

# Judicial Officers' Bulletin

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## Introducing the national online cultural diversity training program

**The Honourable Wayne Martin AC\***

An online training program on cultural diversity, to be launched this month, has been designed for judicial officers. Developed under the auspices of the Judicial Council on Cultural Diversity, the program draws on a number of resources, including the Family Court of Australia's highly regarded online cultural competency training course.<sup>1</sup> The following article outlines the program's objectives and how it may assist judicial officers in dealing with cultural diversity in their courts.

### Introduction

In his "State of the Australian judicature" address last year,<sup>2</sup> former Chief Justice the Honourable Robert French AC stated that equal justice as, "a necessary element of the rule of law, cannot be provided if the courts cannot appropriately respond to cultural and linguistic barriers, to access to them and engagement with them".

The Judicial Council on Cultural Diversity (JCCD), established in 2014, provides advice to the Council of Chief Justices of Australia and New Zealand on matters arising from the interactions of migrants, refugees and Indigenous people with the court system.<sup>3</sup> It has undertaken a number of projects designed to achieve the objective of administering equal

justice in Australian courts by responding to the evolving needs of a culturally diverse society.<sup>4</sup>

One such project is the development of an online training program on cultural diversity for Australian judicial officers. Once the program is made available this month, judicial officers can visit the JCCD website for information on how to access it.<sup>5</sup>

### The nine modules

Nine modules have been designed to help broaden judicial officers' knowledge of the ramifications of cultural diversity for their daily work.<sup>6</sup> The modules aim to go beyond a simple awareness of cultural diversity and to provide judicial

\* Chief Justice of Western Australia; Chair, Judicial Council on Cultural Diversity. The author acknowledges the assistance of Ms Antonia Miller, Judicial Commission of NSW, in the preparation of this article.

1 Special thanks to Ms Leisha Lister, Executive Officer, Family Court of Australia.

2 R French, "The state of the Australian judicature" (2017) 13 *TJR* 153 at 158.

3 *ibid* at 157. See also T Bathurst, "Doing right by 'all manner of people': building a more inclusive legal system", Opening of Law Term Dinner, 1 February 2017, p 31.

4 See R French, above n 2, for details of the other projects including developing national standards relating to the use of interpreters in court and access to justice for migrant, refugee and Indigenous women.

5 At <http://jccd.org.au/>, accessed 7 June 2017.

6 W Martin, "Judicial Council on Cultural Diversity" (2015) 24 *JJA* 214 at 221.

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officers with some practical skills to perform their duties in a culturally informed and appropriate manner. To that end, the nine modules were developed using the eFront learning management system, an online training platform, hosted by the Judicial Commission of NSW. The six primary objectives of the program for judicial officers who complete it are that they should be able to:

- encourage a high level of cultural awareness in the courtroom
- identify when intercultural misunderstandings may have occurred
- understand how to use plain English principles to aid multicultural communication
- assess the need for interpreting assistance
- work effectively with interpreters
- apply cultural awareness principles in practice.

## Encourage a high level of cultural awareness in the courtroom

### Being aware of what you think

The first module, entitled “Cultural awareness”, provides an opportunity for participants to self-assess their current level of cultural awareness by posing 12 questions. Questions include estimating how many hours it takes a non-English speaker to learn basic English. Some may be surprised to learn how long it takes for a non-English speaker to achieve an intermediate level of proficiency. And of course that would be far from the level where he or she can fully understand, without any assistance, what is happening around them in an often stressful courtroom situation.

Other questions in this module are designed to demonstrate the participant's understanding of substantive equality. These highlight the distinction between formal equality and an approach which not only acknowledges cultural differences but requires that these be actively taken into consideration. The overriding aim of this program is to provide judicial officers with more tools to achieve substantive equality and develop best practices with regard to culturally diverse parties in the courtroom.

The program also emphasises that developing cultural awareness or competency is not a one-off learning experience but an on-going responsibility for judicial officers if they are to properly discharge their functions. Similarly the online training program will be regularly maintained to capture the latest changes in policy, protocols, legislation and case law.

### What distinguishes a culturally aware judicial officer?

Judicial officers are obliged to treat all parties fairly regardless of gender, ethnicity, disability, literacy levels or any other personal characteristics. Taking account of cultural diversity is one aspect of administering justice

fairly to achieve substantive equality. In this context, it is significant that more than 28.5 per cent of the population of Australia were born overseas.<sup>7</sup> A culturally aware judicial officer understands that he or she will need to make appropriate adjustments when interacting with people from diverse backgrounds.

This requires, first and foremost, that the judicial officer identify and be aware of his or her own cultural assumptions. He or she will also take the next step and challenge those assumptions, understanding how unfair stereotyping can be and how easily misunderstandings can occur in cross-cultural communications. A degree of self-interrogation and the capacity to reflect on how a different culture might affect one's perspective are therefore important starting points. The goal of the online training modules is to help to instil an informed basis to engage across cultures.

Module 2, entitled “Australian multiculturalism”, covers the challenges of learning a second language, the misconceptions about the extent of Australian multiculturalism and the specific barriers people from diverse cultures experience when accessing the courts. Australia is home to people who come from more than 250 countries, belong to more than 200 cultural groups and speak close to 400 languages and dialects. Of the prison population in Australia, 18 per cent were born overseas.<sup>8</sup> Indigenous Australians make up a (regrettably) significant proportion of those appearing in Australia's criminal courts. These statistics may be somewhat daunting for judicial officers who are obliged to appropriately respond to cultural and linguistic barriers, to access them and to engage with them.

Migrants and Indigenous people may experience barriers when accessing the courts, including language and literacy, as well as cultural and religious barriers that inhibit the seeking of help from those outside their community. A negative perception of the courts because of a misunderstanding about the workings of the law and the Australian legal system may add to a sense of alienation and distrust.

## Identify when intercultural misunderstandings have occurred

Multicultural miscommunication can occur in myriad ways. One of the most insidious barriers to good cross-cultural communication is stereotyping. Module 3, entitled “Stereotyping, assumptions and prejudices”, provides some insight into how stereotyping can be recognised and avoided. Under s 41(1)(d) of the uniform *Evidence Act* 1995, the law recognises that questions are, or questioning is, improper and disallowable if there is no basis other than a stereotype based on the witness's culture or ethnicity. This recognises that stereotyping can result in a poor assessment of a witness and ultimately lead to unfair treatment and/or outcomes.

<sup>7</sup> As at 30 June 2016: ABS, 3412.0 – Migration, Australia, 2015–16, at [www.abs.gov.au/ausstats/abs@.nsf/mf/3412.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/3412.0), accessed 19 June 2017.

<sup>8</sup> As at 30 June 2016: ABS, 4517.0 – Prisoners in Australia, 2016, at [www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0), accessed 18 April 2017.

Module 4 of the cultural diversity training program examines four main areas of intercultural misunderstanding. The online training modules may be completed in stages and take 10 to 20 minutes to complete.



The key to avoiding stereotyping is to question and challenge stereotypes and to focus on the individual rather than ignoring individual differences. The difficulty for judicial officers, of course, is that while they need to avoid stereotypes they also need to be informed by, and respond appropriately to, actual cultural differences.<sup>9</sup>

Module 4, entitled “Intercultural misunderstandings”, examines the four main areas of misunderstanding: different communication or speaking styles, a lack of proficiency in English, hard-to-understand forms of communication such as a thick accent or silence and misunderstanding of the Australian court system.

There are two basic communication or speaking styles: the linear and the circular. Linear communication, where a person makes a point by proceeding directly from fact A to fact B is usually perceived to be the most appropriate or effective way to communicate in Australian legal contexts. However, a number of cultures consider a circular style of speaking to be a more polite or correct form of communication. To linear speakers, circular communication uses a seemingly unnecessary amount of detail to explain a point and may appear to be limited by an inability to point out when conflict has occurred; indeed it may be seen as dissembling. In non-linear speaking cultures, directness of speech may appear blunt, aggressive, impolite or even hurtful. The module identifies ways of recognising signs of unease

and discomfort from a circular speaker and introduces strategies to elicit information respectfully and in a timely fashion from someone who speaks in a circular fashion.

Module 6, entitled “Hard-to-understand forms of communication”, tackles the challenges of other forms of verbal communication such as accent, intonation, inflection, volume and rate of speech. In some cultures, it is polite to talk more quietly or submissively in a formal setting. Some Aboriginal and Torres Strait Islanders may engage in “gratuitous concurrence”, a well-researched<sup>10</sup> trait according to which a person appears to assent to every proposition put to them even when they do not agree. For many Indigenous people, using gratuitous concurrence during a conversation is a cultural phenomenon, and is used to build or define the relationship between the people who are speaking. However it also may be employed as a strategy when confronted by alien institutions and authority figures.<sup>11</sup>

Not all miscommunication is verbal. The module also examines the cultural implications of sometimes problematic non-verbal communication, such as silence and lack of eye contact. Silence, or seeming to avoid answering a particular question, may not indicate dishonesty or evasiveness; it could simply mean a lack of understanding of what is going on or confusion about what is expected. Silence can also occur when cross-examining Indigenous witnesses who, when faced

9 See for example the divergence of opinion in the case of *Moffa v The Queen* (1977) 138 CLR 601; M D Kirby “The ‘reasonable man’ in multicultural Australia”, Ethnic Communities Council of Tasmania, Cultural Awareness Seminar, Hobart, 28 July 1982 at 7, 8 and Associate Professor G Bird, “Power politics and the location of ‘the other’ in multicultural Australia”, in *The Criminal Justice System in a Multicultural Society*, Australian Institute of Criminology Conference Proceedings, Melbourne, 4–6 May 1993, p 5.

10 See M Cooke, “Indigenous interpreting issues for courts”, at [www.aija.org.au/ac01/Cooke.pdf](http://www.aija.org.au/ac01/Cooke.pdf), accessed 11 April 2017; Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Ch 2 “Aboriginal people” at [2.2.2]; D Eades, *Aboriginal ways of using English*, Aboriginal Studies Press, Canberra, 2013, p 122; D Eades, “Telling and retelling your story in court: questions, assumptions and intercultural implications” (2008) 20(2) *CrimJust* 209, at [www.austlii.edu.au/au/journals/CrimJust/2008/26.html](http://www.austlii.edu.au/au/journals/CrimJust/2008/26.html), accessed 11 April 2017; D Eades, “Judicial understanding of Aboriginality and language use”, (2016) 12 *TJR* 471; K Liberman, “Ambiguity and gratuitous concurrence in inter-cultural communication” (1980) 3(1) *Hum Stud* 65.

11 Legal Services Commission of South Australia, “How to assist an Aboriginal defendant – gratuitous concurrence” at [www.lsc.sa.gov.au/dsh/ch03s04.php](http://www.lsc.sa.gov.au/dsh/ch03s04.php), accessed 4 May 2017.

with a declarative form of questioning, may need time to process the question, marshal their thoughts and respond.<sup>12</sup> Where a question transgresses cultural norms, silence may in fact be regarded as the appropriate response for members of that culture.<sup>13</sup>

In Australian mainstream culture, direct eye contact can convey respect, confidence and trustworthiness. However, in other ethnic groups, avoiding eye contact may indicate respect, modesty and a wish to avoid confrontation. Being aware of such a cultural norm for a certain group of people will provide a more accurate interpretation of what is being presented in the courtroom.

### Understand how to use plain English principles to aid multicultural communication

The use of plain English principles can go some way to avoid intercultural miscommunication. Module 5, entitled “Plain English principles”, provides a number of useful strategies, including the avoidance of legal jargon, acronyms, idioms and slang and the occasional need to redefine legal words in plain English. There are times when the use of legal terms cannot be avoided. However, parties, witnesses and interpreters can be helped if the judicial officer, when relevant, provides a plain English explanation of a particular legal term. The core aim of plain English principles or strategies is that the judicial officer uses language that is appropriate to the listener’s language skills and knowledge, a courtesy that will

inevitably enhance communication in the courtroom. Indeed as the Chief Justice of NSW, the Honourable Tom Bathurst AC, recently observed, the benefits of clarity of expression in the courts are not limited to only intercultural communications.<sup>14</sup>

### Assess the need for interpreting assistance

One vexed question facing judicial officers in cases with multicultural parties and/or witnesses is how to assess when interpreting assistance is required. Generally, whether an interpreter will be used is a matter for the court’s discretion. The basic rule is that the provision of an interpreter is essential whenever there is a possibility that a trial would be unfair because of the absence of an interpreter. Module 7, entitled “Assessing the need for interpreting assistance”, canvases a number of factors that could provide assistance in deciding whether an interpreter should be provided.

The module provides two checklists garnered from the *Multicultural language services guidelines for Australian Government agencies*<sup>15</sup> and emphasises the importance of using tertiary qualified or interpreters accredited by the National Accreditation Authority for Translators and Interpreters. The issue of whether it is advisable to use the witness’s family or friends in certain circumstances is

**Cultural Diversity E-Learning**

Home Cultural Diversity Module 7 Module 7: Assessing the need for the ...

**Module 7: Assessing the need for the interpreting service**

**Module 7**

**Assessing the need for interpreting assistance**

This module is designed to help you to:

- Work out when to use an interpreter and/or translator
- Identify whether an interpreter is suitably experienced
- Deal with an unaccredited interpreter
- Identify what language is required.

Set the unit as not completed

Interpreters and translator...

**Lesson material**

- Module 7: Assessing the n...
- Interpreters and translat...
- The right to an interpret...
- Provision of an interpret...
- Assessing the need for an...
- When is an interpreter ne...
- Checklist: engaging an L...
- Checklist: engaging an L...
- Responsibility for engag...
- Booking a language servic...
- Payment for a language se...
- Accreditation or qualifi...
- NAATI accreditation
- Identifying what language...
- New and emerging langua...
- Dealing with un-accredite...
- Using family and friends
- The risk of miscommunica...
- When a translation is req...
- Assessing the need for in...
- Test Your Knowledge [7]

**Lesson progress**

Progress: 9.52%

Completion rules completed: 0 out of 1

**Unit operations**

1. Print unit
2. Print all units
3. Open unit in popup window

*Module 7 of the of the program provides guidance on how to assess when an interpreter is required and the importance of using suitably qualified interpreters. Module 8 provides information about working effectively with an interpreter.*

- 12 D Eades, “I don’t think it’s an answer to the question: silencing Aboriginal witnesses in court”, (2000) 29(2) *Language in Society* 161.
- 13 R Goldflam, “‘Silence in court!’ Problems and prospects in Aboriginal legal interpreting” (1997) 13 *Australian Journal of Law and Society* 17, at 43–44.
- 14 T Bathurst, “Writing judgments with the parties in mind”, *NJCA writing better judgments program*, Keynote Address, 3 April 2017.
- 15 Australian Government Department of Social Services, *Multicultural language services guidelines for Australian Government agencies*, at [www.dss.gov.au/sites/default/files/documents/03\\_2016/multicultural\\_language\\_services\\_guidelines.pdf](http://www.dss.gov.au/sites/default/files/documents/03_2016/multicultural_language_services_guidelines.pdf), accessed 11 April 2017.

also addressed. Another problematic area is identifying the language of the party or witness. A person's language may not be based on their country of birth or nationality and can also be fraught if the language is one that is "new and emerging". Strategies for dealing with unaccredited interpreters are also provided.

### Work effectively with interpreters

Module 8, entitled "Working with interpreters", provides nuts and bolts style information addressing how to work effectively with an interpreter. Preparing to use an interpreter, establishing the ground rules and dealing with interpreters in the courtroom are covered.

One issue the module highlights is the complexity of the interpreting task. While languages may share basic words and concepts there are likely to also be considerable divergences. Words may not exist in another language and legal terms or phrases in particular may have no equivalent. For example, the word "private" or "privacy" in English means "lonely" in Greek. Consequently, interpreters may need to use several words or phrases to communicate not only the original word but its meaning. Further, it cannot be assumed that the witness or a party will understand legal phraseology even if it is interpreted into their language.

During the preparation of the online training modules, the development of the proposed *Australian national standards for working with interpreters in courts and tribunals* was monitored.<sup>16</sup> The module has gathered a range of best practices from a variety of sources, including the Judicial Commission's *Equality before the Law Bench Book*.<sup>17</sup>

### Apply cultural awareness principles in practice

The final module comprises a set of scenarios that will help judicial officers apply best practice cultural awareness principles. A subcommittee to the working group, which includes myself, the Honourable Justice Perry of the Federal Court, the Honourable Justice Kyrou of the Victorian Court of Appeal, the Honourable Justice Blokland of the Northern Territory Supreme Court and her Honour Magistrate Boss of the ACT Magistrates Court, provided a number of scenarios based on our own experiences that were formatted into a series of questions.

One scenario focuses on explaining cultural issues to a jury. Deciding when and how to explain the interpreter's role to the jury can also be a complex issue. The circumstances chosen involve presiding over a jury trial in a regional location with a significant Aboriginal population where it appears that only one Aboriginal person has been empanelled in the jury to try the case.

The questions include: do you address the cultural issues about which you are concerned in the course of your opening remarks to the jury so that they can properly appreciate the evidence when it is given, or do you wait until the relevant evidence is given and then give directions specific to the issues which are raised? Or, do you say nothing?

Other scenarios in the initial version of the online training modules deal with assessing the need for, and working with, an interpreter. It is anticipated that more scenarios will be added to the list in due course as more cases and examples become available.

### Conclusion

As was observed by former Chief Justice of Australia, the Honourable Robert French AC:

it is entirely appropriate that those involved in the administration of justice in various ways should ensure so far as they can that people are not disadvantaged in their access to or interaction with the justice system by reason of their culture. With the very significant shift in the composition of the Australian population and the many countries of origin from which Australians now come, the potential for misunderstanding and misinterpretation, by people of different cultures, concerning the working of the justice system and the potential for misunderstanding and misinterpretation of those people by those involved in the justice system is real.

...

Judicial awareness of the significance of cultural diversity is a key area of concern. Another is the unconscious influence on a judge of underlying assumptions or attitudes based on race, religion, ideology, gender or life style which are irrelevant to the case which the judge is hearing.<sup>18</sup>

The online training modules are written in a concise, direct fashion. Although the modules can take up to three-and-a-half hours to complete, the training may be stopped and started at the discretion of the judicial officer. The program can be completed in stages to accommodate other commitments, as each module takes between 10 to 20 minutes to complete. For those who have more time or inclination to delve deeper into the program, there are a number of links to primary sources and articles that enhance the information provided.

How these diverse cultural strategies are used from case to case will more often than not rely heavily on "context and common sense".<sup>19</sup> However, it is anticipated that the online training course will add to a judicial officer's toolkit in cases that have diverse cultural dimensions.

16 At [http://jccd.org.au/wp-content/uploads/2016/06/National\\_Standards\\_for\\_Working\\_with\\_Interpreters\\_in\\_Courts\\_and\\_Tribunals\\_-\\_Final\\_Consultation\\_Version\\_June\\_2016.pdf](http://jccd.org.au/wp-content/uploads/2016/06/National_Standards_for_Working_with_Interpreters_in_Courts_and_Tribunals_-_Final_Consultation_Version_June_2016.pdf), accessed 28 April 2017.

17 Above n 10.

18 R French, "Equal justice and cultural diversity — the general meets the particular" (2015) 24 JJA 199 at 204–205.

19 E Kyrou, "Judging in a multicultural society" (2015) 24 JJA 223 at 226.