge paper* (2016) 2.

<sup>22</sup> Wayne Martin AC, "Reflecting on the Practice of Non-adversarial Justice" (Second International Conference on Non-Adversarial Justice: integrating theory and practice, Sydney, 6 April 2017) 17.

framework, intended to identify its key features and whet appetites for a more detailed consideration of the framework.

The framework starts from the proposition that the provision of equal justice is a core value and principle underpinning any justice system worthy of that description. At the most general level, the achievement of equal justice for women from CALD backgrounds requires, as a minimum:

- that women must be able to understand and be understood, which in turn requires access to appropriately trained interpreters supported by policies and practices which appropriately reflect and value the role of an interpreter and which are implemented by appropriately trained personnel, including judicial officers;
- that women must have sufficient understanding and awareness of the justice system, how it works, and the protections which the law offers;
- that the justice system must be free from unconscious bias and discrimination, proceedings must be conducted fairly and impartially by personnel and staff who possess a level of cultural awareness with respect to the challenges and barriers faced by women from CALD backgrounds, including the intergenerational trauma and institutional discrimination suffered by many indigenous women and the potentially adverse impact of pre-arrival experiences of migrant and refugee women, together with contemporary pressures on women which may be applied within indigenous, migrant and refugee communities, together with an understanding of gendered inequality and gendered violence.

The framework aligns with the seven areas for court excellence outlined in the International Framework for Court Excellence.<sup>23</sup> Those seven areas are:

- leadership and management;
- planning and policies;
- resources (human, material and financial);
- proceedings and processes;
- client needs and satisfaction;
- affordable and accessible services;
- public trust and confidence.

### ***Leadership and management***

The framework recognises that leadership from judicial officers and court administrators is essential to demonstrate a commitment to providing equal justice and equal access to justice for women from CALD backgrounds. The framework proposes that those leaders should consider the impact of demographic shifts upon users of their services and reflect upon the changes which may be necessary to respond to those shifts. The leaders must also develop a systemic approach to the resolution of cultural and linguistic issues, complemented by meaningful engagement with local communities and facilitated by the establishment of cultural diversity committees and partnerships with other organisations involved in the provision of services to CALD women. Consideration should be given to regular meetings with key stakeholders, including legal practitioners regularly representing CALD women, community visits, the celebration of diversity on occasions such

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<sup>23</sup> International Consortium for Court Excellence, *The International Framework for Court Excellence* (2<sup>nd</sup> Edition) (2013).

as NAIDOC Week and Harmony Day, and the provision of open days and tours to improve public understanding of the court and its processes.

### ***Planning and policies***

The framework proposes that courts should develop clear plans to implement the framework and develop strategies for working with women from CALD backgrounds.

### ***Resources***

The framework proposes that resources, human as well as material and financial, must be efficiently and proactively managed so as to meet the particular demands of CALD users of those resources. Judicial education and professional development programmes should specifically address the skills required for the provision of equal justice to all users, irrespective of their cultural or linguistic characteristics. Similar training should be provided to staff, and employment strategies should be directed to increasing the representation of indigenous staff and staff from migrant and refugee backgrounds. If resources permit, cultural liaison officers should be appointed, charged with the responsibility of assisting women from CALD backgrounds to complete paperwork, understand where to go and when, providing information about processes and procedures, familiarising women with the physical facilities at the place of hearing, assessing the need for an interpreter and coordinating interpreting arrangements, together with coordinating access to support services and legal advice.

### ***Proceedings and processes***

The framework recognises that if any hearing process is to be fair, it is essential that all involved understand the process and are able to

contribute fully to the proceedings. The framework proposes that Magistrates Courts should consider introducing education sessions for women applying for intervention orders, and all courts should consider developing video resources and written materials that explain the court process to women, specifically targeted to particular cultures and language groups that are significantly represented amongst the users of the particular court.

### ***Client needs and satisfaction***

The framework proposes that data should be collected with respect to the cultural, linguistic and gender diversity of users, because lack of demographic information might adversely impact upon the ability to respond to the particular needs of those users. The framework identifies the particular topics that should be addressed in the data collected, including court-user satisfaction levels and experiences.

### ***Affordable and accessible services***

The framework proposes that brochures should be prepared and distributed explaining services in plain English and in key community languages. The framework also proposes that a resource list should be given to women from CALD backgrounds and identifies the topics that should be addressed in that resource list.

The framework also:

- draws attention to the issues and principles identified in the course of the interpreters' project;
- provides general guidance as to the approach which should be taken with respect to the use of interpreters;

- includes recommendations with respect to the steps that should be taken to ensure that CALD women feel physically safe when participating in court processes, including by the provision of separate waiting areas for cases involving family violence;
- proposes that other steps should be taken to reduce the stress upon women participating in proceedings, including the provision of an opportunity to visit the hearing room prior to the case being heard, sitting women in the hearing room in a place at which they cannot see an alleged offender, allowing women to be accompanied by support workers, and, where necessary, closing the hearing to the public to minimise the potential pressure exerted by the presence of community members; and
- recommends the improvement of signage, which in many court areas is inadequate, to provide court users with information about where they should go, and where they might go for assistance.

### ***Public trust and confidence***

The framework proposes that public trust and confidence will be enhanced if courts demonstrate an awareness of the barriers faced by court users from CALD backgrounds, and demonstrate their willingness to address those barriers, and their responsiveness to honest and genuine feedback. Meaningful engagement with diverse communities in the development and implementation of the various steps outlined in the framework is also likely to improve public trust and confidence amongst the migrant and refugee communities, and indigenous communities.

The framework also proposes systems for monitoring and evaluation, and includes a helpful checklist of actions that might be taken in the implementation of the various measures proposed in the framework.



## **Summary and conclusion**

If the justice system is to provide equal justice to all, irrespective of cultural and linguistic differences, all the components of the justice system must be aware of, and responsive to, the particular needs of those who come from diverse cultural backgrounds and who do not have sufficient facility with English to comprehend and respond to the complex issues which often arise. Administrative tribunals are a vital component of the justice system and will often be, in effect, the face of the justice system to many from linguistically and culturally diverse backgrounds. In this paper I have endeavoured to identify some of the issues which arise when courts and tribunals face up to the obligation to provide equal justice to all, and to identify the way in which some of those issues can be addressed utilising the work undertaken by the Judicial Council on Cultural Diversity. An active, diligent and informed response to these issues is essential if courts and tribunals are to achieve their fundamental objective of providing equal justice to all.