# The Hellenic Australian Lawyers Association (Queensland Chapter)

*Embracing Diversity in the Law: solutions and outcomes*

address

by

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## Introduction

I am greatly honoured to have been invited to address this seminar dealing with the important topic of cultural diversity and the law. I am particularly grateful to the Queensland Chapter of the Hellenic Australian Lawyers Association for providing this opportunity. Hellenic Australians have provided a paradigm example of the ways in which cultural diversity can enrich and advance all facets of the life of our community, over a period almost as long as European colonisation during which migrants from Greece have gone from transported convicts[1] to positions of leadership in business, the professions and government.

### Acknowledgement of traditional owners

Given the topic I am addressing this evening, it is more than usually appropriate for me to commence by acknowledging the traditional owners of the lands on which we meet, on this side of the Brisbane River the Turrbal people and on the southern side the Jagera people, and by paying my respects to their Elders past and present, and acknowledging their continuing stewardship of these lands.

### A monochrome judiciary

It will be obvious to all that neither background nor experience qualifies me to address tonight's topic. Regrettably, although I am a proud philhellene, I cannot claim any Greek heritage. My Anglo-

[1] Department of Immigration and Citizenship, 'Community Information summary – Greece-born' (2014), available at: https://www.dss.gov.au/sites/default/files/documents/02_2014/greece.pdf

Scottish origins place me within a cultural grouping which has dominated colonial Australia, and which remains significant, although not nearly as dominant as it once was. I speak only one language. I am male, and although I like to think of myself as middle-aged, others might say I am pushing the upper end of that classification,

These characteristics are stereo-typical of the majority of Australia's judiciary. It can fairly be said that I epitomise the lack of first-hand experience of cultural and linguistic diversity amongst much of the judiciary. This has the capacity to impede the provision of equal justice to all in a community which has become multicultural rather than monochromatic. Put bluntly, I am typical of the problem, not the solution.

There is not much to be said in response to this entirely justified self-criticism. Perhaps all that I can suggest is that one needs to have a full appreciation of any problem, and its depths and facets, in order to arrive at an effective solution. The knowledge which I have gained since taking up the role of chair of the Judicial Council on Cultural Diversity has, I hope, provided me with some insights into the problems of cultural competency and comprehension which I face in common with many other members of Australia's judiciary.

**The Judicial Council on Cultural Diversity**

The Judicial Council on Cultural Diversity (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. The primary function of the Council is to provide advice and recommendations to Australian courts, judicial officers and administrators, and judicial educators, for the purpose of improving the response of the courts to evolving community needs arising from Australia's increasing cultural diversity.

The Council comprises judicial officers 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. There are also a number of judicial officers who, like me, have no claim to represent culturally diversity but have a particular interest in this topic. Our judicial resources are augmented by additional members with particular expertise and experience in issues associated with cultural diversity.

It is important to emphasise that the Council's interests are 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.

The question of whether Aboriginal and Torres Strait Islander people are properly included within the grouping "culturally and linguistically diverse" (CALD) is controversial in some quarters. With the greatest of respect to those who have expressed a view on the topic, it seems to me that the issue is one of terminology, rather than substance. As a matter of substance, there can be no doubt that the issues which arise

when the descendants of the first Australians interact with our justice system are of profound significance to both indigenous communities and the justice system. Because of the significance of those issues, the Council also has an Aboriginal member, although the fact he has had to be recruited outside the judiciary should not go unremarked.

As I have noted, the primary function of the Council is to assist courts to provide equal justice to all in a community of significantly increasing cultural diversity. Later in this paper I will identify specific ways in which the Council hopes to further those objectives in two important areas under current consideration, namely:

(a) equal justice for indigenous and CALD women; and

(b) the use of interpreters in courts and tribunals.

I would like to set the scene for my discussion of those two projects by explaining what I mean by "equal justice", and how it differs from equal treatment.

## Equal Justice

> "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".[2]

When lawyers talk about "equality" before the law, they generally connote the notion of equality often attributed to Aristotle that "things

[2] Per French CJ, Crennan & Kiefel JJ in ***Green v The Queen; Quinn v The Queen*** [2011] HCA 49; 244 CLR 462 [28].

that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness".[3]

Application of this notion of equality to the legal system:

> 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][4]

So, the provision of equal justice depends critically and fundamentally upon the identification of all the characteristics that are ***relevant*** to the legal outcome. Thus, in ***Bugmy v The Queen***[5] the High Court held that the Aboriginality of an offender was irrelevant to the sentencing process, although the circumstances of social deprivation often associated with Aboriginal communities may be relevant to that process for individual Aboriginal offenders. Because the relevant characteristic is social deprivation, not Aboriginality, equal justice 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

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[3] Aristotle, *Ethica Nicomachea* (Trans W D Ross) (1925) Volume 3 at 1131a-1131b, as summarised by Prof Peter Weston, 'The Empty Idea of Equality' (1982) 95(3) *Harvard Law Review* 537, 543.
[4] Per French CJ, Crennan and Kiefel JJ in ***Green v The Queen,*** n 2.
[5] [2013] HCA 37; 249 CLR 571.

those who have not. Equal justice also requires all who have suffered extreme social deprivation to be treated alike, irrespective of whether or not they are Aboriginal.

**The legal relevance of culture**

However, in other circumstances the High Court has held that the culture of an alleged offender can be relevant to the legal process. Those decisions have been controversial - especially in cases in which the purported behavioural norms of a defendant are not considered consistent with the standards of "ordinary" persons.

In ***Masciantonio v The Queen***,[6] McHugh J considered that the culture of an accused was relevant to the application of that aspect of the law of provocation which relates to the loss of self-control by the accused. In that context he observed:

> … 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 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.[7]

[6] [1995] HCA 67; 183 CLR 58.
[7] At 74.

On one view this approach is entirely consistent with the provision of equal justice because it treats differently those who have different cultural perspectives of provocative behaviour. On another view, this approach could be seen as the legal condonation of purported cultural norms which are not acceptable to mainstream Australian society, such as the subordination of females, if necessary by violence. I note that McHugh J was in the minority on this point in ***Masciantonio.***

In another case involving provocation however, ***Moffa v The Queen***,[8] the High Court accepted that ethnic and cultural background of the offender was relevant to the assessment of the character of the provoking conduct. Some considered the decision to be laudable judicial recognition of multiculturalism.[9] However, others were less complimentary:

> In Moffa's case, an Italian male was partly excused for the killing of his wife because of his ethnically linked hot bloodedness.[10]

Associate Professor Bird condemned the decision which she considered embedded "stereotypes in the law which are profoundly racist" and because the "inclusion of male versions of ethnic

[8] [1977] HCA 14; 138 CLR 601.
[9] 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.
[10] Associate Professor Greta Bird "Power politics and the location of 'the other' in multicultural Australia" (1995) 5.

characteristics and belief systems into a structure that is already male further disadvantages women".[11]

Associate Professor Bird's comments highlight some of the difficulties in this area. How can the courts know what the norms are for diverse cultures and who should inform them? Clearly there might be reason to be cautious of the arguments put forward on behalf of the accused by defence counsel.

The issue of stereotypical and often highly derogatory characterisations, together with the marginalisation of women's perspectives, in particular indigenous women, has made this a fraught area.[12] These observations have a particular resonance with the work of the Council, and highlight the importance of working in consultation with CALD and indigenous women on the issue of family violence - a topic to which I will return.

It is also the case that the legal relevance of culture may turn upon factual issues of nuance and degree particular to each case. Cases in which a witness wishes to give evidence wearing clothing which obscures her face from view provide an example of the potential significance of the particular facts of the case. In those cases, the nature of the evidence to be given by the witness and its significance, the likelihood of a significant contest with respect to the credibility of

[11] Ibid.

[12] See for example the controversial sentencing of a 55 year old Aboriginal man in the Northern Territory for one month for the assault and sexual assault of a 14 year old girl, whom it was claimed had been promised to him under traditional law (The Queen v GJ (Sentence) SCC 20418849, 11 August 2005) and Irene Watson, 'Aboriginality and the Violence of Colonialism' 8(1) (2009) *Borderlands e-Journal* available at: www.borderlands.net.au/vol8no1_2009/iwatson_aboriginality.pdf

the witness, whether the tribunal of fact is a judicial officer or a jury and the source and strength of the witness's conviction with respect to facial covering are all considerations properly taken into account by a court when deciding the appropriate course in a particular case.[13]

## Addressing Disadvantage

Despite these observations, or perhaps because of them, it is important that the likelihood of contention with respect to the appropriate judicial response to cultural and linguistic diversity is not overstated. In many areas, it will be clear beyond argument that cultural and/or linguistic differences place persons at a significant disadvantage in relation to the justice system generally, and with respect to particular aspects of that system. In those cases there can be no doubt that the principles of equal justice require the court to take all reasonable steps to ensure that such disadvantage is ameliorated as far as possible. In those cases, equal treatment of all will not provide equal justice to all. Equal justice requires that disadvantage within the justice system be identified and ameliorated to the greatest practicable extent.

The two areas to which I will now turn - namely, justice for CALD and indigenous women, and the use of interpreters by courts and tribunals both provide examples of areas in which disadvantage is manifest., The consequence is that the courts must take all reasonable steps to ameliorate those disadvantages in order that justice is equally available to all irrespective of their cultural background or the

[13] The Council hopes to issue guidelines for use by courts in relation to these issues later this year.

language they speak. The achievement of that objective motivated the Council to embark upon each of the projects to which I will now turn.

## Justice for CALD and indigenous women

With financial support from the Commonwealth Office for Women,[14] the Council is undertaking a project aimed at strengthening the capacity of Australian courts to provide access to justice for women facing cultural and linguistic challenges. Although the project was not specifically focused upon family violence and family law issues, perhaps unsurprisingly, research and consultation showed that these are the two areas in which women most commonly come into contact with the justice system. The attention given to issues associated with family violence is timely, given the long overdue focus of public attention upon this important issue, facilitated by the two most recent Australians of the Year - Rosie Batty and David Morrison, and the recent report of the Victorian Royal Commission into the subject chaired by the Hon Marcia Neave AO.

The Council's project involves three phases:

- Research and consultation;
- Development of a framework of best practice guidelines and protocols for use by courts throughout Australia;
- Advice on training packages for judicial officers and court administrators relating to gender, culture and family violence.

[14] Augmented by executive resources generously supplied by the MCA.

The first phase of the project is complete, and we are partway through the second phase, having published a draft framework which will be the subject of consultation with interested parties.

## Research and Consultation

It soon became apparent that although there was likely to be a significant overlap between the issues confronting indigenous women and women from CALD communities when they come into contact with the justice system, there are also significant differences. For that reason, during the research and consultation phase of the project, the issues confronting indigenous women were addressed separately from those confronting women from CALD communities. Separate reports have been published in relation to each group and are available on the Council's website.[15]

The following portions of this paper draw upon the published reports. The full reports make very interesting reading, and are highly commended to all with an interest in this important area.

### CALD women - research

#### *Data relating to family violence*

Before undertaking consultations, the existing literature relating to the experience of CALD women in Australia's justice system was surveyed.

[15] www.jccd.org.au

The literature relating to family violence generally establishes that one very significant characteristic of such violence is under-reporting, the precise extent of which is, almost by definition, very difficult to estimate. It follows that data relating to the prevalence of family violence in Australia cannot be relied upon to establish the precise extent of the phenomenon, or even comparative trends over time, because it is impossible to know whether increases or decreases in reports are due to increases or decreases in prevalence, or to increases or decreases in reporting rates. For the same reason, data relating to the prevalence of family violence amongst people from English-speaking backgrounds as compared to people from non-English speaking backgrounds does not provide a reliable guide to the comparative prevalence of violence experienced by those groups.

However, the literature does establish that family violence in CALD communities can have particular characteristics including:

- Migrant and refugee women are more likely to move in with their husband's family after marriage and suffer abuse from their in-laws and other extended family members;
- Migrant and refugee women are particularly vulnerable as a result of their immigration status, which may in turn limit their capacity to access welfare;
- Issues relating to dowry and bride price can result in violence;
- Migrant and refugee women are more likely to be vulnerable to forced marriage and female genital mutilation or cutting;

- The literature reports increasing evidence of human trafficking for sexual and domestic servitude.

The difficulties confronting CALD women who are victims of family violence, with or without these particular characteristics, are often exacerbated by linguistic difficulties, the lack of an independent rental history, lower employment rates, lack of transport, lack of friend or family support, social isolation or, perhaps, cultural ostracisation, barriers to accessing welfare, lack of understanding of the Australian legal system and lack of an awareness of available support systems.

The research indicates that perpetrators of family violence often exploit the particular vulnerability of CALD women as a result of the combination of one or more of these disadvantages.

**CALD women - consultation**

The consultation phase of the project relating to CALD women involved the engagement of CALD women from all regions of Australia in focus groups. The outcomes of those consultations have been presented in three key areas:

- Barriers to reporting family violence;
- Communication barriers - working with interpreters;
- Attending court - barriers to full participation

***Barriers to reporting family violence***

The focus groups consistently revealed that women from CALD communities face particular barriers to reporting family violence as a

consequence of their backgrounds.[16] The barriers most consistently reported were:

- Lack of legal knowledge and understanding, including the lack of a realisation that they were being subjected to behaviour which is not acceptable by contemporary Australian standards, a lack of comprehension of the Australian justice system and its capacity to protect victims of violence, and a lack of understanding of Australia's family law system resulting in fear that children will be taken away if family violence is reported;
- The lack of financial independence, often exacerbated by language barriers, lower education levels making it difficult to obtain work or manage finances, visa status which precludes working, visa status which precludes access to welfare, all of which can make it difficult for CALD women to leave a violent relationship;
- The importance of integrated support services so that, for example, legal, settlement and domestic violence service providers have a better appreciation of the issues arising from family violence, including in particular training of case workers on legal issues;
- Poor police responses, including failure to encourage reporting, failure to engage an interpreter where required, lack of understanding of the impact of culture and failure to enforce intervention or restraining orders;

[16] Although some of these barriers might also be experienced by women in the cultural mainstream.

- The impact of pre-arrival experiences including a history of torture and trauma inducing, perhaps, post-traumatic stress disorder or lack of trust in police and the courts;
- Community pressures arising from cultural stigma relating to divorce and family breakdown, or which assume the subordination of women;
- Uncertainty about immigration status and fear of deportation in the event of family breakdown including the possible loss of Australian born children;
- The cost of securing legal representation in order to render the Australian legal system comprehensible.

***Communication barriers - working with interpreters***

The focus groups consistently reported serious concerns with respect to the use of interpreters, including key issues with respect to:

- Lack of clarity about responsibility for engaging the interpreter;
- Failure to assess the need for an interpreter or incorrectly assessing need;
- The lack of training and qualifications of translators sometimes engaged;
- Lack of awareness amongst judicial officers, lawyers, police and others in relation to the proper way of working with an interpreter;
- Failure to ensure that interpreters are appropriate for the individual woman, particularly having regard to gender, the

importance of maintaining confidentiality, and the need for separate interpreters for protagonists in a situation of conflict;

- Unethical or inappropriate professional conduct by interpreters.

***CALD women attending court - barriers to full participation***

The consultations with CALD women consistently showed significant barriers to full participation in the court process by those women. The barriers most frequently reported were:

- The intimidating process of arriving at court, where there is often inadequate signage, even in English;
- Safety concerns while waiting at court arising from inadequate secure waiting areas separating women from alleged perpetrators;
- A lack of understanding of court processes resulting in a failure to adequately engage with those processes;
- Difficulty understanding forms, orders and judgments;
- The dynamics of the courtroom, including the requirement that women must sit in the same room as the alleged perpetrator;
- Lack of cultural awareness by judicial officers and court staff;
- The limited availability of men's behavioural change programmes generally, and culturally appropriate programmes in particular;
- The abuse of court processes by perpetrators.

## Indigenous women - research

As with CALD women, a review of the existing literature relating to the experience of indigenous women in the Australian justice system was undertaken prior to the commencement of consultations.

### *Violence against indigenous women*

The research establishes conclusively that indigenous women are significantly more likely to be victims of violence, including particularly family violence, than non-indigenous women. That violence includes assault, including serious assaults resulting in homicide, sexual assault, and violence towards children. Indigenous women are also over-represented in the data relating to self-harm and suicide. Previous research has also confirmed very high levels of under-reporting of family violence in indigenous communities, and the increasing prevalence of such violence in rural and regional communities, as compared to metropolitan communities. The research also showed an association between family violence and alcohol abuse in indigenous communities, together with cannabis and increasingly, the use of amphetamine type stimulants and prescription medication abuse.

## Indigenous women - consultation

As with CALD women, the consultation phase of the project involved a series of focus groups conducted around Australia. However, in the case of indigenous women, participants in the focus groups were representatives of agencies engaged in service delivery to indigenous

communities, rather than by way of direct engagement with members of those communities.[17]

As with CALD women, the results of the focus group consultations have been reported in three areas:

- Before court - barriers to reporting family violence;
- Communication barriers;
- Attending court - barriers to full participation.

### *Indigenous women: before court - barriers to reporting family violence*

As with CALD women, consultation revealed that indigenous women experience barriers to reporting family violence associated with their indigenous background. The barriers to reporting family violence most consistently reported were:

- The need for greater understanding of the impact of intergenerational trauma, experiences of discrimination and racism, poverty, a past history of abuse, difficulties with literacy, health and mental health issues, and welfare dependency on Aboriginal or Torres Strait Islander women's access to the justice system;
- Fear that reporting violence will result in the removal of children;
- Geographic isolation from police, courts, child protection agencies, support services and welfare agencies;

[17] Although, of course, many of the representatives of the agencies were themselves indigenous women living in indigenous communities.

- Poor police responses including discouraging of reporting and not taking complainants seriously;
- Family and community pressure discouraging women from reporting violence;
- The potential complexity of the inter-related legal issues which confront indigenous women reporting violence, including criminal law, family law, child protection and residential tenancy issues;
- Limited access to legal assistance;
- Lack of legal knowledge and understanding of legal rights.

***Indigenous women: communication barriers - working with interpreters***

The difficulties experienced by indigenous women requiring the assistance of an interpreter reported during the consultation phase were similar to those reported by CALD women, including:

- The lack of funding for indigenous interpreter services;
- Uncertainty with respect to the responsibility for engaging an interpreter;
- The lack of appropriately trained interpreters in many indigenous languages;
- The practical difficulty of obtaining an appropriate interpreter without a connection with one or other of the participants in the dispute;
- Failure to assess when an interpreter is required;

- Lack of knowledge by judicial officers and court staff as to the proper ways of working with an interpreter;
- A failure to appreciate the need to engage separate interpreters for the protagonists in a dispute.

***Indigenous women: attending court - barriers to full participation***

Again, the barriers to full participation in court proceedings reported by indigenous women are similar to those reported by CALD women. The key issues arising from the consultations were:

- The intimidating nature of arriving at court without adequate signage or appropriately staffed reception areas;
- The burden of lengthy waiting times;
- The poor case coordination for women who often have complex legal needs across a variety of criminal, family children's and drug courts;
- The lack of safe and secure waiting areas in which victims can be separated from alleged perpetrators;
- A lack of understanding of the court processes, resulting in failure to adequately engage with those processes;
- Difficulty understanding forms, orders and judgments of the court;
- Courtroom dynamics, including the need to be present in the same courtroom as the alleged perpetrator;
- Lack of cultural awareness by judicial officers and court staff;
- Abuse of court processes by perpetrators.

## The Proposed Policy Framework

Following on from the research and consultation phase of the project, the Council has prepared and published a draft policy framework responding to the issues identified and is currently consulting with interested parties in relation to that draft framework. The key components of the draft include:

- Emphasising the importance of leadership from senior judicial officers and court administrators and the need to adjust court practices and procedures to achieve equal justice for indigenous and CALD women;
- The establishment of cultural diversity committees in each court, charged with various responsibilities including monitoring the implementation of the framework, overseeing judicial education programmes, raising awareness among the judiciary and court staff, coordinating community outreach events, overseeing the development of resources for indigenous and CALD court users and reporting to the Council on progress;
- Improving court engagement with communities, including through community education forums, regular meetings with key stakeholders amongst indigenous and CALD communities, regular visits to communities, court open days and tours, and the celebration of diversity;
- The need for court planning and policies to address issues identified in the consultation phase of the project and to

consider other positive steps such as development of reconciliation action plans;

- The importance of the education of judicial officers and staff in relation to the particular issues which confront indigenous and CALD court users;
- The implementation of employment strategies which would increase the engagement of indigenous and CALD staff members;
- The possible engagement of indigenous and CALD cultural liaison officers to serve courts operating in areas with a significant component of either indigenous or CALD communities;
- Implementing steps to improve the comprehensibility of court processes through education sessions and the provision of easy to read information, including information translated into languages used by significant groups of court users;
- Improving data collection with respect to court use by community members;
- Assessing court satisfaction levels amongst indigenous and CALD court users;
- Supporting the provision of on-site legal and other support services;
- Improving the ways in which courts utilise interpreters;

- Improving signage in courthouses and, where possible, providing secure waiting areas in which victims can be separated from alleged perpetrators;
- Ensuring victims are aware of the option to participate in court hearings through video link from a remote and secure area where this option is available;
- The establishment of key performance indicators to measure progress in the achievement of these objectives.

The consultation phase in relation to the draft framework has only just commenced, and it is therefore quite likely that the final terms of the framework may differ significantly from the current draft, although I would expect those differences to lie in the augmentation of the various policy proposals contained within the framework, rather than the diminution of those proposals.

**Summary - indigenous and CALD women in the Australian justice system**

The research and consultation phase has confirmed that indigenous women and women from CALD communities suffer very significant and specific disadvantages at all levels within the Australian justice system as a consequence of their cultural heritage and linguistic differences and other associated social deprivations. Disadvantages are experienced before the justice system is invoked, and discourage the reporting of family violence, and in the barriers to communication which arise from the inadequate use of interpreters. Further disadvantages arise once the court process has been engaged,

discouraging full participation in that process by women from indigenous and CALD backgrounds.

If the Australian community and the courts take the commitment to the provision of equal justice[18] seriously, it is imperative that action be taken to address these significant disadvantages. The framework which is currently under development by the Council should provide guidance and assistance to courts with respect to the specific steps which might be taken to address the multi-faceted disadvantages experienced by women from these backgrounds.

The next phase of the Council's work in this area will involve the provision of assistance with respect to continuing programmes of education for judicial officers and staff on these important topics.

**The Use of Interpreters in Courts and Tribunals**

The Council's view is that much needs to be done to improve the utilisation of interpreters by courts and tribunals in order to provide equal justice to those who do not have a sufficient command of the English language to adequately participate in court proceedings without the use of an interpreter. This was confirmed by the feedback obtained during the women's project.

In order to address those issues, the Council embarked upon a major project relating to the use of interpreters in courts and tribunals. With the assistance of the MCA, the Council was very pleased to secure the assistance of two consultants with great expertise in this area -

[18] In the sense I have described.

Professor Sandra Hale, Professor of Interpreting and Translation at the University of New South Wales, and the Hon Dean Mildren AM FRD QC, formerly a judge of the Supreme Court of the Northern Territory. The project is being overseen by a Committee chaired by Justice Melissa Perry of the Federal Court of Australia.

The objective of the project is to improve the ways in which courts and tribunals utilise interpreters by developing:

- Australian national standards to be applied when interpreters are used by courts and tribunals;
- Model rules of court for utilisation by courts around Australia;
- A model practice note, again for utilisation by courts around Australia;
- A Code of Conduct governing the work of interpreters engaged to serve in courts and tribunals.

Each of these documents has been drafted and recently reached the point at which they have been made available to interested parties for the purposes of consultation prior to finalisation, hopefully later this year.

**Australian National Standards**

The proposed national standards propose minimum standards to be adopted by courts, judicial officers, interpreters and legal practitioners, and also suggest a number of optimal standards which courts should consider adopting. The minimum standards for courts include standards relating to:

- The adoption of model rules of court;
- The engagement of interpreters where required to ensure procedural fairness;
- The provision of information to the public about the availability of interpreters;
- The training of judicial officers and court staff in the use of interpreters;
- The provision of adequate budgetary resources to engage interpreters where required;
- Systems facilitating the coordination of the engagement of interpreters;
- The provision of support for interpreters including working areas, positioning within the courtroom, and trauma counselling where required.

The optimal standards to which courts might aspire including standards relating to:

- The advance booking of interpreters;
- Arrangements for simultaneous interpreting, including the use of equipment to facilitate simultaneous interpreting;
- Arrangements for team interpreting;
- The provision of professional mentors to interpreters;
- The provision of professional development to interpreters.

The proposed standards relating to judicial officers include minimum standards dealing with:

- The duties of a judicial officer when an interpreter is utilised;
- The desirability of judicial officers ensuring that proceedings are conducted in plain English when interpreters are utilised;
- The training of judicial officers as to the manner in which interpreters should be utilised;
- The training of judicial officers and court staff in the assessment of the need for an interpreter;
- The conduct of proceedings utilising an interpreter.

The proposed minimum standards relating to interpreters include standards with respect to:

- The importance of the interpreter's role as an impartial, professional officer of the court;
- Adherence to the proposed interpreter's code of conduct;
- The specific duties and obligations of interpreters.

The minimum standards proposed for legal practitioners include standards with respect to:

- Assessing the need for an interpreter;
- Advance booking of interpreters where required;
- The terms of engagement of an interpreter where the interpreter is engaged by a lawyer rather than the court;
- The need to adequately brief interpreters in advance of the hearing;
- The use of plain English by practitioners in proceedings which are being interpreted.

## The Model Rules of Court

The Model Rules of Court are intended to provide guidance to courts as to the rules which they might implement in order to ensure the optimal use of interpreters. The model rules deal with the circumstances in which interpreters might be engaged, and the circumstances in which interpreters must be engaged. They also deal with the qualifications required for the performance of the office of interpreter and specify the functions to be performed by the interpreter. The proposed model rules also include an obligation for an interpreter to comply with the proposed code of conduct. The rules also empower the court to give directions with respect to all and any matters associated with the use of interpreters.

## The Model Practice Note

As with the Model Rules, the Model Practice Note is intended to provide guidance to courts as to the practices and procedures appropriately adopted with respect to the engagement and use of interpreters. Subjects addressed in the Model Practice Note include the provision of the code of conduct to any interpreter engaged to provide services to a court, the matters appropriately considered when an interpreter is engaged, the fees to be paid to interpreters, the manner in which proceedings utilising an interpreter are to be conducted, and the implementation of the proposed national standards.

## The Proposed Court Interpreters' Code of Conduct

The proposed Code of Conduct is intended to be adopted by courts and by interpreters engaged to provide services during court hearings. It includes provisions relating to the interpreter's overriding general duty to the court, the obligation of complying with directions of the court, and specific duties in relation to:

- Accuracy
- Impartiality
- Competence
- Confidentiality.

## Flexibility

Although the manner in which I have described these documents might suggest that they impose rigid and prescriptive standards, in fact, they incorporate a degree of flexibility which is necessitated by current circumstances in relation to the provision of interpreters. The most significant of those circumstances is the limited supply of interpreters qualified to a standard appropriate for court interpretation in many languages. Because of that significant circumstance, the proposed national standards allow for differing minimal standards of qualification and experience depending upon the language which is to be interpreted. So, if there are a significant number of fully qualified interpreters in the language to be interpreted, the highest standards of qualification and experience are mandated by the proposed standards.

As the number of accredited interpreters in any particular language diminishes, the minimum standards required also diminish.

Similarly, the standards recognise that in some cases, practical necessity will obviate adherence to generally desirable standards. For example, there are many indigenous languages spoken only by a relatively small number of people. When an interpreter is required in such a language, it may be impossible to obtain an interpreter with a specific qualification in interpretation, or who has no knowledge of or affiliation with any of the parties to the proceedings.

The Council has worked closely with the National Accreditation Authority for Translators and Interpreters (NAATI) in the development of this project, and Mr Mark Painting, the CEO of NAATI has served as a member of the Committee overseeing the project.

**Summary relating to interpreters**

The Council has recognised a clear need for the introduction of professional standards with respect to the engagement and use of interpreters by courts and tribunals. The project currently nearing completion aims to provide assistance to courts and tribunals in the achievement of those professional standards.

The disadvantages suffered by persons involved in court or tribunal proceedings who lack a sufficient command of English to adequately comprehend and participate in those proceedings are so obvious and so profound as to not require any further elaboration by me. If equal

justice is to be provided to such persons, the effective and professional provision of the services of an interpreter is essential. The Council hopes that the work it is doing in relation to this project will help courts and tribunals to achieve this important objective.

## General Summary

The title to this seminar is appropriately optimistic and positive, in its reference to solutions and outcomes. The work of the Council in the two areas I have addressed in this paper - namely, indigenous and CALD women in the justice system of Australia, and the effective use of interpreters by courts and tribunals shows significant deficiencies in current practices and procedures in each of these areas. I hope that in this paper I have shown the steps which the Council is taking to assist courts and tribunals to improve relevant practices and procedures in order to facilitate the achievement of the vital objective of providing equal justice to all in a community enriched by increasing cultural diversity.