

Aboriginal Benchbook
for Western Australian courts
(AIJA Model Indigenous Benchbook Project)
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(Introduction)

Foreword

The gathering of information which could be included in a Benchbook for the judiciary, alerting them to cross-cultural issues which may arise in the course of the conduct of trials involving Aboriginal people and, in particular, criminal trials involving Aboriginal accused persons and Aboriginal witnesses, has been a matter of importance to this Court for some time. The project to produce such a book was taken up by the Australian Institute of Judicial Administration (AIJA) and in June 2000, Ms Stephanie Fryer-Smith was asked to prepare a template for a West Australian Benchbook. The National Aboriginal Cultural Awareness Committee of the AIJA, Chaired by her Honour Judge Yeats of the District Court, approved the template on 26 July 2000.

The need to understand issues in cross-cultural communication is of critical importance in improving access by Aboriginal peoples to justice. That need is reinforced if one considers our adversarial trial process. If the parties before the Court do not have an equal opportunity to adduce evidence, the adversarial system tends to break down. In the context of individuals who may come from different cultural backgrounds, the "opportunity" to present evidence is not limited to the right to call witnesses, but includes the opportunity to present evidence clearly and without the distortion that may result from misunderstanding, or poor communication between the witness and the bench. This is of particular concern in criminal proceedings. Failure by the Court to ensure that both parties have an equal opportunity to adduce evidence raises fundamental questions of human rights and the rule of law.

In legal proceedings the opportunities to misunderstand or misinterpret what a witness has said, or how he or she has said it, are legion. Trial proceedings are largely based on oral communication. Evidence is adduced by direct questioning of witnesses who are then cross-examined. Clear verbal communication between the bench, counsel and the witness is paramount to each party adducing the best possible evidence to assist their cause. Witnesses from different cultural backgrounds run a significant risk of being misunderstood, even if there is legal representation. The legal terms often used in Courtrooms often confuse ordinary persons. Cultural differences need to be taken into account. Ways of explaining an event or answering direct questions that differ from what is ordinarily expected from witnesses have the potential for significant danger of misunderstanding.

In addition to verbal communication, Justices, Magistrates or Judges are required to assess the weight of evidence according to a host of non-verbal aspects of a witness' presentation. For example, whether the witness looks uncomfortable or will not look the judicial officer in the eye. Although there are no formal rules to guide how a witnesses' demeanour should be assessed, such aspects are often used as a key indicator of honesty and reliability.

Understanding issues in cross-cultural communication, as a means of improving access to justice for all peoples, is also a significant aspect of protecting judicial independence and the Rule of Law. Confidence in the justice system can be significantly increased or damaged by the community's perceptions of the judiciary. Where the judiciary is perceived as being unethical or out of touch with the community, the community's confidence in the justice system, and respect for the law are liable to be damaged.

By addressing the concerns of Aboriginal peoples in dealing with the justice system we encourage confidence in the ability of law and the Courts to remain sensitive to community concerns. This is of particular importance in the context the criminal justice system. In 2001, Indigenous prisoners comprised 20 per cent of people in jails. The rate of imprisonment of Indigenous persons was 15 times the non-indigenous rate. The causes of these dramatic differences in arrest and imprisonment rates are numerous. One aspect, however, is how Aboriginal people are dealt with by the criminal justice system.

I commend the AIJA and Ms Fryer-Smith for the work that has gone in to preparing this Benchbook. Misunderstandings or misconceptions that may arise in the course of criminal proceedings, in which an Aboriginal person is a witness or a defendant, can have drastic consequences. Both as a model for other Australian jurisdictions and as a tool for the judiciary in Western Australia, this Benchbook will be invaluable.

THE HON DAVID K MALCOLM AC CitWA
CHIEF JUSTICE OF WESTERN AUSTRALIA

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