

**THE HON T F BATHURST AC  
CHIEF JUSTICE OF NSW\*  
DOING RIGHT BY 'ALL MANNER OF PEOPLE': BUILDING A  
MORE INCLUSIVE LEGAL SYSTEM  
OPENING OF LAW TERM DINNER  
WEDNESDAY 1 FEBRUARY 2017**

## **Introduction**

1. Good evening. It is a pleasure to once again have the opportunity to address you on the occasion of the opening of the law term. Before I begin my address, I would like to acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders, both past and present. Aboriginal and Torres Strait Islander peoples have been custodians of this land for thousands of years. They are central to any discussion of social harmony and inclusivity - two themes I will focus on this evening.

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\* I express my thanks to my Research Director, Sarah Schwartz, for her assistance in the preparation of this address.

2. In 1888, the New South Wales government ordered the police force to prevent Chinese passengers disembarking from a ship which had arrived in Sydney Harbour. Following an application of *habeus corpus* by one passenger, Lo Pak, the Supreme Court found that the detention of the passengers was illegal.<sup>1</sup>

3. Shortly following the Court's decision, the then Premier, Sir Henry Parkes, dismissed the decision as 'technical'. He stated, in inflammatory language that we are perhaps not unfamiliar with today,

“there is one law which overrides all others, and that is the law of preserving the peace and welfare of civil society. Would you talk about a technical observance of the law if a plague was stalking in our midst—if a pestilence was sweeping off our population—if a famine was reducing the members of our households to skeletons?”<sup>2</sup>

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<sup>1</sup> *Ex parte Lo Pak* (1888) 9 LR (NSWR) L 221. See too The Hon JJ Spigelman, 'Opening of Law Term Dinner' (Speech, 29 January 2008).

<sup>2</sup> Sir Henry Parkes, *Fifty Years in the Making of Australian History* (1982) p 383, available at <<http://adc.library.usyd.edu.au/data-2/fed0024.pdf>>.

4. The government maintained this defiance of the rule of law for a considerable period of time, leading Chief Justice Darling to admonish the government's actions as unprecedented and in flagrant disregard of the law.<sup>3</sup> Eventually, the government conceded and released the detainees.
  
5. As stated by my predecessor, Jim Spigelman, it should give us pause that one of the most serious threats to the rule of law in Australia was grounded in xenophobia.<sup>4</sup> However, this story also demonstrates the role of the judiciary and the profession in promoting equality, fairness and the rule of law, in spite of popular sentiment.
  
6. Indeed, judicial officers are required by oath to "do right to all manner of people ... without fear or favour, affection or ill-will".<sup>5</sup>

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<sup>3</sup> *Ex parte Woo Tim* (1888) 9 LR (NSWR) L 493 at 495-6.

<sup>4</sup> Spigelman, above n 1.

<sup>5</sup> *Oaths Act 1900 No 20* (NSW) Fourth Schedule.

7. This precept reflects the fundamental goal of the legal system to give equal access and protection to “all manner of people”, regardless of race, ethnicity, language, socio-economic status, political opinion, gender or sexual orientation.
  
8. That brings me to the title of my address, ‘Doing Right by ‘All Manner of People’: Building a More Inclusive Legal System’. This evening, I will speak about inclusivity in two senses. First, in regard to improving access to justice for Australia’s diverse community, particularly culturally and linguistically diverse people and Aboriginal and Torres Strait Islander people, and second, in regard to improving the inclusivity of our courts for foreign parties and witnesses in international commercial disputes.
  
9. While these groups are not often lumped together, each face unique cultural and linguistic barriers to fully and fairly participating in court proceedings. These barriers are required to be addressed by the judiciary and the profession at large if we are to maintain our commitment to serving “all manner of people”.

10. In this address, I will first discuss the importance of access and inclusion for Australia's diverse community and foreign parties and witnesses. I will then turn to the barriers to access and participation in the legal system that these groups face. Finally, I will discuss a number of ways in which courts are working towards improving inclusivity and some suggestions for innovation in this area.

### **The importance of equal access to justice for Australia's diverse community**

11. For most of you, the importance of equal access to justice is axiomatic. Almost one third of Australia's population were born overseas, the highest proportion in 120 years.<sup>6</sup> While the vast majority of migrants come from the United Kingdom and New Zealand, in the past 10 years, the number of Australians born in non-English speaking countries such as China, India, Italy, Vietnam and Middle Eastern countries has increased.<sup>7</sup>

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<sup>6</sup> Australian Bureau of Statistics, 'Media Release: Overseas born Aussies highest in over a century', 30 March 2016.

<sup>7</sup> Australian Bureau of Statistics, 'Reflecting a Nation: Stories from the 2011 Census, 2012-2013', 21 June 2012.

12. In New South Wales, 23 per cent of the population speak a language other than English at home and 19 per cent were born in a non-main English speaking country.<sup>8</sup> Throughout Australia, 11 per cent of Aboriginal and Torres Strait Islander peoples speak an Australian Indigenous language at home. Language plays an important role in Indigenous communities in communicating culture and tradition.<sup>9</sup>

13. These statistics should be a cause for celebration; the location of this event tonight, Sydney, is internationally recognised as one of the most culturally and linguistically diverse cities in the world.

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<sup>8</sup> The Judicial Commission of NSW, *Equality before the Law Bench Book* (August 2016), available at <<https://www.judcom.nsw.gov.au/publications/benchbks/equality/>>.

<sup>9</sup> See House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our Land Our Languages Report* (2012), available at <[http://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=/atsia/languages2/report.htm](http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=/atsia/languages2/report.htm)>.

14. The diversity of our community means that in order for us to achieve equal justice, the courts and the profession must consider the unique needs of different sections of the community. Reiterating a famous Aristotelian phrase, the High Court has stated that equality before the law “requires, so far as the law permits, that like cases be treated alike ... [and], where the law permits, differential treatment of persons according to differences between them ...”<sup>10</sup> In this sense, equal justice requires us to develop procedures and practices to accommodate particular cultural or linguistic differences that may hinder effective participation in the legal system.

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<sup>10</sup> *Green v The Queen* (2011) 244 CLR 462 at [28] (per French CJ, Crennan and Kiefel JJ); Aristotle, cited in Prof Peter Weston, ‘The Empty Idea of Equality’ (1982) 95(3) *Harvard Law Review* 537, 543.

15. Ten years ago, in his state of the judicature address, Sir Gerard Brennan stated that in order “to maintain the rule of law in a free and confident nation”, the judiciary must meet four requirements:

- First, it must be and be seen to be impartial and independent;
- Second, it must be competent and knowledgeable of the law and its purpose, including accepting and observing limitations on judicial power and, within those limits, “developing the law to answer the needs of society from time to time”;
- Third, it must have “the confidence of the people”; and
- Fourth, it must be “reasonably accessible to those who have a genuine need for its remedies”.<sup>11</sup>

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<sup>11</sup> Sir Gerard Brennan, ‘The State of the Judicature’ (1988) 72 *Australian Law Journal* 33, 33-34.



16. These four requirements are as relevant now as they were one decade ago. They can all be connected to the need for an inclusive justice system. In regard to the first requirement, one aspect of impartiality is that the judiciary possess knowledge of the unique ways in which people might be disadvantaged by court processes and procedures within the existing legal framework. In regard to the second, part of developing the law to answer the needs of society includes responding to the diversity of our population by developing accommodating and inclusive procedures. Third, gaining public confidence requires 'all manner of people' to have confidence that they will be able to utilise the legal system. And the final requirement speaks for itself – like all people, culturally and linguistically diverse Australians, as well as Aboriginal and Torres Strait Islander peoples, have a genuine need for the protection of the law and must be provided with reasonable access to it.

## **The importance of accommodating international commercial litigants in Australian courts**

17. For different but related reasons, it is important that the Australian legal system is accommodating to foreign parties and witnesses. The last few decades have seen an exponential increase in international trade and investment, particularly in the Asia Pacific region. In 1990-1991, Australian exports to ASEAN nations were worth \$8 billion and our two way trade with China was worth \$3.2 billion.<sup>12</sup> By 2014-2015, those figures were more than \$38 billion and \$155 billion, respectively, and China was Australia's largest trading partner.<sup>13</sup>

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<sup>12</sup> Department of Foreign Affairs and Trade, 'Australia's Trade Performance 1990-91 to 2010-11', available at <<http://dfat.gov.au/about-us/publications/Documents/australias-trade-performance-1990-91-2010-11.pdf>>.

<sup>13</sup> Australian Government Department of Foreign Affairs and Trade, 'Australia's trade in goods and services by top 15 partners 2015', available at <<http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Pages/australias-trade-in-goods-and-services-2015.aspx>>.

18. The exponential increase in regional trade across Asia and the Pacific has created a corresponding need for a safe and neutral seat for the resolution of international commercial disputes. While litigation is merely one means by which to resolve such disputes, it has many desirable qualities which necessitate its availability as a dispute resolution mechanism for commercial parties. These include efficiency, cost, transparency and predictability. I will not waste your time waxing lyrical about the benefits of litigation; it is indeed my prerogative as a judge to promote it. Nonetheless, it is clear that the benefits of litigation as a means for resolving transnational disputes require us, as a profession, to identify and meet its challenges.

19. The development of an international reputation amongst our legal institutions of accommodating international commercial parties is a worthwhile objective for our profession. This reputation can only be attained if we analyse the difficulties faced by international parties and witnesses in Australian courtrooms and work towards overcoming them.

20. One distinct challenge that must be overcome is the fact that cultural and linguistic differences may make it difficult for parties to access and understand Australian laws and procedures. As former Supreme Court Judge, Clifford Einstein, stated,

The means by which litigious disputes are resolved, and indeed the substantive laws from which actionable rights spring, are deeply enmeshed with cultural traditions and understandings.<sup>14</sup>

21. Acknowledging and accommodating these different understandings is important to creating a more inclusive legal system, one that will strengthen Australia's position as a leading forum for the resolution of international commercial disputes.

### **Access and participation issues for Australia's diverse community and international commercial litigants**

22. Tonight I will focus on three barriers faced by culturally and linguistically diverse people, including Aboriginal peoples and foreign parties and witnesses, in accessing and participating in our legal system.

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<sup>14</sup> CR Einstein and A Phipps, 'Trends in International Commercial Litigation Part II – The Future of Foreign Judgment Enforcement Law' (Speech, August 2005).

23. The first two, namely, knowledge and understanding of legal rights and court processes and communication barriers, reflect a fundamental requirement of equal justice; that all people be able to understand and be understood in legal proceedings. The third barrier - confidence in the justice system and in judicial institutions - is of central importance to the rule of law.

### **Knowledge and understanding of legal rights and court processes**

24. People have been having difficulty understanding court processes and procedures for many years. In *Bleak House*, Dickens described the litigation process as “such an infernal country-dance of costs and fees and nonsense and corruption as was never dreamed of in the wildest visions of a Witch’s Sabbath.”<sup>15</sup> While I don’t believe that Dickens’ scenes of corruption and inefficiency apply to any Australian courts today, I do acknowledge that the law can be incredibly confusing to non-lawyers, and even to many lawyers.

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<sup>15</sup> C Dickens, *Bleak House* (1853) p 67.

25. We can indeed be needlessly wordy at times. Arthur Symonds once said that if you wished to give another person all right and title to an orange, instead of saying “I give you that orange”, you would have to say,

“I give you all and singular, my estate and interest, right, title, claim and advantage of and in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I the said A.B. am now entitled to bite, cut, suck, or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, and pips, anything hereinbefore, or hereinafter, or in any other deed, or deeds, instrument or instruments of what nature or kind soever, to the contrary in any wise, notwithstanding.”<sup>16</sup>

Of course, a lawyer in Sydney might ask whether the conveyor had transferred the right to make an orange infused latte to be served in a re-purposed jam jar in Surry Hills.

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<sup>16</sup> A Symonds, *Mechanics of Law Making* (1835) p 75; cited in RE Megarry, *A Second Miscellany At Law* (1973) p 285.

26. Jokes aside, it is certainly worrying that in one survey conducted by the Australia Institute, 88 per cent of respondents agreed with the statement that “the legal system is too complicated to understand properly.”<sup>17</sup> That being said, 79 per cent did state that if they had a legal problem, they would know where to get help.<sup>18</sup>

27. Culturally and linguistically diverse parties and witnesses are often at a distinct disadvantage in understanding court processes and procedures, which may be very different to those in their country of origin. Further, the stress of participating in court proceedings is magnified where the justice system is unfamiliar and events occur in a non-native language.<sup>19</sup>

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<sup>17</sup> R Denniss, J Fear and E Millane, The Australia Institute, ‘Justice for all’ (Institute Paper No 8, March 2012) p 22.

<sup>18</sup> Ibid.

<sup>19</sup> See The Hon Wayne Martin AC, Judicial Council on Cultural Diversity, ‘Submission to the Productivity Commission’s Inquiry into Access to Justice Arrangements’ (28 November 2013) p 6, available at <[http://jccd.org.au/wp-content/uploads/2014/07/04\\_Submission\\_to\\_Productivity\\_Commission\\_made\\_by\\_Martin\\_CJ\\_for\\_JCCD.pdf](http://jccd.org.au/wp-content/uploads/2014/07/04_Submission_to_Productivity_Commission_made_by_Martin_CJ_for_JCCD.pdf)>.

28. People with limited English language skills are at a distinct disadvantage when understanding forms, court paperwork, communicating with court staff, participating in court proceedings and understanding court orders.
29. In our legal system, where knowledge of the law is presumed and ignorance is no excuse, the impact of lack of knowledge of the law and court processes is compounded; it increases the likelihood of transgressions and reduces the capacity of “all manner of people” to participate in legal proceedings.
30. One study conducted by Footscray Community Legal Centre, now Western Community Legal Centre, found that many African migrants did not have adequate access to information about the legal system. It found that legal information was often exclusively communicated by family and friends and was often incorrect and unreliable.<sup>20</sup>

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<sup>20</sup> Katie Fraser, Footscray Community Legal Centre, ‘Out of Africa and into Court: The Legal Problems of African Refugees’, June 2009, available at <[http://www.communitylaw.org.au/footscray/cb\\_pages/images/African%20Legal%20service%20Report%20Final.pdf](http://www.communitylaw.org.au/footscray/cb_pages/images/African%20Legal%20service%20Report%20Final.pdf)>.



31. Common legal problems which arose as a result included driving related offences, incurring debts through breaching contracts, particularly those entered with door-knockers, and breaching Centrelink obligations.

32. There is also substantial evidence that Indigenous people are “disproportionately disadvantaged” in accessing the civil justice system. A research project commissioned by the New South Wales Legal Aid Commission found that 70 per cent of Aboriginal participants who identified a dispute with a landlord did not seek legal advice and that only 14 per cent with debt-related problems sought legal advice. While failure to access the legal system may also be a result of lack of confidence in the system, the survey demonstrates that the civil law needs of Aboriginal peoples are unmet and that we must do more to provide accessible legal processes and procedures for Aboriginal and Torres Strait Islander peoples.

## **Communication barriers**

33. In addition to understanding court processes, people from diverse backgrounds can also face barriers in being understood by courts, court staff and legal service providers.
  
34. Language is one of the largest barriers affecting the capacity of people to take advantage of the court system. Poor or improper translation, including a failure to take into account differences in dialects, can lead to erroneous factual findings or miscarriages of justice.
  
35. In international commercial litigation, challenges can arise both from the fact that witnesses may not speak English and due to documentary evidence being in a foreign language. Translations of documents may be poor and crucial information can become 'lost in translation'.

36. As stated by Dr Andrew Bell,

“[m]atters of idiom, cultural dislocation, and the variable quality of translators who, in a hearing, will need to translate both questions and answers all contribute to the possibility that a party’s ‘story’ and evidence will be incomplete or distorted.”<sup>21</sup>

37. This ‘lost in translation’ problem can be a very real one for witnesses and parties. As stated by Bell,

“the foreign language of the relevant transactions or events may be a powerful source of prejudice to a party including one whose exculpatory evidence, as it were, will largely fall to be given in a foreign language by a number of witnesses with all of the difficulties of translation that inevitably arise.”<sup>22</sup>

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<sup>21</sup> Andrew Bell SC, ‘Getting to the Forum: Witnesses in Transnational Litigation’ (2011) 85(9) *Australian Law Journal* 562, 567.

<sup>22</sup> *Ibid* at 566.

38. An Australian case illustrating such difficulties is *PCH Offshore Limited v Dunn (No 2)*,<sup>23</sup> heard by Justice Siopis in the Federal Court. While the case involved a claim by an Australian company against its former CEO, the company's operations were almost entirely conducted in Azerbaijan and Kazakhstan and most of the witnesses resided in Azerbaijan and were Azeri speakers. Problems arose as there were only two potential Azeri interpreters in Australia, neither of whom were NAATI accredited, and one of whom had already been engaged by one of the parties.<sup>24</sup> Further, many important documents in the case were in Azeri and their translations were not easy to follow.<sup>25</sup>
39. Issues of evidence and communication being 'lost in translation' can have even graver results in criminal proceedings. Even where properly trained interpreters are engaged, dialectical differences can lead to errors.

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<sup>23</sup> (2010) 273 ALR 167.

<sup>24</sup> *Ibid* at [124], [131].

<sup>25</sup> *Ibid* at [132].

40. Dr Diana Eades gives a good example of this in a paper she delivered on Aboriginal English. Dr Eades describes a case in the Northern Territory where an Aboriginal witness gave evidence that on a particular night, there was a 'half-moon'. Cross examining counsel sought to discredit the witness's account of the night by noting that there was no half-moon on the particular night in question. Fortunately, an interpreter was present who interjected. It soon became evident that the witness was using an Aboriginal English expression, 'half-moon', to mean what Standard English speakers would refer to as a 'crescent moon'.<sup>26</sup> This case provides a good example of how subtle dialectical differences can have a large impact on the courts perceptions of a witness.
41. Even when translation and interpretation is provided, cultural and linguistic differences can create other communication barriers and affect the way in which evidence is received.

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<sup>26</sup> Dr Diana Eades, 'Telling and retelling your story in court: Questions, assumptions, and intercultural implications' (Speech, 14 October 2007), available at <<http://www.aija.org.au/ac07/Papers/Eades.pdf>>.

42. At a conference I attended a couple of years ago, Justice Rares referred to a paper by Phillip Yang, an international maritime arbitrator.<sup>27</sup> In the paper, Yang noted that most English arbitrators lack proper understanding of Chinese witnesses, including how they communicate and conduct business.

43. He referred to an arbitration in London on which he sat with two retired English judges. They were tasked with determining whether Chinese delegates and a European party had reached an agreement over the sale of six new bulk carriers. The European party claimed that the parties had reached an agreement by signing a pro-forma contract. The Chinese witness who had signed the contract stated that he felt he had “to sign something ... to justify the delegation’s expensive trip to Europe to [his] superior and the State authorities”.<sup>28</sup> The documents subsequent to the trip indicated a clear record of continuous negotiations over outstanding issues.

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<sup>27</sup> Phillip Yang, ‘The Eastern and Western Cultural Influences on Maritime Arbitration and its recent development in Asia’ (2013) *CMI Yearbook 2013*, p 396; referred to in S Rares, ‘Open and Accessible Courts: Community Engagement, Public Education and Awareness’ (Speech, 13 March 2015).

<sup>28</sup> Yang, above n 28, p 401.

44. While his fellow Tribunal members would have found against the Chinese delegates, Yang explained to them the differences between Chinese business methods and European methods. The Tribunal ultimately found that in this case, documentary evidence did not provide the full picture.

45. This story provides just one example of how cultural differences in business practices can impact on a case. Although this example is from an arbitration, the same could equally occur in domestic legal proceedings. While it is important not to overgeneralise, courts have acknowledged that cultural factors can provide context for a witnesses evidence, particularly where evidence might be considered unreliable.<sup>29</sup>

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<sup>29</sup> *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588 at 618; *Ak-Tankiz v Ak* [2014] NSWSC 1044 at [68]; *Videski v Australian Iron and Steel Pty Ltd* (unreported, NSWCA, 17 June 1993) at 6, 9. See too The Hon E Kyrou, 'Judging in a multicultural society' (2015) 24 *Journal of Judicial Administration* 223.

46. For example, witnesses may be from a culture where direct eye contact is considered challenging or offensive, witnesses may pause before speaking as a sign of respect for court processes and it has been well documented that both Aboriginal people and other linguistically diverse people might answer yes to a question regardless of whether they understood the question or agreed with it.
47. It is important for both judges and legal professionals to be aware of the ways in which culture can influence communication, so as to prevent misunderstandings and erroneous findings of unreliability or evasiveness.<sup>30</sup>

### **Confidence in the legal system**

48. The final barrier I will discuss, confidence in the legal system, is related to the first two. A lack of understanding of court processes and procedures, communication difficulties and other factors can result in diminished confidence in the legal system.

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<sup>30</sup> See Kyrrou, above n 30, p 224.



49. The public's confidence in the judicial system is not merely important because judges want to be liked. Indeed, we would be fighting an uphill battle in that respect. We are accustomed to criticism and disdain by disgruntled litigants, and this has a very long history. One obscure historical example that I came across was a case before Malins V.C. in the 19<sup>th</sup> century. After having been committed, the defendant is said to have thrown an egg at Sir Richard Malins, which broke on the wooden canopy behind his seat. Malins responded, "that must have been intended for my brother Bacon".<sup>31</sup> Bacon V.C was sitting in another court on the same day.

50. But apart from disgruntled litigants, broad community confidence in the administration of justice is of central importance to the functioning of the justice system and the maintenance of the rule of law. It is critical to the willingness of victims to report crimes, to the readiness of witnesses to testify, to the peaceful acceptance of verdicts – even those which are vehemently disagreed with – and to compliance with court orders.

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<sup>31</sup> Megarry, above n 17, pp 70-71.

51. The history of dispossession and colonisation affecting Australia's Indigenous population has led to a complex relationship with Australian law. As stated by the Chief Justice of Western Australia, Wayne Martin,

“The imposition of colonial law and the dismantling of Indigenous ‘Lore’ has resulted in significant mistrust of the legal system ...”<sup>32</sup>

52. The Judicial Council on Cultural Diversity, which I will refer to in more detail shortly, found that Aboriginal and Torres Strait Islander women may have a “legacy of trauma”, fear of reporting violence and history of institutional discrimination, making them fearful or distrustful of the justice system.<sup>33</sup>

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<sup>32</sup> Martin, above n 20, p 1. See too Judicial Council on Cultural Diversity, ‘The Path to Justice: Aboriginal and Torres Strait Islander Women’s Experience of the Courts’ (Report, 20 March 2016) p 17, available at <[http://jccd.org.au/wp-content/uploads/2016/04/JCCD\\_Consultation\\_Report\\_-\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Women.pdf](http://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf)>.

<sup>33</sup> Ibid pp 16-23.

53. It also found that migrant and refugee women may lack confidence in legal processes due to the adverse impacts of pre-arrival experiences, such as persecution by authorities, as well as financial dependence and concerns regarding immigration status.<sup>34</sup>

54. For international commercial litigants, confidence in the Australian justice system means that Australia is seen as an appropriate forum for the resolution of international commercial disputes.

55. With these access and participation barriers in mind, let me now turn to the ways in which courts are working towards improving inclusivity and some suggestions for innovation in this respect.

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<sup>34</sup> Judicial Council on Cultural Diversity, 'The Path to Justice: Migrant and Refugee Women's Experience of the Courts' (Report, 20 March 2016) pp 18-28, available at <[http://jccd.org.au/wp-content/uploads/2016/04/JCCD\\_Consultation\\_Report\\_-\\_Migrant\\_and\\_Refugee\\_Women.pdf](http://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Migrant_and_Refugee_Women.pdf)>.

## **Measures to improve inclusivity and access**

### **Understanding barriers through research and education**

56. First and foremost, if courts and legal service providers wish to address issues of trust and improve inclusivity, we must focus our attention on understanding barriers faced by diverse sections of the community. One of the functions of the judiciary is to ensure that, as far as possible, court proceedings are fair and impartial. In fulfilling this function, judges may have to assess potential disadvantages suffered as a result of linguistic and cultural differences and intervene to ensure fairness. The assessment of such disadvantage requires that judges, as well as other court staff, be aware of factors productive of inequality.<sup>35</sup> This is where research and education come in. A judiciary which is more aware of cultural nuances and the ways in which people can be hindered in their access to justice is more likely to take steps to ensure that people are properly informed of court processes and procedures and that all communication is properly understood.

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<sup>35</sup> See The Hon Jon von Doussa QC, 'Launch of the Supreme Court Equal Treatment Benchbook' (Speech, 15 February 2006), available at <<https://www.humanrights.gov.au/news/speeches/launch-supreme-court-equal-treatment-benchbook>>.

57. In this State, there are currently a range of education programs on offer in this respect, most provided by the Judicial Commission of New South Wales. I have personally benefited from this training and so have my fellow judges, with judges in New South Wales spending an average of 5 days a year in education programs.<sup>36</sup>
58. Of particular note, the Ngara Yura program, developed in response to the final recommendations of the Royal Commission into Aboriginal Deaths in Custody, seeks to raise judicial awareness of Aboriginal culture and interactions with the justice system.<sup>37</sup>

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<sup>36</sup> The Judicial Commission of New South Wales, 'Annual Report 2015-16' (November 2016) p 31, available at <<https://www.judcom.nsw.gov.au/annual-report-2015-2016/>>.

<sup>37</sup> The Judicial Commission of New South Wales, 'Ngara Yura Program', available at <<https://www.judcom.nsw.gov.au/education/ngara-yura-program/>>.

59. Ten years ago, the Commission published the *Equality Before the Law Bench Book*, which has since been updated numerous times. The Bench Book is a looseleaf reference setting out information on the diversity of the New South Wales population, the importance of perception and the avoidance of bias, as well as practical considerations relating to the use of the justice system by Aboriginal peoples, people from culturally and linguistically diverse backgrounds, people with religious affiliations, children and young people, women, LGBTQI people, gender diverse people and self-represented parties.

60. Other more informal education initiatives exist in the form of seminars and conferences. The Supreme Court's Annual Conference for judicial officers has always featured lectures on the specific needs of diverse sections of the community. Other conferences, such as a Conference I attended in 2015 on Cultural Diversity and the Law, seek to promote discussion between judicial officers and community members about access issues.

61. At the forefront of many recent initiatives in this area is the Judicial Council on Cultural Diversity. The Council was established in 2014 as an independent advisory body tasked with assisting Australian courts, judicial officers and administrators with positively responding to evolving community needs arising from Australia's cultural diversity. The Council reports regularly to the Council of Chief Justices and provides policy advice and recommendations to it. The Council is predominantly composed of judges who represent all Australian jurisdictions and court levels, as well as other legal and community body representatives.<sup>38</sup>

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<sup>38</sup> Judicial Council on Cultural Diversity, 'About Us', available at <<http://jccd.org.au/>>.

62. Last year, the Council completed four significant projects. In February, it released a study on existing resources that support Australian courts to deliver services to culturally diverse clients.<sup>39</sup> In March, it published two reports, one on access to justice for Aboriginal and Torres Strait Islander women and one on access for migrant and refugee women.<sup>40</sup> These reports focus on family violence and family breakdown. In compiling these reports, the Council held a national consultation process with a range of stakeholders, including community and legal representatives. The Council is currently in the process of developing a National Framework for enhancing access to justice for these groups. The Framework consists of best practice guidelines, resources and protocols to be used by courts in Australia.

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<sup>39</sup> Judicial Council on Cultural Diversity, 'Cultural Diversity Within the Judicial Context: Existing Court Resources' (Report, 15 February 2016), available at <[http://jccd.org.au/wp-content/uploads/2016/02/JCCD\\_Cultural\\_Diversity\\_Within\\_the\\_Judicial\\_Context\\_-\\_Existing\\_Court\\_Resources.pdf](http://jccd.org.au/wp-content/uploads/2016/02/JCCD_Cultural_Diversity_Within_the_Judicial_Context_-_Existing_Court_Resources.pdf)>.

<sup>40</sup> Judicial Council on Cultural Diversity, above n 33 & 35.



63. In June, the Council also released a public consultation draft of Australian National Standards for working with interpreters in courts and tribunals.<sup>41</sup> I will speak about this in further detail shortly.

64. I very much look forward to continuing to work with the Council and to implementing the recommendations made in its reports. The consultations engaged in by the Council are to be commended and continued. Judges alone are not in a position to assess whether the justice system is serving the needs of the wider community. It is important for courts to develop links with diverse communities and to facilitate ongoing consultation and communication about their specific needs.

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<sup>41</sup> Judicial Council on Cultural Diversity, 'Public Consultation Draft – Australian National Standards for Working with Interpreters in Courts and Tribunals' (16 June 2016), available 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)>.

65. One of the major initiatives of the Council has been to commission specialised training for judicial officers and court staff to respond to the needs of diverse court users. I welcome the partnership between the New South Wales Judicial Commission, the Judicial College of Victoria, the National Judicial College, the Australasian Institute for Judicial Administration and the Family Court of Australia for the development of a cultural diversity online training program for judicial officers. The program is expected to launch in May of this year.

66. Similar programs should also be developed for legal service providers, including members of the profession, and court staff, in particular registry staff, who often act as a first point of contact for persons wishing to access the justice system.<sup>42</sup>

### **Overcoming communication barriers through interpreters**

67. The second way in which Courts can overcome communication barriers is through better provision of interpreter and translator services.

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<sup>42</sup> See The Hon Chief Justice Robert French AC, 'Equal Justice and Cultural Diversity: The General Meets the Particular' (2015) 24 *Journal of Judicial Administration* 199, 206.

68. While courts have discretion to determine whether it is appropriate for an interpreter to be made available,<sup>43</sup> common practice suggests that courts generally err on the side of caution. They take into account the fact that while a person may be able to perform social or business tasks in English, they may not be able to present evidence in English in a courtroom. As stated by Justice Kirby,

“[a] relationship in which the speaker is in command (as when dealing with friends or purchasing or selling goods and services) is quite different from a potentially hostile environment of a courtroom. There, questions are asked by others, sometimes at a speech and in accents not fully understood.”<sup>44</sup>

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<sup>43</sup> See *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 at 80, 84.

<sup>44</sup> *Ibid* at 80.

69. One of the current projects of the Judicial Council on Cultural Diversity is the development of National Standards relating to the use of interpreters in the court room.<sup>45</sup> The Standards are intended to be flexible and to apply across a range of court settings. They provide guidelines for assessing the need for an interpreter, minimum standards to be met by interpreters and support and assistance provided to interpreters. The Standards are accompanied by Model Rules, which include a Court Interpreters' Code of Conduct and a Model Practice Note.

70. The Standards have been revised and amended following a series of extensive consultations with the interpreting community, judges and legal service providers. The final draft is expected to be launched early this year. I am confident that working towards the adoption of these standards will improve access to justice and procedural fairness for linguistically diverse court-users. The Standards also promote a closer relationship between the courts, the legal profession and the interpreting profession.

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<sup>45</sup> Judicial Council on Cultural Diversity, above n 42.

71. I echo the Council's findings that the use of plain English is a vital component in effectively engaging with interpreters. The use of plain English in all proceedings also goes a long way to creating a more accessible and inclusive legal system.

72. There are many other possibilities that we can explore in regard to overcoming language barriers. It is interesting to look at what other jurisdictions around the world are doing in this respect. For example, in 2011, the Paris Commercial Court (*Tribunal de Commerce*) established an international division to be staffed with nine judges who speak foreign languages such as English, German and Spanish. The express aim was to make French courts more attractive to international commercial litigants. While these commercial courts virtually never hear witnesses, the judges of the new international division are able to read documents in several foreign languages and are able to better grasp the subtleties of a document and its economic meaning.<sup>46</sup>

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<sup>46</sup> See G Cuniberti, 'Paris, the Jurisdiction of Choice?', *Conflict of Laws .net*, 2 February 2011, available at <<http://conflictoflaws.net/2011/paris-commercial-court-creates-international-division/>>.

73. Similar initiatives exist in German Courts of First Instance in Hamburg and Köln. These courts established “international chambers” in 2009 which permitted the hearing of cases in English.<sup>47</sup>

74. I am not suggesting that such an approach would necessarily be appropriate in the Australian context. However, it is useful to look to other jurisdictions to see how they overcome linguistic barriers, particularly as the world becomes more and more interconnected. Enhancing the inclusivity of our court system, through the provision of better interpretation and translation services is both beneficial in ensuring that Australia’s multicultural population is able to have equal access to justice and ensuring that our courts remain accommodating to international commercial litigants.

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<sup>47</sup> Ibid.

## **Community engagement**

75. The third way in which courts can improve their inclusivity is by actively engaging with the wider community. While traditionally, judges have been reticent to engage in public discussion, I think that the days in which the judiciary can solely communicate to the public through judgments is gone. I regret to inform my fellow judges here tonight that very few people actually read the decisions that we spend so long considering and crafting. Courts must take an active role in explaining what we do and why. This is important for the maintenance of public confidence in our processes and procedures.

76. The Supreme Court has been working hard to facilitate better community understanding of our work. For example, the Court now produces summaries of important judgments which provide an overview of the reasoning behind a particular decision in a simple and concise fashion. Links to these summaries and to the judgments themselves are published on the Court's Twitter and Facebook accounts, along with a brief sentence or two stating the final result. The aim is to allow the community and media to readily access and digest judgments of interest.

77. I do admit that our five and a half thousand followers are not much in the twitter stakes. Apparently Lord Voldemort has over 400 times more followers and Depressed Darth Vader has 144 times more followers. Nonetheless, I still do think that the court's account plays an important role in disseminating important legal information to members of the community – far more noble than disseminating dark magic or fighting for an evil galactic empire, albeit quite sadly.

78. In the past few years, the Court, in conjunction with the Bar Association, and with the support of the Law Society, has also hosted seminars on the process of judicial decision making in criminal matters. The seminars include an explanation by judges of the sentencing process and also answer questions and address any concerns. I hope to have seminars on this topic and other topics in the future. Engagement such as this should serve as a sign to the community that the judiciary is ready and committed to better explaining how we function and listening to community concerns.



79. Another initiative, developed by the Judicial Commission, is the Community Awareness of the Judiciary Program. The Program provides community representatives with the opportunity to learn more about the work of the courts. I also note the hard work of organisations such as the Legal Aid Commission, which provide an extensive range of community legal education programs to diverse communities.

### **Global Engagement**

80. In addition to community engagement, both the Courts and the profession have made substantial efforts toward enhancing our global engagement. Now, more so than ever, we operate in an internationalised legal environment. A large number of law firms provide international services, either through mergers with foreign firms or by establishing a presence in overseas markets.

81. Young lawyers seem eager to practice in locations around the world, including in the Asian offices of Australian firms and in London and, increasingly, New York. I myself have former Tipstaves and Researchers who have gone to work in New York, Haiti and Washington DC. It sometimes seems as if they will do anything so that they don't have to attend Christmas drinks and listen to me rabbit on about recent developments in corporations law.

82. Over 27 per cent of legal practitioners in New South Wales were born overseas and of those, approximately 41 per cent were born in Asian countries.<sup>48</sup> Both overseas born lawyers and lawyers who have practiced overseas increase our profession's global orientation and familiarity with diverse cultural and commercial practices. This strengthens the ability of Australian lawyers to conduct and represent foreign clients in international commercial litigation. The profession should make efforts to remain inclusive towards lawyers who bring diverse and global experiences.

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<sup>48</sup> The Law Society of New South Wales, '2015 Profile of the Solicitors of NSW – Final Report' (Report, May 2016), available at <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1149382.pdf> p 9.

83. Australian lawyers and judges have been instrumental in bringing together members of the profession throughout Asia, and indeed globally. For example, LawAsia, an international organisation of lawyers' associations, lawyers, judges and legal academics, was a project of the Law Council of Australia. Since it was founded in 1966, LAWASIA has served as a platform for the cross-jurisdictional exchange of legal information and for encouraging adherence to the rule of law, the protection of human rights and high standards of legal practice.<sup>49</sup>

84. I currently serve as the chair of the judicial section of LAWASIA. In this capacity, I organised the 16<sup>th</sup> Conference of Chief Justices of Asia and the Pacific, held at the Supreme Court in 2015. This conference, held biannually, provides an invaluable opportunity for Chief Justices throughout Asia and the Pacific to exchange views and information and promote the rule of law.

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<sup>49</sup> The Law Association for Asia and the Pacific, 'About LAWASIA', available at <[http://www.lawasia.asn.au/who\\_we\\_are.html](http://www.lawasia.asn.au/who_we_are.html)>.

85. In 2008, Jim Spigelman, in a joint venture with the High Court of Hong Kong, hosted the first Judicial Seminar on Commercial Litigation at the Supreme Court. The objects of the seminar were first, “to enhance the understanding of the judiciary of one nation about the practices of other nations, in order to enable judges to make decisions on cases involving cross border disputes” and second, “to strengthen the prospect of cooperation between courts which is often required when cross border issues arise.”<sup>50</sup> These seminars have continued biannually, the next one to be held in Sydney in 2018.

86. Over the past 5 and a half years that I have been Chief Justice, I have had the opportunity to witness the extensive global engagement of the Supreme Court. This includes sending and receiving judicial delegations, attending and speaking at conferences and events with a focus on international law, negotiating formal MoUs between the Supreme Court and overseas courts and speaking at and attending international conferences.

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<sup>50</sup> The Hon JJ Spigelman, ‘Cross Border Issues for Commercial Courts’ (Speech, 13 January 2010).

87. Last year, I attended and spoke at 6 international conferences and events in Singapore, Sri Lanka, Papua New Guinea, Japan, London and Hong Kong. As Chief Justice, I have had the opportunity to meet officials from Spain, the People's Republic of China, Japan, Guatemala, Bangladesh, South Africa, Hong Kong, Paris, the Czech Republic, the Philippines, the United Arab Emirates, Egypt and Jordan.
88. The Supreme Court has also negotiated formal MoUs with the Supreme Court of Singapore, the Chief Judge of the State of New York, the High Peoples Court of Shanghai, the High Peoples Courts of the Hubei and Guangdong Provinces in China and the Dubai International Finance Centre Courts on topics including judicial exchange, procedures for consultation with the courts of the other party and cooperation when determining questions of the law of the other party.
89. I by no means wish to suggest that the Supreme Court is the only court engaging globally. The High Court has been involved in the governance and work of the Asian Business Law Institute and recently led a judicial delegation to the Supreme People's Court of the People's Republic of China.

90. The Federal Court is the preferred tenderer for the new five year Pacific Strategic Justice Initiative and has entered into a MoU with the Supreme Court of Indonesia which focuses on commercial dispute resolution, insolvency and commercial contracts. The Family Court is also commencing work with Vietnam, funded by UNICEF.

91. This global engagement by judges and members of the profession enhances our commitment to inclusivity and equal justice. It also plays an important role in facilitating dialogue, allowing judges and members of the profession to share experiences, discuss reform initiatives and reaffirm the basic conditions that are essential to maintaining a justice system of the highest standard. It allows us to create a common vision for judicial development that supports mutual understanding and can inform future directions for judicial systems in our region.

92. An additional benefit is the promotion of uniformity between laws. There have been numerous calls over the years for greater legal convergence in the Asia-Pacific region, including by myself.<sup>51</sup> Whether this be greater convergence between domestic bodies of law or a harmonised body of international law striving for the status of a *lex mercatoria*, the advantages are self-evident. A better understanding between countries of their respective legal systems will assist, where possible, in the development of harmonised legal principles and practices, which can in turn lead to greater certainty for those who approach the courts. Furthermore, a consistent body of law regulating commercial disputes helps to secure legitimacy and confidence in courts in the resolution of such disputes.

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<sup>51</sup> See, e.g. The Hon T F Bathurst, 'The Importance of Developing Convergent Commercial Law Systems, Procedurally and Substantively' (Speech, 28-30 October 2013).

## Conclusion

93. In conclusion, multicultural diversity continues to be a defining feature of modern Australia, and one that we can be proud of. The 2016 Scanlon Foundation's Mapping Social Cohesion report found that an overwhelming majority of Australians, 83 per cent, believe that multiculturalism is good for the country.<sup>52</sup> A clear majority also believed that immigration levels were either 'about right' or 'too low'.<sup>53</sup> These numbers provide the best indication that Australia is a country committed to diversity and inclusivity.

94. However, there are also findings in the report that should give us pause. There has been an increase in people reporting discrimination, with the highest levels of discrimination reported by people from non-English speaking backgrounds.<sup>54</sup> As a profession, we must work together to give a voice to those who are marginalised in order to ascertain what barriers they face in fully participating in our legal system.

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<sup>52</sup> Professor Andrew Markus, Scanlon Foundation, 'Mapping Social Cohesion The Scanlon Foundation surveys 2016', p 50, available at <http://scanlonfoundation.org.au/wp-content/uploads/2016/11/2016-Mapping-Social-Cohesion-Report-FINAL-with-covers.pdf>.

<sup>53</sup> Ibid pp 37-39.

<sup>54</sup> Ibid pp 25-28.



95. If the profession is to develop relationships of trust with diverse communities, we must not only engage in consultations, but we must act on recommendations.

96. In regard to international commercial litigants, the globalisation of dispute resolution has placed a burden of cultural competency and inclusivity on our profession and we must adapt to meet these changes.

97. It should be acknowledged that courts alone cannot deal with all of the barriers I have discussed today. As stated by Chief Justice French,

“... courts have a distinctive constitutional function which is necessarily a limited one. They are not, and cannot be, holistic service providers. They deal with and decide cases brought before them as the law requires. They can nevertheless aspire to shape the ways in which they do that so as to maximise access to justice, notwithstanding diversity.”<sup>55</sup>

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<sup>55</sup> Chief Justice Robert French, ‘Judicial Council on Cultural Diversity National Roundtable – Access to Justice for Culturally and Linguistically Diverse Women Opening Remarks (Speech, 24 June 2015), p 3.

98. It is also clear that enhancing access to legal services and addressing these barriers will have cost implications. The support of the wider legal community and the executive is crucial to ensure that we have adequate funding to adapt and remain inclusive. Legal Aid Commissions and Community Legal Centres must also be adequately funded to meet the needs of the wider community. These institutions are an essential layer in the support structure that endeavours to facilitate access to our legal system for Australia's diverse community.

99. This year marks a quarter of a century since the high court's decision in *Mabo* – a decision which marked a turning point in the law's recognition of the unique legal rights of Aboriginal and Torres Strait Islander peoples. Since *Mabo*, the legal profession has seen a greater push toward recognising the unique issues faced by diverse groups in accessing the legal system.

100. A few months ago, the Commonwealth Attorney-General announced that he would ask the Australian Law Reform Commission to examine the factors leading to Indigenous overrepresentation in our prison system. I hope that this inquiry will provide an opportunity for the legal system, as well as the wider community, to reform the ways in which we cater to the needs of Indigenous Australians and produce better outcomes.

101. While our commitment to the core values of the legal system and the integrity of our legal institutions must not change, we must, as a profession, expand and adapt our way of doing business in order that our fundamental commitment to access to justice and equality before the law remains paramount. It is also important that the profession engage and support law reform in areas where current legislation and regulation are inappropriate in today's society. In that context I would like to note that the New South Wales Law Reform Commission celebrates its 50<sup>th</sup> anniversary at this time and continues to do much work in this area.

102. On a slightly more gloomy note is the dismantling of the Corporations Market and Advisory Committee whose reports over the years provided much guidance and impetus to law reform in the corporations and securities area. Its last discussion paper was issued in March 2014 and it is to be hoped that this in fact was not its swansong.

103. What I think all this demonstrates is that, with one in four Australians born overseas and an increase in Australia's engagement in international commercial transactions, the legal profession and the courts in particular have the potential to become leaders in the way we ensure that "all manner of people" have equal access to our judicial institutions. We certainly have the obligation to endeavour to ensure that this occurs.