Submission to the Productivity Commission's

Inquiry into

ACCESS TO JUSTICE ARRANGEMENTS

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EXECUTIVE SUMMARY

In addition to our rich Indigenous cultures, Australia is a nation built on the migrant experience and consequently is one of the most diverse countries in the world, speaking more than 300 languages, including Indigenous languages, identifying with more than 300 ancestries and observing a wide variety of cultural and religious traditions.[2]

Yet individuals from culturally and linguistically diverse (CALD) backgrounds can experience significant barriers to accessing justice as a result of their circumstances and past experiences. The need for the justice system to recognise, understand and respond to the needs of culturally diverse communities is paramount if accessible, equitable and fair justice is to be delivered to all.

Aboriginal and Torres Strait Islanders have a complex relationship with the law, regrettably grounded in a history of violence and dispossession. The imposition of colonial law and the dismantling of Indigenous 'Lore' has resulted in significant mistrust of the legal system by many within Indigenous communities across the country.

There is also evidence to suggest that trust in the legal system may be declining among migrants. New arrivals that have experienced persecution and corruption under the law of the country they have previously resided in, may have reduced confidence in the courts. Their capacity to overcome this mistrust can be hindered by a lack of resources in languages other than English and a lack of outreach to CALD communities.

Some newly arrived migrants are particularly disadvantaged in a system where defined knowledge of the law is presumed and where ignorance is no excuse. A lack of understanding of Australian law, often fundamentally different to the law of their country of origin, not only increases the likelihood of transgressions, it reduces the overall effectiveness of the justice system.

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[2] Australian Bureau of Statistics, *1301.0 Year Book Australia, 2009-10*, 'Australia's Cultural and Linguistic Diversity' http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article32009%E2%80%9310?opendocument&tabname=Summary&prodno=1301.0&issue=2009%9610&num=&view= (viewed 26 November 2013).

Australian Bureau of Statistics, *2011 Census shows Asian languages on the rise in Australian households*, Media Release, 21 June 2012, http://www.abs.gov.au/websitedbs/censushome.nsf/home/CO-60 (viewed 7 October 2013).

Australian Bureau of Statistics, *2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, 'Cultural Diversity in Australia', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (viewed 7 October 2013).

Language barriers present other issues in the legal system. Being able to understand and be understood in one's own hearing or trial is a fundamental legal right. Yet for those without English proficiency, access to justice is compromised by the cost of interpreter services, lack of adequately skilled court interpreters and a lack of information about court processes in community languages.

Accessibility and procedural fairness require members of the judiciary and court staff to be culturally competent and to understand the communities they serve. There is opportunity to explore case management processes and systems that better link CALD litigants to the support they need, including interpreter services and community support. Moreover, court staff and the judiciary need to be culturally competent, skilled and able to undertake their work without bias.

No two communities are the same. Cultural norms differ and simply translating a foreign concept of justice into a community language is not enough. To remain responsive and relevant to the changing demographics and needs of different CALD communities, courts must design and structure their services and communication accordingly. This objective can only be achieved if courts are properly informed of the cultural and linguistic needs of the diverse communities they serve, and have the resources to respond to those needs.

The courts need to be supported in meeting the needs of their culturally diverse users: increased resourcing for these purposes is urgently required. Equally critical is engagement with the communities with which courts work.

The following recommendations are made as part of this submission:

- That a comprehensive survey of CALD community attitudes, knowledge and barriers to the civil legal system be undertaken to identify priority areas for courts and other components of the system.
- That linkages are built with Indigenous and migrant organisations to enable ongoing consultation.
- That a toolkit for community engagement be developed to help courts orient themselves outwards, to include all CALD communities through outreach and consultation programs.
- That a range of resources in languages other than English be developed and widely distributed within CALD communities, to explain the role and processes of the courts. Specific attention should be given to the development of language resources for Indigenous communities, including material reflective of Aboriginal English, and Aboriginal culture and practices.
- That an analysis be undertaken of the cost of interpreting services and its impact on access to justice.
- That training programmes be developed and delivered to court staff and legal service providers to assist them to recognise the particular needs of court users from CALD communities, and facilitate their referral to agencies with the skills and resources to assist in meeting those needs.

- That a series of round table events be conducted to consult with community leaders on the accessibility of the courts, covering barriers to access and the actions required to overcome them.
- That settlement services include programs to introduce new migrants to the legal system and to provide an overview of how the rule of law operates in Australia.
- That consideration be given to ensuring all courts are adequately resourced to adopt case management approaches that can be tailored to the needs of CALD litigants.
- That national diversity protocols covering uniform interpreter practices, and referrals to support services, be developed for courts.
- That special legal interpreting qualifications be introduced.
- That court specific interpreter protocols be adopted for contracting, engaging, selecting, briefing and assisting interpreters to remove the disadvantage experienced by many CALD court users.
- That cultural awareness and competency programs, particularly addressing attitudes and bias, be developed for courts and their staff.
- That a cultural diversity curriculum be developed for judicial officers in alignment with the National Judicial College of Australia's standards
- That a national bench book on cultural diversity be developed as a readily accessible guide to the kinds of issues that may need consideration by judicial officers to ensure a fair trial for CALD litigants.

INTRODUCTION

The Judicial Council on Cultural Diversity welcomes the opportunity to make this submission to the Productivity Commission's *Access to Justice Arrangements* inquiry.

It is the contention of this submission that legal services – whether provided by the courts or more generally – should be structured and resourced in a manner that enables access and addresses the needs of all Australians, regardless of their cultural or linguistic background. While Australia has greatly benefited from increased cultural and linguistic diversity over recent decades – both in economic and social terms – this growth in diversity has also created challenges in both access to, and delivery of, equitable services.

The Productivity Commission's Issues Paper questions how the Commission could best add value to the ongoing discussion of access to justice in Australia, specifically where reform of the civil dispute resolution system would generate the greatest benefits for the community.

With Australia's multi-language, multi-cultural and multi-faith population, consideration of how Australia's civil legal system operates and its impacts on Australia's culturally and linguistically diverse communities is imperative if the principles of equity and fairness are to be maintained. In particular, the ability of the structures and processes of Australia's courts to adequately service all of Australia's diverse communities must be considered. This submission identifies the barriers that cause issues for culturally and linguistically diverse (CALD) communities, including Aboriginal and Torres Strait Islander communities, when interacting with courts and recommends mechanisms to address them.

This submission focuses on issues of particular interest and relevance to the work of the courts. To this end, the discussion is about adapting policies and procedures in the legal system, and particularly within our courts, to positively respond to Australia's diversity.

The submission does not attempt to address all of the issues raised in the Productivity Commission's issues paper, nor does it advocate changing the content of the law.

Australia's Culturally and Linguistically Diverse Population

Australia today is an extraordinarily culturally and linguistically diverse nation.

According to the Australian Bureau of Statistics (ABS), at the 2011 Census, Australians identified with more than 300 ancestries, over a quarter (27%) of Australia's population were born overseas and a further one fifth had at least one overseas-born parent.[3] 548,400 people identified and were counted as being of Aboriginal and Torres Strait Islander origin, representing 2.5% of the 2011 Census count.[4]

Joining the First Peoples, immigrants have come from all corners of the globe seeking a future in Australia. Since October 1945, more than 7.2 million people have migrated to Australia, with about one million migrants arriving in each of the six decades following 1950.[5] Initially these migrants were drawn from the United Kingdom, Southern and Eastern Europe, with migrants from South-East Asia more prominent since the 1970s.

Patterns of migration remain diverse and changing. Migrants who arrived in Australia in 2010-11 came from over 200 countries. As the Department of Immigration and Citizenship has observed, '[t]he substantial growth in overseas-born residents is changing Australia's ethnic composition'. While the United Kingdom and New Zealand remain the top two source countries for Australia's overseas-born resident population, the People's Republic of China and India are now the third and fourth largest contributors to Australia's overseas-born population.[6] The top 10 countries of birth of Australia's overseas born population in 2011 were the United Kingdom, New Zealand, China, India, Vietnam, Italy, Philippines, South Africa, Malaysia and Germany.[7] Notably, English is not the first language in eight of these 10 countries.

The diversity of source countries in Australia's migration program and the increasing proportion of Australia's overseas-born population have in turn contributed to Australia's linguistic diversity:

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[3] Australian Bureau of Statistics, *2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, 'Cultural Diversity in Australia', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (viewed 7 October 2013).

[4] Australian Bureau of Statistics. (2012). *Aboriginal and Torres Strait Islander Peoples - identification by Australia and state/territory* (2011 and 2006). Australian Bureau of Statistics Census Fact Sheet, http://www.abs.gov.au/websitedbs/censushome.nsf/home/mediafactsheetsfirst/$file/Census-factsheet-Indigenous-national.doc (viewed 26 November 2013).

[5] Department of Immigration and Border Protection, *Fact Sheet 2 – Key Facts About Immigration,* June 2012, http://www.immi.gov.au/media/fact-sheets/02key.htm (viewed 7 October 2013).

[6] Department of Immigration and Citizenship, *Australia's Migration Trends 2011-12*, May 2013, 'Table 7.2 - Country of birth of Australia's overseas-born resident population, 1996 and 2011, http://www.immi.gov.au/media/publications/statistics/immigration-update/australian-migration-trends-2011-12.pdf (viewed 7 October 2013).

[7] Department of Immigration and Citizenship, *Australia's Migration Trends 2011-12*, May 2013, 'Table 7.2 - Country of birth of Australia's overseas-born resident population, 1996 and 2011, http://www.immi.gov.au/media/publications/statistics/immigration-update/australian-migration-trends-2011-12.pdf (viewed 7 October 2013).

according to data released by the ABS, the 2011 Census showed that more than 300 different languages were spoken in Australian households.[8] While 81% of Australians spoke only English at home, almost half (49%) of longer-standing migrants and 67% of recent arrivals spoke a language other than English at home.[9]

Overall, other commonly spoken languages in the Australian community included Mandarin (1.7%), Italian (1.5%), Arabic (1.4%), Cantonese (1.3%) and Greek (1.3%).[10]

For most recent arrivals – migrants who arrived in Australia during the period 2007 to August 2011 – Mandarin, Punjabi, Hindi and Arabic were the most commonly spoken languages other than English, demonstrating the more recent shifts in Australia's migration program.[11] Linguistic diversity is also characteristic of Australia's Indigenous communities. At the time of colonisation there were over 200 Indigenous traditional languages in over 500 dialects spoken in Australia,[12] in two distinct language groupings: Aboriginal languages spoken on the mainland and Tasmania, and Torres Strait Islander languages.

About one in 10 Aboriginal and Torres Strait Islander people (11%) reported speaking an Australian Indigenous language at home. Of the Australian Indigenous languages spoken at home, Arnhem Land and Daly River Region Languages and Western Desert Languages were the most widely spoken (18% and 14% respectively). The next most prominent language groups spoken at home were Yolngu Matha and Torres Strait Island Languages (11% each).[13]

The important role that language plays in terms of understanding and transmitting culture and reinforcing the ties between kinship, country and family has been highlighted by the House of

[8] Australian Bureau of Statistics, *2011 Census shows Asian languages on the rise in Australian households*, Media Release, 21 June 2012, http://www.abs.gov.au/websitedbs/censushome.nsf/home/CO-60 (viewed 7 October 2013).

[9] Australian Bureau of Statistics, *2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, 'Cultural Diversity in Australia', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (viewed 7 October 2013).

[10] Australian Bureau of Statistics, *2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, 'Cultural Diversity in Australia', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (viewed 7 October 2013).

[11] Australian Bureau of Statistics, *2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, 'Cultural Diversity in Australia', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 (viewed 7 October 2013).

[12] McConvell, Patrick and Nicholas Thieberger. 2001. *State of Indigenous languages in Australia - 2001*. Australia State of the Environment Second Technical Paper Series (Natural and Cultural Heritage), Department of the Environment and Heritage, Canberra.

[13] Australian Bureau of Statistics, *2076.0 Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011,* 'Language', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0main+features902011 (viewed 26 November 2013).

Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into language learning in Indigenous communities, the *Our Land Our Languages report*.[14]

[14] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our land our languages: language learning in Indigenous communities* (2012).

RESPONSE TO ISSUES RAISED IN THE PRODUCTIVITY COMMISSION ISSUES PAPER

Section two: Avenues for dispute resolution and the importance of access to justice

Issue: CALD communities and a mistrust of the legal system

The most vulnerable members of society are also those who most often require access to justice. The lack of simplicity and usability in the system arguably affects these vulnerable members the most, especially those from Aboriginal and Torres Strait Islander, non-English speaking and refugee backgrounds.

A challenging relationship continues to exist between Indigenous people and the Australian legal system. The mistrust of the justice system, and the 'government' in general, affects all aspects of the interaction between Indigenous Australians and access to justice.

As the Australian Institute of Judicial Administration (AIJA) has noted:

'There is increasing recognition in courts and in other parts of the justice system that legal processes have failed to take into account the cultural background and rehabilitation needs of Indigenous peoples. Indeed, arguably legal processes have compounded social and behavioural problems confronting Indigenous people in the justice system and promoted distrust as to its fairness and capacity to address their problems.'[15]

There is evidence to suggest that some migrant communities are also more likely to have an unfavourable view of the courts and have lower perceptions of procedural fairness than other court users.

The Scanlon Foundation Social Cohesion Research is an annual poll that includes a national survey of 1,200 randomly selected participants and a targeted survey of 2,300 newly arrived migrants. In 2013, the poll for the first time asked participants to rank trust in different institutions. Nationally trust in

[15] Australasian Therapeutic Jurisprudence Clearinghouse, 'Indigenous Issues and Indigenous Sentencing Courts' http://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse/indigenous-issues-and-indigenous-sentencing-courts?task=view&id=410 (viewed 25 October 2013).

police was 86.9%, while trust in the legal system was only 67.4%. It is concerning that among migrants, while 64.9% of those who were newly arrived (between 2000 and 2010) had trust in the legal system, only 54.6% of those who had spend considerable time in Australia (arriving between 1990 and 1999) had trust.[16] This would seem to indicate a decline in trust over time. Again, looking specifically at the migrant experience, a reduction in confidence levels did not apply to all public institutions and trust in some institutions was retained over time or increased. These findings are partly echoed in international research. For example, a survey of attitudes of residents in Toronto to the justice system found higher levels of trust in police and also a decline in trust in the justice system among immigrants over time.[17]

Despite the general research cited above, there is a lack of information about the knowledge, perceptions and attitudes of many CALD communities toward the courts and justice system. Yet, it is critical for courts to understand diverse communities' perspectives if they are to address issues of trust and improve access to justice. Such an understanding is essential when providing information tailored to the needs of those diverse communities, to build credibility and maintain relationships with CALD communities over time. Courts will be strengthened by open consultation with the communities they serve.

Recommendation #1

It is recommended that a comprehensive survey of CALD community attitudes, knowledge and barriers to the civil legal system be undertaken to identify priority areas for courts and other components of the system.

Recommendation # 2

It is also recommended that linkages are built with Indigenous and migrant organisations to enable ongoing consultation.

Issue: Challenges for CALD communities in understanding the way the law and justice systems operate

Related to the issue of trust are the significant disadvantages that Aboriginal, Torres Strait Islander and migrant communities face in understanding the way the law and the justice system operate in Australia.

[16] Scanlon Foundation Social Cohesion Survey, 2013.

[17] Wortley, Scot. & Owusu-Bempah, A. Unequal Before the Law: Immigrant and Racial Minority Perceptions of the Canadian Criminal Justice System, *Journal of International Migration and Integration* (2009); 10:447-473.

This includes understanding the role of the courts, which is critical to maintaining the authority of our legal institutions. Compliance with and acceptance of court decisions is influenced by people's sense of fairness about how courts render decisions. Hence education about the legal system, the role of courts, and court procedures is critical to fostering trust in the capacity of courts to manage disputes.

The direct link between language difficulties and miscarriages of justice is well established by research. For many new migrants, a lack of English proficiency also hinders ability to access information. The ABS' Migrants Census Data Enhancement project[18] highlights the differences in English language proficiency between different streams of Australia's migration program. For example, most humanitarian stream migrants are not born in predominantly English speaking countries and their self reported English proficiency is likely to be lower than for other migrant groups.[19] Poor English language proficiency compounds the challenge of both understanding and participating in Australia's legal system.

In some Indigenous communities, English is a second, third or even fourth language and is not spoken at home. This presents obvious difficulties in communicating effectively and providing effective legal services. Of Aboriginal and Torres Strait Islander people who spoke an Australian Indigenous language at home, the majority (82%) reported speaking English well or very well, while 17% reported they did not speak English well or at all. Aboriginal and Torres Strait Islander people aged 25 to 44 years reported the highest rate with 91% speaking English well or very well.[20]

Linguistic difficulties experienced by Indigenous people when engaging with the legal system have been amply documented already. See, for example, *Aboriginal Benchbook for Western Australian Courts*[21] and *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*.[22]

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[18] – which integrated 2011 Census data with administrative information on permanent migrants who arrived in Australia between 1 January 2000 and the Census on 9 August 2011 from the Department of Immigration and Citizenship's Settlement Data Base –

[19] Australian Bureau of Statistics, *3417.0 - Understanding Migrant Outcomes - Enhancing the Value of Census Data, Australia, 2011*, 19 September 2013, http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3417.0Main%20Features22011?opendocument&tabname=Summary&prodno=3417.0&issue=2011&num=&view= (viewed 7 October 2013).

[20] Australian Bureau of Statistics, *2076.0 Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011,* 'Language', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0main+features902011 (viewed 26 November 2013).

[21] Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (2nd Ed) AIJA (2008); Chapter 5 http://aija.org.au/Aboriginal%20Benchbook%202nd%20Ed/Chapter%205.pdf (viewed 25 October 2013).

[22] House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system* (2011) [7.45]-[7.62] http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm (viewed 25 October 2013).

Where English skills are poor, interpreters become crucial to accessing justice. However, in remote communities, it can be close to impossible to access an interpreter. If an interpreter can be found, it can be time consuming and obviously impacts on a service provider's resources.

These types of communication difficulties may be able to be overcome by consultation with individual communities. For example, by speaking with members of a particular community or non-Indigenous personnel who have constant interaction with communities, suitable community members may be able to be identified who are willing to act as translators or liaisons. Such arrangements may address communication difficulties and assist in building trust in communities.[23]

Community engagement through outreach programs can provide hands-on experience in how the judicial system works and how disputes are resolved in a democratic society. Bringing community groups into the courts, or encouraging judicial officers to regularly engage with settlement programs is important in building inclusive and informed courts. Proactive outreach programs can enhance existing community relations committees, which have been found to be reactive, have limited reach and may be slow to respond to need.

Local services, such as Community Justice Groups and even Aboriginal and Torres Strait Islander Health Services, are often the first port of call in communities when people have a legal issue. It is important for staff of these services to be able to identify the issue and relevant services and refer clients to those services.

Involvement of local organisations is integral to the success of assisting people to progress the resolution of their matter. Local organisations are often accessible in both physical and cultural terms. Such organisations often have the trust of the community members and usually hold a wealth of knowledge about community members' families.

Recommendation #3

It is recommended that a toolkit for community engagement be developed to help courts orient themselves outwards, to include all CALD communities, through outreach and consultation programs.

[23] Although care needs to be taken when seeking such informal interpreting arrangements – see for example, Commonwealth Ombudsman, *Talking in Language: Indigenous language interpreters and government communication* (March 2011) [1.6]-[1.7].

Recommendation #4

It is recommended that a range of resources in languages other than English, be developed and widely distributed within CALD communities, to explain the role of the courts. Specific attention should be given to the development of language resources for Indigenous communities, including material reflective of Aboriginal English, and Aboriginal culture and practices.

Section four: The costs of accessing civil justice

Issues: Cost of translation services

For those who do not speak English well, paying interpreters becomes a cost of participating in the justice system. These costs vary across jurisdictions.

In some Indigenous communities English is not spoken as a first language and sourcing culturally appropriate interpreters can have time, confidentiality and cost consequences.

All states and territories have mainstream interpreter services which provide for a vast array of international languages, however the quality and supply of interpreters for Aboriginal and Torres Strait Island languages varies significantly across the states and territories.

There are two established Indigenous interpreting services in Australia: the Northern Territory Aboriginal Interpreter Service (NT AIS) provides interpreting across the Northern Territory and the Kimberley Interpreting Services (KIS) provides interpreting in Kimberley and central desert languages.[24] The rest of Australia is not serviced by established services, but depends upon ad hoc services and arrangements.[25]

The Commonwealth Ombudsman noted in its March 2011 report *Talking in Language: Indigenous language interpreters and government communication* that there was often a lack of awareness of the significant barriers that language poses for communication between Indigenous and non-Indigenous Australians which can lead to gaps in service delivery by governments. The Ombudsman reported that there was a shortage of interpreters and a failure to use them when they are available.

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[24] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our land our languages: language learning in Indigenous communities* (2012) [6.6]

[25] For example, the South Australian Government's Interpreting and Translating Centre offers services in Pitjantjatjara and Yankunytjatjara languages. In Queensland an interpreter service provides interpreting and translating in a number of Indigenous languages and in Aurukun there are qualified interpreters in the Wik Mungkan language.

The justice sector was identified by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs as a key area where effective interpreting and translating is essential and in urgent need of more training and resources. Precise concepts and unique vocabulary in these specialised fields require additional training or orientation.

The National Congress of Australia's First Peoples supported the establishment of a National Indigenous Interpreting Service as important for the delivery of basic human services, particularly necessary in the area of courts and justice, where the lack of provision of these services may affect the ability of Aboriginal and Torres Strait Islander people to obtain a fair trial, and may lead to increased rates of incarceration.[26]

It is understood that the Commonwealth is responsible for introducing a National Framework for the effective supply and use of Indigenous language interpreters under the National Partnership Agreement on Indigenous Remote Service Delivery, but that jurisdictions such as Western Australia are of the view that delivery mechanisms and investment levels should be a matter for each jurisdictions' discretion.[27]

Similar issues affect Australia's migrant communities. While in federal jurisdictions interpreter services are funded by the Department of Immigration and Citizenship, in civil cases in most state jurisdictions the party requesting a translating service must pay for the costs. However the application of a user-pays system is varied. NSW has a commission to take bookings; WA Courts will organise services on behalf of litigants and bill litigants correspondingly; and Victoria requires litigants to arrange and pay for their own interpreter. While some jurisdictions have a means test exception, many do not. As a result, the requirement to meet the cost of interpreting services presents a significant additional barrier for non-English speaking litigants in accessing justice.

Some judicial officers may allow the use of friends, community members or family to undertake interpretation services, reducing the organisational and financial burden to CALD litigants. However there are obvious risks associated with such practices — including the possibility of unfair outcomes — and therefore many judicial officers do not allow this practice.

[26] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our land our languages: language learning in Indigenous communities* (2012) [6.57].

[27] FaHCSIA, 'Indigenous Interpreting Services in Western Australia: 2013' (July 2013).

Recommendation #5

It is recommended that an analysis be undertaken of the cost of interpreting services and its impact on access to justice.

Issue: Other costs of participation for CALD communities

Despite vast reforms in court administration in recent years, courts remain daunting places for many, regardless of efforts to simplify processes. The requirement to fill in forms, provide information, attend multiple court events and understand court protocols imposes a cost for most individuals.

For many individuals from CALD backgrounds, particularly new arrivals and those not fluent in English, the cost — measured in time and financial burden — is greater than for most, as they try to understand both the basis of the law and justice system in Australia and the processes and practices of a particular court. Among the additional costs incurred are:

- time spent understanding Australia's legal system;
- time spent understanding a particular court's processes;
- time spent filling in forms and providing information in a second language;
- the cost of engaging interpreters and translators (see above).

There is also often a wider cost, incurred by family members or friends, in providing assistance and support.

Participating in court processes is stressful for most. It is important to acknowledge that stress is likely to be magnified in circumstances where the system of justice is unfamiliar and when events occur in a non-native language. Further, for many new arrivals that have left countries due to corruption or persecution, negative perceptions of the justice system add to a stressful process.

Broader issues of disadvantage and social exclusion also increase the complexity of Indigenous legal needs. In particular, lower levels of educational attainment and literacy, as well as high levels of hearing loss, disability and mental health problems, can all impede understanding of legal processes and require appropriate adaptations.

A 2009 report*, Access to Information on Civil Law for Remote and Rural Indigenous Peoples*, found there was limited access to civil law information. Further the report noted that there was often 'no awareness that a problem is a legal problem...[or] that rights have been infringed'.[28]

Recommendation #6

It is recommended that training programmes should be developed and delivered to court staff and legal service providers to assist them to recognise the particular needs of court users from CALD communities, and facilitate their referral to agencies with the skills and resources to assist in meeting those needs.

Section five: Is unmet need concentrated among particular groups?

Issue: CALD litigants experiencing multiple barriers to accessing civil justice

The 2004 Senate Inquiry into Legal Aid and Access to Justice found that Indigenous people are 'disproportionately disadvantaged' when it comes to accessing the civil legal system, especially in relation to family law and family violence.[29] Funding for legal services for Indigenous peoples has narrowed the scope of services so that civil law problems and broad community legal education are prioritized well behind the vast and relentless work involved in representing individuals in criminal law matters.

A report published in 2008, *The family and civil law needs of Aboriginal people in New South Wales* by Chris Cunneen and Melanie Schwartz, found a lack of legal advice or representation for parents in cases where their children are being removed. The survey also noted that five of the 27 individuals (or 18.5%) responsible for a young person in an educational institution indicated a problem at school (mainly suspension and expulsion), however few sought legal advice (four women and one male).

Of the 63 Aboriginal people who identified a dispute with a landlord, some 70% of individuals indicated they did not seek legal advice. Further, while 34.9% of the participants identified debt-related problems, only 5 focus group participants (three men and two women) indicated they sought legal advice for their debt-related problems.

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[28] de Plevitz, Loretta and Loban, Heron. Access to Information on Civil Law for Remote and Rural Indigenous Peoples. *Indigenous Law Bulletin*, Vol. 7, No. 15, Nov/Dec 2009: 22-25.

[29] Senate Legal and Constitutional References Committee, *Legal aid and access to justice* (2004) [5.123].

The report concluded that:

'the legal needs of Aboriginal clients are complex, not only often involving several areas of law, but also a range of social and cultural issues.

In relation to the areas of civil and family law that were explored in this report, the areas of housing, discrimination, credit and debt and family/DOCS issues arose the most frequently in consultations as being the areas of highest priority for Aboriginal people across New South Wales. This is not to say that other areas of law were not considered urgent in some locations. Matters involving employment, neighbourhood disputes, social security and education emerged in some places as causing a lot of grief to individuals, largely without satisfactory resolution.

In addition, there were a number of legal areas where there may not have been a high recognised legal need, but where there was yet a substantial unrecognised need. The lack of identification of need spoke more of the absence of community legal education in the area rather than an absence of need.'[30]

Following this work in NSW, a national research study of the civil and family law needs of Indigenous Australians has been established – the Indigenous Legal Needs Project. The project aims to identify and analyse the legal needs of Indigenous communities in non-criminal legal areas such as discrimination, consumer matters, credit and debt, child protection, education, employment, health, housing and wills and estates. The research is directed towards identifying priority areas of legal need and is intended to inform successful models of legal service delivery to deliver better access to justice, enhanced compliance with human rights norms and improved social justice outcomes for Indigenous people.[31] In 2012 it produced a detailed report on its findings in relation to Indigenous Legal Needs in the Northern Territory.[32] Research is to be conducted at other sites in Queensland, Victoria and Western Australia, representing Indigenous communities in rural, regional, urban and remote locations.[33]

[30] Chris Cunneen & Melanie Schwartz, *The family and civil law needs of Aboriginal people in New South Wales – Final Report* (2008) p 15.

[31] The Indigenous Legal Needs Project is funded by the Australian Research Council and based at The Cairns Institute, James Cook University. See http://www.jcu.edu.au/ilnp/ (viewed on 25 October 2013).

[32] Fiona Allison, Chris Cunneen, Melanie Schwartz and Larissa Behrendt, *Indigenous Legal Needs Project: NT Report* (2012).

[33] The Indigenous Legal Needs Project, 'Project Overview' at http://www.jcu.edu.au/ilnp/ (viewed on 25 October 2013).

The Family Law Council's report *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds*[34] considered ways in which the family law system can better meet the needs of Indigenous and culturally and linguistically diverse clients.

In considering the specific issues for Indigenous clients, the Council highlighted that the interaction between Aboriginal and Torres Strait Islander peoples and the family law system raises complex issues that must be understood in the context of past policies, including policies that relate to the forced removal of children and forced resettlement of communities, contemporary patterns of engagement with criminal justice and child protection systems, and the continuing disadvantage experienced by many Aboriginal and Torres Strait Islander families. The Council stressed that efforts to improve culturally responsive service delivery must also take account of the diversity of Aboriginal and Torres Strait Islander peoples and the important ways in which family structures and practices may differ from those of other clients of the family law system.

In relation to migrants, the Family Law Council in its Report acknowledged the strain that resettlement places on relationships:

> '... increasing the likelihood of family breakdown and the need for legal and family support services. Recent studies also indicate growing concerns about family violence within new and emerging communities, as changing gender roles within families after settlement in Australia threaten traditional power relations and family stability.'[35]

Yet despite these concerns, people from culturally and linguistically diverse communities are underrepresented as users of family law system services. Through consultation, the Council found that: 'while some members of cultural and faith-based communities prefer to use community or religious forms of dispute resolution, a more representative proportion of people from culturally and linguistically diverse backgrounds would access mainstream family law services if the present barriers to their use by these families were addressed.'[36]

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[34] Family Law Council. (February 2012). *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds.* Canberra: Commonwealth of Australia.

[35] Family Law Council. (February 2012). *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds.* Canberra: Commonwealth of Australia, p 3.

[36] Family Law Council. (February 2012). *Improving the Family Law System for Clients from Culturally and Linguistically Diverse Backgrounds.* Canberra: Commonwealth of Australia, p 3.

In summary, the main barriers identified were:

- a lack of knowledge about the law and available services;
- language and literacy barriers;
- cultural and religious barriers that inhibit help-seeking outside the community;
- negative perceptions of the courts and family relationships services;
- social isolation;
- a lack of collaboration between migrant services and the family law system;
- a fear of government agencies;
- a lack of culturally responsive services and bi-cultural personnel;
- legislative factors; and
- cost and resource issues

While the report focused on family law, these are the same barriers experienced by many CALD clients when accessing legal services more generally.

Recommendation #7

It is recommended that a series of round table events be conducted to consult with community leaders on the accessibility of the courts covering barriers to access and the actions required to overcome them.

Section seven: Preventing issues from evolving into bigger problems

The Issues Paper notes that improving the clarity and accessibility of laws can allow people to better identify, and act in accordance with, their legal obligations and rights. Similarly, legal information that is clear and accessible makes it easier for people to resolve their own disputes.

In their 2008 report Schwartz and Cunneen found, for example, that very few Aboriginal people have wills.[37] They noted that although wills were not considered a priority where there was no substantial property to bequeath; yet the absence of a will can result in considerable family and community tension. Moreover, the usefulness of a will for clarifying other posthumous wishes, such as burial place or guardianship of children, was not generally understood. In Western Australia alone, a number of applications made to the Supreme Court may have been avoided had the burial wishes of a deceased Indigenous person been recorded.

[37] Chris Cunneen & Melanie Schwartz, *The family and civil law needs of Aboriginal people in New South Wales – Final Report* (2008) p 100.

A subsequent ramification of the lack of community knowledge and availability of services identified in this preliminary work was that unaddressed civil or family needs may potentially escalate to become criminal in nature.[38] Research conducted in NSW before the establishment of the Indigenous Legal Needs Project looked at the impact of accumulated debt in Aboriginal communities and concluded that there was an increased risk of contact with the criminal justice system from civil infringements.[39] The research also found that there was an increased risk of recidivism for those coming out of jail with debt. It also suggested that:

'Improved access to legal services for Indigenous people, particularly in relation to civil law, is likely to assist in creating the infrastructural capacity necessary for improved social conditions and for economic development. On the other hand, failure to adequately address civil and family law needs introduces a danger that these issues can escalate to criminal acts, resulting in charges and a perpetuation of the cycle of criminal overrepresentation.'[40]

There is a growing body of evidence, discussed below, that for newly arrived migrants and refugees, a lack of familiarity with Australian laws and legal rights is one of the most significant barriers in compliance with the law.

Issue: Migrant communities and low legal literacy

Many of the features of Australia's legal system are wholly unfamiliar to Australia's migrant communities. For example, Australia's common law system is 'adversarial' in nature, which differs from the 'inquisitorial' approach commonly operating in civil law systems in many countries in Western Europe, South America, China and Japan. As noted above, in 2010-11, migrants to Australia came from over 200 countries. While many migrants settling in Australia come from countries that employ variations of the common law system – such as India, New Zealand, the United Kingdom and Malaysia – many others come from countries where the system of law is entirely different to that operating in Australia. In addition, some refugees and humanitarian entrants to Australia will be fleeing countries where the legal system may have played a role in their persecution.

[38] Chris Cunneen and Melanie Schwartz, 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' *UNSW Law Journal Volume* (2009); 32(3) 725-745 at 744.

[39] Melanie Schwartz and Chris Cunneen, 'From Crisis to Crime: The Escalation of Civil and Family Law Issues to Criminal Matters in Aboriginal Communities in NSW' (2009) *Indigenous Law Bulletin* 7(15) 18-21.

[40] Chris Cunneen and Melanie Schwartz, 'Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas' *UNSW Law Journal Volume* (2009); 32(3) 725-745 at 745.

This lack of familiarity and understanding of Australia's legal system can manifest in different ways. Low levels of knowledge of Australian systems, rules and laws can lead to legal problems for newly arrived migrants, with legal assistance not sought in a timely manner and minor issues escalating into bigger disputes. There is also a growing body of evidence that for newly arrived migrants and refugees, a lack of familiarity with Australian laws and legal rights is the most significant barrier to compliance with the law. Furthermore, low levels of trust and confidence in the legal system and courts can prompt some groups to avoid contact with the legal system.

One study, analysing casework conducted by the African Legal Service during their first 18 months of operation, sought to identify the types of legal problems faced by new arrivals.[41] A common theme was legal ramifications arising through unfamiliarity with Australian systems, rules and laws. Examples included driving without a license, debts incurred while driving without insurance, breach of contracts (often entered into with door-knockers), as well as family law and child protection issues. Information was particularly limited among refugees who were not literate in their native language. Often, information about Australian laws and systems was informally communicated by family and other community members and was partially or wholly incorrect.

A follow up report by the Victorian Law Commission reasoned that targeted legal education could prevent some kinds of legal problems among newly arrived African refugees.[42] It also argued that timely legal assistance (and knowledge of legal services) could prevent minor issues from escalating and improve overall outcomes. In particular, the report noted that a lack of legal awareness meant new refugees often did not recognise the problem as 'a legal problem' and so did not seek timely assistance. A recommendation was made to introduce new refugees to legal services as part of a settlement process in order to establish the capacity of the legal system to assist them.

The Australian Human Rights Commission identified similar issues during consultations with the African community.[43] African community leaders described the Australian legal system as 'complex, confusing and overwhelming'.[44] Areas of particular concern included limited awareness of family and domestic violence laws, inadvertent transgressions (due to lack of knowledge of laws) and language barriers when dealing with police and the courts.

[41] Fraser K, 'Out of Africa and into Court: The legal Problems of African Refugees' (June 2009).

[42] Fraser, K 'Prevention is better than Cure: Can Education Prevent Refugees' Legal Problems?' (March 2011).

[43] Australian Human Rights Commission, 'In our Own Words – African Australians: A Review of Human Rights and Social Inclusion Issues' (2010).

[44] Australian Human Rights Commission, at 28.

The impact of low legal literacy has also been analysed with particular reference to refugee youth.[45] A study of the experiences of Australian Sudanese young people noted that the concept of 'the court' was often unfamiliar. For example, some young offenders found it difficult to comprehend the delay between committing a crime and receiving a punishment.[46] In addition, there is sometimes little understanding of the impact of a conviction on employment prospects and life goals.

While most recent studies have tended to focus on the African community, research has been undertaken to determine whether other refugee groups experience similar issues in relation to the legal system. In their 2010 study, Smith and Boi demonstrate that the Burmese refugee community also face similar legal problems in their first few years of settlement. [47] Echoing studies of the African community, they conclude that a 'lack of experience of Australia's systems and regulations was the main cause of these [legal] problems'.[48]

In a system where defined knowledge of the law is presumed and where ignorance is no excuse, newly arrived migrants are at a particular disadvantage. A lack of understanding of Australian law not only increases the likelihood of transgressions, it reduces the overall effectiveness of the justice system.

Indeed, the capacity of the legal system to offer protection is unquestionably undermined by diminished understanding of legal rights and guarantees. By way of example, studies of domestic violence have shown that women in migrant communities lack awareness of their rights under Australian law.[49] This in turn, can delay or prevent women from seeking help. In particular, newly arrived women can be unaware that violence in the home contravenes Australian law and that there are legal mechanisms (such as apprehended violence orders) that are available to protect them and/or their children. In one

[45] Victorian Equal Opportunity and Human Rights Commission (VEOHRC), 'Rights of Passage: The experiences of Australian-Sudanese Young People' (2008).

[46] VEOHRC at 8.

[47] Smith, A. and Boi, N., 'The Burmese Community and the Legal System – A Study in Confusion' (2010).

[48] Smith, A. and Boi, N. at 3.

[49] Immigrant Women's Domestic Violence Service, 'I Lived in Fear Because I Knew Nothing: Barriers to Justice System Faced by CALD Women Experiencing Family Violence' (2010); ASSESTS, 'The Exploration of the Nature and Understanding of Family and Domestic Violence within the Sudanese, Somalian, Ethiopian, Liberian and Sierra Leonean Communities and Its Impact on Individuals, Family Relations, the Community and Settlement, Sawirkar, P. and Katz, I., 'Enhancing Family and Relationship Service Accessibility and Delivery to Culturally and Linguistically Diverse Families in Australia', AFRC Issue 3 (2008); Dimopoulos, M. 'Implementing Legal Empowerment Strategies to Prevent Domestic Violence in New and Emerging Communities' (2010).

study, the women interviewed noted that, had they received information about their legal rights on arrival, the knowledge might have influenced them to leave abusive relationships earlier.[50]

A lack of awareness of individual laws can also extend to a lack of understanding of rule of law and the legal system as a whole. Many judicial officers will have seen newly arrived migrants who have struggled to comprehend the seriousness of court proceedings and have missed court dates or appointments.

One study commissioned in 2008, surveyed 243 refugees and migrants who were attending Adult English classes and had arrived in the past two years.[51] The survey covered nine different areas of knowledge in relation to Australian systems and services. [52] In the initial survey and in follow up interviews both groups ranked their knowledge of the legal system as lowest.[53] The majority of refugees indicated they had no knowledge of the Australian legal system, while most migrants interviewed indicated they had only little legal knowledge.[54]

Follow up interviews were conducted at one-year intervals to determine progress in their settlement process. By the final follow up interview (2010), nearly 50% of refugees still had no knowledge of the legal system and most migrants still only indicated a little knowledge.[55] When asked to nominate their main source of information on the legal system, most indicated they did not know.[56]

New migrants can face additional cultural and linguistic barriers in the course of seeking justice. Difficulties experienced can include the added trauma of testifying through an interpreter, sensitivities generated within their broader community and negative perceptions of legal processes derived from experiences in their country of origin.[57]

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[50] Immigrant Women's Domestic Violence Service at 16.

[51] Adult Migrant English Service (AMES) Victoria, *Words to Work* (2011) http://www.ames.net.au/media/docs/Words%20to%20Work.pdf.

[52] Interviews were face to face and were conducted in the participants' native language through the use of a bilingual worker. Areas covered in the survey include: housing, healthcare, transport, banking, Centrelink, jobs, childcare, Government and legal.

[53] AMES at 24.

[54] AMES at 23.

[55] AMES at 23.

[56] AMES at 24.

[57] Immigrant Women's Domestic Violence Service.

The importance of raising legal literacy among migrant communities is paramount in increasing compliance with Australian laws, facilitating the use of alternative dispute resolution, raising awareness of the protections available under the law and fostering trust in the legal system. This further highlights the need for resources about the legal system, courts and their operation in languages other than English (see Recommendation 4).

Recommendation #8

It is recommended that settlement services include programs to introduce new migrants to the legal system and to provide an overview of how the rule of law operates in Australia.

Section eleven: Improving the accessibility of courts

CALD court users and the accessibility of courts

The Hon Alastair Nicholson has observed that with modern court administration comes the multiple challenges of 'needing to understand the needs of court users, tailoring services so that people are not treated as numbers and providing services within our constraints.' [58]

The courts have a significant role in ensuring services are accessible and culturally appropriate, and that information is provided to recently arrived and more established communities.

For CALD court-users, the accessibility (and their first impression) of courts begins with their first contact with a registry via the telephone, internet or in-person at a registry office. Issues of access begin with whether they can understand and be understood in their own language, when speaking with staff (in person or over the telephone), using reading material or accessing information via the internet. The ease of access to interpreter services, already discussed above, is a critical enabler for many CALD court users.

As a CALD court-user's case progresses, the adequacy of case management processes and protocols (usually supported by an electronic case management system) can be used to determine whether a CALD litigant is provided with the support they many need from interpreter services to migrant support services and others. This requires courts to maintain and strengthen relationships with external organisations, particularly those who provide support services,[59] so that staff can link CALD litigants to

[58] Hon Alastair Nicholson, interview with Theresa Layton, 2012.

[59] For example, the family court maintains relationships with family relationship services providers (including Family Relationship Centres), Legal Aid Commissions, Community Legal Centres, or the Department of Human Services (Child Support) and the private legal profession.

the relevant mix of ancillary services they require. The physical design of court registries, particularly the adequacy of signage in multiple languages, is also linked to access and ease with which CALD litigants can use the courts.

More challenging than the redesigning of forms, processes and signage is inspiring in staff the desired attitudes and behaviours toward CALD court-users. Staff must have the right training and development to gain cultural literacy and competency.

Finally, it is essential for judicial officers to understand the communities they serve. Australia's cultural diversity presents judicial officers with a challenge to ensure procedural fairness and provide for equality before the law.

These issues are expanded upon below.

Issue: Court case management processes and CALD litigants

The pre-trial case management stage can be of particular importance to CALD litigants as it can provide courts with the opportunity to identify the needs of CALD litigants and put in place the support they require to make the courts accessible and enable them to participate. During this pre-trial stage, courts have the opportunity to:

(a) identify whether a person identifies as CALD;

(b) identify the need for interpreter services;

(c) understand the unique needs of an individual, and refer CALD litigants to any appropriate external support services (examples include migrant support services, mental health support, housing, women's legal services and family violence support).

Case management software can be a useful tool for prompting staff to identify need and take follow up action. It can also be a useful tool for capturing data about the diversity of court users such as the languages spoken.

Practice example: case management practices

At the point of filing, the Family Court of Australia appoints a single case coordinator to manage the administration of the case through to its conclusion. This practice assures continuity for CALD litigants and is likely to reduce the stress of navigating through the court process.

That case officer has responsibility for identifying and putting in place the support a CALD litigant needs as their case progresses, including interpreters, support by community organisations and information about family law court processes.

The Family Court of Australia and Federal Circuit Court of Australia both use a system of judicial dockets, where a case is assigned to a single judicial officer. This allows judicial officers to concentrate closely on the issues and circumstances of a particular case. It facilitates a close focus on the needs of individuals, including CALD litigants. Furthermore, the use of a judicial docket reduces the requirement of litigants to repeat their story multiple times and tends to resolve cases earlier.

Court case management principles can be quite rigid, setting timeframes for the gathering and filing of information. Flexibility within Court Rules and processes is integral in terms of factoring in cultural nuances and power imbalances between parties, which may be of particular significance where Aboriginal and Torres Strait Islander peoples are involved.

Recommendation #9

It is recommended that consideration be given to ensuring all courts are adequately resourced to adopt case management approaches that can be tailored to the particular needs of CALD litigants.

Issue: Processes and protocols to assure access to justice

Practice example: diversity protocol

The Family Court of Australia and Federal Circuit Court of Australia's diversity protocol sets out clear steps for staff when providing services to CALD clients. Staff at the National Enquiry Centre, where most queries are received, are required to check if a client needs an interpreter, book that interpreter for upcoming court events, check if the client would like community support and refer them to local providers and enter information into the case management system. It is also standard practice for staff to summarise the telephone conversation in an email so that CALD litigants can take the time they need to understand the material provided. The email also contains information in community languages if it is available, about what the client can expect from the court, what the court can and cannot do for them, and where support is available.

The development and adherence of courts to standard CALD protocols, similar to that outlined above, would help overcome some of the barriers to accessing justice experienced by the CALD community.

Recommendation #10

It is recommended that national diversity protocols covering uniform interpreter practices, and referrals to support services, be developed for courts.

Issue: Adequacy of translation services

Accurately translating to and from English in legal proceedings requires a language proficiency often misunderstood by participants in the judicial process, and a lack of proficient interpretation can give rise to errors, which threaten the integrity of the justice process.

Being able to understand and be understood in one's own hearing or trial is a fundamental legal right. For those who do not speak English fluently, that right can only be exercised through the provision of adequate and competent interpreting services. Hence for many CALD litigants, use of interpreters is an unquestionable necessity.

The issue of translating and interpreting services in Australia's courts is particularly significant. A 2009 study found that appeals on the basis of incompetent interpreting had increased by 27.7% between 2007 and 2008.[60]

The 2011 Australasian Institute of Judicial Administration (AIJA) survey of interpreter polices, practices and protocols by Professor Sandra Hale[61] found that minimum qualifications for court interpreters are not mandated (however National Accreditation Authority for Translators and Interpreters Ltd is desirable), and cited anecdotal evidence of dissatisfaction from some courts and tribunals, as well as highly qualified interpreters, about the poor quality of some interpreting services and the lack of availability in some languages. In turn, some interpreters cited poor working conditions, lack of recognition of qualifications and poor remuneration. The AIJA survey found that the majority of judicial officers surveyed supported the need to introduce compulsory legal interpreting and a national protocol on use.

Further, with courts and the legal profession having their own nomenclature and language nuances, and the importance of language in proceedings, inadequate interpreting services may lead to unfair outcomes and/or costly appeals. There is a need for specialist legal translations and interpreting services for courts and the legal profession to support access to justice.

Recommendation #11

It is recommended that special legal interpreting qualifications be introduced.

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[60] Hayes, A., & Hale, S. *Appeals on incompetent interpreting*, Journal of Judicial Administration, 20, 119-130m (2010).

[61] Hale, Professor Sandra . (2011). Interpreter Policies, *Practices and Protocols in Australian Courts and Tribunals: A National Survey*. Canberra. Australasian Institute of Judicial Administration Incorporated.

Recommendation #12

It is recommended that court specific interpreter protocols be adopted for contracting, engaging, selecting, briefing and assisting interpreters to remove the disadvantage experienced by many CALD court users.

Issues: Court staff attitudes, behaviours and skills regarding CALD court-users

Court staff are the public face of legal system. They can shape people's perceptions and attitudes toward the justice system before they step inside a courtroom. Staff are also enablers, they are the people who can provide the right assistance to CALD court users and who will have a significant influence over whether justice can be accessed by an individual.

Diversity training is an important part in an overall organisational strategy for diversity management. However, the format and content of the training must be appropriate to be effective. Judy Sava in her report on diversity skills training and human rights integration in policing[62] quotes Stoner and Russell-Chapin, who identify that organisations need to expand traditional training on diversity. That is, organisations need to adopt an approach that:

> '...challenges the established thinking of participants and moves them to seriously consider alternative views and perspectives. In other words, knowledge and skills are not enough. Training needs to seriously address the attitudes of the participants, in order for them to be able to make full and on-going use of their skills and knowledge, and in order to maintain an ethical position. Further, the organisation must endeavour to support training initiatives and reflect its understanding of diversity in all of its activities'[63]

Recommendation #13

It is recommended that cultural awareness and competency programs, particularly addressing attitudes and bias, be developed for courts and their staff.

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[62] Sava, Judy. 2010. Report to study and compare diversity skills training and human rights integration in policing. Winston Churchill Memorial Trust of Australia Report.

[63] Stoner, C.R. and Russell-Chapin, L.A. (1997) 'Creating a culture of diversity management: moving from awareness to action' Business Forum, v.22, n2/3, Spring.

Issue: Judicial awareness of CALD issues

It is concerning that studies indicate that the public perceive the judiciary as closed, out of touch with the community, and disconnected from contemporary values.[64] The 2007 Australian Survey of Social Attitudes shows that levels of confidence in the courts are low relative to other important public institutions.[65] Australia's cultural diversity presents Australia's 1100 judicial officers with a challenge to ensure procedural fairness and provide for equality before the law. Satisfaction with such principles is essential in advancing broad public trust and confidence in Australian courts, in turn buttressing Australia's social cohesion. Conducting fair proceedings requires an appreciation of the people who come before the court and their cultural differences.

Education of the judiciary plays an active part in ensuring that courts are free from unconscious bias and discrimination and that proceedings are fair. Attitudes towards the justice system and the fairness of court proceedings unquestionably influence a person's inclination to use courts as a way of resolving disputes.[66] As Sir James Gobbo has argued, cultural difference will impact on issues of procedural fairness, that 'these matters are essentially about the way the service is delivered and not about its content'. Currently there is no overarching education plan in relation to cultural diversity for judicial officers and the development of tools and resources occurs on an ad hoc basis.

A highly important factor in promoting access to justice for Indigenous people is a judiciary that is culturally competent, particularly in its understanding of Aboriginal and Torres Strait Islander families, kinship, child-rearing practices, and the central place that cultural identity and affiliation plays in the life of Indigenous people.

Joanna Kalowski describes communication in courtrooms as a strange hybrid: formal, artificial, constrained and rule bound.[67] She expands on this point saying it is unique in that it '...takes place in a highly structured environment few have previously experienced. It is very different from the usual settings in which people communicate important messages to one another, yet is one in which the outcomes will profoundly affect participants' lives.'

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[64] Anleu, S. and Mack, K. 'The work of the Australian Judiciary: Public and Judicial Attitudes' Journal of Judicial Administration, vol 20 iss 3, 2010.

[65] Anleu, S. and Mack, K. 'The work of the Australian Judiciary: Public and Judicial Attitudes' Journal of Judicial Administration, vol 20 iss 3, 2010.

[66] Anleu, S. and Mack, K. 'The work of the Australian Judiciary: Public and Judicial Attitudes' Journal of Judicial Administration, vol 20 iss 3, 2010.

[67] Kalowski, Joanna. 2009. Communication Techniques to support a less adversarial trial in The Less Adversarial Trial Handbook. Family Court of Australia.

The work of linguists such as Diana Eades and Michael Cooke has gone a long way toward understanding the linguistic problems that can arise during Aboriginal encounters with police and the courts; and the use of both interpreters and, more recently, Indigenous sentencing courts, has helped remove many of these issues.[68]

A 2007 report on Aboriginal English in the Courts[69] quoted the 1986 Australian Law Reform Commission (ALRC) *Recognition of Aboriginal Customary Laws Report* finding that:

'Difficulties of communication and comprehension are very real for many Aborigines… Many Aborigines speak non-standard English so that the way in which questions are asked, especially direct questions, may often lead to misunderstanding and incorrect answers being given.'[70]

The report refers to common types of questions identified in the Tom Calma's submission on common difficulties facing Aboriginal witnesses as creating communication difficulties for Indigenous Australian clients in the court system, including: either/or questions; hypothetical questions; negative questions; and questions rely on double negatives, figurative speech or abstract concepts or references.

The report notes that Calma goes on to say that culturally, communication difficulties can arise in several ways. For example, the use of direct questioning is generally considered rude in Aboriginal culture and may lead to the defendant answering 'I don't know' regardless of truthful knowledge and intention. Another effect of this form of inappropriate questioning on Aboriginal and Torres Strait Islander clients may be a reaction of embarrassment, resulting in visible discomfort, which may in turn be misinterpreted as a sign of guilt or avoidance of the question.

A further cultural issue highlighted by Calma was that of 'gratuitous concurrence'. This is when an Indigenous Australian client agrees with a question because they wish to keep the person asking the question happy.

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[68] Cooke, Michael (2002) Indigenous Interpreting Issues for Courts. Carlton, Victoria: Australian Institute of Judicial Administration Incorporated

Eades, Diana (2007) 'Telling and Retelling your story in court: Questions, assumptions, and intercultural implications'. (Speech presented to the Australasian Institute of Judicial Administration in October 2007); later adapted for publication in: Current Issues in Criminal Justice, v.20, no.2, Nov 2008: 209-230.

[69] Fiona Roberts, *Aboriginal English in the Court Kit: a Report on Aboriginal English in the Courts* (2007) Victorian Aboriginal Legal Service, referring to a submission from Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner (19 April 2007), filed with the Federal Court in *Gilbert v Queensland* (No QUD300/2005), Queensland District Registry http://www.humanrights.gov.au/commission-submission-1 (viewed 26 November 2013).

[70] ALRC as cited in Calma 2007:3.

Most litigants, particularly those from CALD backgrounds, look to a judicial officer to use language that is accessible, to paraphrase, to explain common legal expressions and to speak simply and clearly yet not simplistically. Kalowski surmises that that is a daunting task for many judges in a setting where technical legal language is the norm and is regularly used as if everyone, rather than simply the lawyers, readily understands.

This not only highlights the need for judicial education but further highlights the need for specialist court interpreters (see recommendation ten).

Recommendation #14

It is recommended that a cultural diversity curriculum be developed for judicial officers in alignment with the National Judicial College of Australia's standards.

Recommendation #15

It is recommended that a national bench book on cultural diversity be developed as a readily accessible guide to the kinds of issues that may need consideration by judicial officers to ensure a fair trial for Indigenous and CALD litigants.