The Supreme Court Equal Treatment Benchbook

Queensland Chapter of COAT

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May I first say what a pleasure it is to be invited to speak on the Equal Treatment Benchbook at this month's meeting of the State Chapter of COAT. One of the reasons I am so pleased to be able to speak to you is that I share the experience of being a member of a Tribunal. Not long after I commenced practice at the bar, I was appointed as a part-time member of the Social Security Appeals Tribunal and then I was the first member and subsequently the first President of the Queensland Anti-Discrimination Tribunal, as well as a hearing Commissioner for the Human Rights and Equal Opportunities Commission. I also had the opportunity of appearing as barrister before a number of Tribunals during my time at the bar. All of these experiences have given me enormous respect for the depth of learning and the width of life experience of members of Tribunals.

Tribunals are the modern day engine room of the Australian justice system. They perform an important function and impact on many areas of life. As the Honourable Justice Downes, President of the AAT has observed, an individual member of society is more likely to encounter a tribunal than they are to find themselves in a court.[1] In a wider context they contribute towards the accountability of the government and transparency in government decision making. COAT's objectives of sharing information and trends in administrative decision making only increases the ability of Tribunals to perform that important function.

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1 Downes G, 'Tribunals in Australia' (2004) 84 *Reform* 7-9 at 9

The Equal Treatment Benchbook is a publication which I hope can be of immense benefit to tribunal members to ensure that proceedings are as accessible and independent as possible. The benchbook covers a multitude of areas from family diversity to self represented litigants to Indigenous culture language and communication. Whilst I intend to go over the chapters in the Equal Treatment Benchbook in some detail during in this seminar, let me commence by posing some basic questions which informed our work when we prepared the benchbook.

What are the elements of a society that are essential to a democracy?

This is a question that many Western societies, usually secure in their democratic values, have been forced to ask themselves in the wake of the violent assaults of terrorism on their citizens.

What constraints do we accept in the name of liberty?

There is a range of opinion on these vexed questions but there are some things on which everyone will agree. An essential pillar of a democratic society is the rule of law. Everyone, no matter how high or how low, is bound by the law; and the same laws apply to everyone rich and poor. Those laws are rule based and are not the subject of whim or caprice. Integral to the rule of law therefore is equality under the law. Equality under the law is easily said but in a diverse society as Australia's how do we effectively provide for equality under the law, that is equality of treatment to all who come to court for redress or subject to its sanctions?

Judicial neutrality and impartiality are the foundation of our legal system. Yet, as individuals, judges possess different views and opinions based on our upbringing, education and experience. The more Judges learn about the experiences of others and the challenges different people face in their daily lives, the more we are able to fulfil the traditional judicial values of impartiality and fairness for all. If Judges are aware of their subconscious attitudes and feelings, they can begin to control their internal bias and become better decision makers.

As the former Chief Justice Sir Gerard Brennan has said:

> "Attitudes based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in hand may unconsciously influence a judge who does not consciously address the possibility of prejudice and extirpate the gremlins of impermissible discrimination. Such gremlins are not extirpated by mere declaration.[2]

If Judges and other quasi judicial decision makers are seen to be genuinely educating themselves about the issues and experiences of other members of our community, it will not only improve the quality of decision making, but also increase people's confidence in the judiciary and our democracy.

As Judges we are conscious of the need not only for justice to be done, but to be seen to be done and we must avoid so far as possible perceptions of injustice. Some of those perceptions are unavoidable because they are so unreasonable that no level of quality of justice could satisfy some that they have received equal treatment. That having been

[2] "*Judicial Independence*" delivered at the Australian Judicial Conference on 2 November 1996.

said, to some extent, these perceptions of inequality can be reduced by knowledge of what causes them.

This does not require a judge to apply a different law or legal standard according to a person's race, gender, impairment, cultural or economic background or any other attributes. Nonetheless the assessment of where the truth lies in a particular case can require some understanding of the habits, manners and customs of the groups to which particular individuals in the case belong. One of the aims of the Equal Treatment Benchbook is to dispel any perception that judges of the Supreme Court of Queensland do not have that understanding.

Let me give an example of the challenges that face different members of the community. The language of the law in Australia is English and yet many people do not speak English or do not have English as their first language. This includes not only those who were not born in Australia but also members of the deaf community for whom Auslan is their first language and some members of Aboriginal communities who may speak not only English but also Creole and their own language such as Wik Mungkan. In addition, the language spoken in different communities within Australia, may seem to be the same as the language found in the Macquarie Dictionary, but in fact words may have different meanings or connotations within that group or community.

All of this matters in court where ordinary people are required to participate. They may be victims of crime, they may be perpetrators of crime, they may be witnesses to crime, they may be parties or witnesses in civil litigation. In those circumstances they will need to speak in their

own language of what happened and we need to be able to understand them.

Courtrooms are places of intense communication. And yet, the formal environment of a courtroom and the serious nature of the proceedings, may act as constraints to communication. That is one of the many reasons why judges wish to inform themselves as to the language, the culture, the religion and mores of different communities within the Australian community and also of the particular issues that beset people when they try to access the courts and vindicate the rights which the law gives them or are subject to the responsibilities which the law imposes.

It is because of these democratic needs and values that the judges determined to produce a benchbook from which we could inform ourselves of issues that face many members of our society and our community of which we might not otherwise be aware from our own personal experience. The courts do not operate for an elite; but are profoundly based in their capacity to be courts for all members of the community.

In 2003 the judges resolved that the Supreme Court of Queensland would produce an Equal Treatment Benchbook for the assistance of judges and delegated the work to Justice Philip McMurdo and myself. We determined that it should cover a wide range of issues. This was, to our knowledge, the first time that such a benchbook had been attempted in Australia. The Judicial Studies Board in the United Kingdom has produced such a benchbook but this is the first which we know of, where it has been produced by the court for the court.

The reality of poverty, discrimination, sexual abuse, unemployment and disability is usually not within the ordinary understanding of most Judges. There is no part of our Judicial training to prepare us about these kind of issues. It is to the credit of the Judges of the Queensland Supreme Court that they recognised that greater awareness is necessary for both the judiciary and practitioners.

The Equal Treatment Benchbook covers such topics as justice and equality; ethnic diversity in Queensland; religions in Queensland; family diversity; oaths and affirmations; effective communication in court proceedings; Indigenous Queenslanders; Indigenous culture, family and kinship; Indigenous language and communication; Indigenous people and the criminal justice system; disability; self represented parties; children; gender; and sexuality and gender identity. I will now turn to those chapters in some detail

Ethnic Diversity

Today just over one in six of the people who live in Queensland were born outside Australia and therefore many of them face language and cultural difficulties when they come into contact with court system. Chapter 2 of the Benchbook contains very detailed and up to date information on ethnic communities in Queensland including migration figures, language and religious statistics and geographic distribution.

An analysis of ethnic groups within the criminal justice system is also included in this chapter. The Australian Institute of Criminology has indicated there are significant difficulties in relying on available statistics on the involvement of migrant or ethnic groups in crime. Significantly much research which attempts to explain the relationship between

ethnicity and crime fails to make reference to social and economic factors as distinguishing variables.

The over representation of certain ethnic and cultural minorities within the criminal justice system can lead to a perception, which is widespread in the community and expressed in the media, that a person's race, ethnicity or cultural background is in some way a contributing factor to his or her propensity to engage in criminal behaviour.

The fact of a person's race or that of a group involved in criminal activity may divert our attention from other relevant facts and circumstances in the trial and sentencing process. There is a risk of error not only from not identifying the relevant facts and circumstances which are explained by a person's race or ethnic group, but also in other cases from giving the matters of race and ethnic origin a relevance which they should not have.

Religions

Chapter 3 focuses on religions in Queensland. The relationship between ethnicity and religion is complex. Ethnic groups are often multi-religious and assumptions cannot be made about a person's religion because of their ethnicity. 71 per cent of the Queensland population identifies with a Christian denomination. The second largest group described in the 2001 census said they have no religious identification followed then by Buddhism, Islam, Hinduism and Judaism.

The benchbook broadly outlines the key beliefs and practices of each religion, their holy books/scriptures, forms of worship and how their religion may impact upon their appearance at, or involvement in, the court. For example, bowing is common amongst Buddhists. Jews and

Hindus have strict dietary requirements (which may be of significance if they are members of a jury) and Muslim women and girls may or may not wear a *hijab* in different forms.

Family Diversity

Chapter 4 highlights some of the issues which arise from family relationships in recognition of the diversity that exists in terms of a family's composition, economic wellbeing, culture, language and religion.

The chapter is divided into two sections, one which describes various family compositions and some of the current social trends and the other looks at some of the special issues which arise in the context of families and family relationships such as family violence and relationship breakdown.

The Australian Bureau of Statistics defines family as two or more persons, one of whom is at least 15 years of age, who are related by blood, marriage (registered or de facto), adoption, step or fostering and who are usually resident in the same household.[3] The benchbook makes note of the fact that while this definition may be useful, this concept of family is limited and most people consider family as extending beyond their household.

The Chapter examines in some detail at the issues facing families from diverse ethnic and cultural backgrounds; mixed race familles; sole parent families and families with same-sex parents. One of the more interesting points that the benchbook raises in relation to families from diverse

[3] Australian Bureau of Statistics Australian Social Trends: Family and Community – Living Arrangements: Changing Families 2003.

ethnic and cultural backgrounds is the concept of ‘honour’ which is found in some form in all migrant groups. It can be a significant element in family life, acting as a control mechanism and guiding socialisation in ethnic families. A key area where the concept of family honour can differentiate some families of diverse cultural or ethnic background is in court support.

For example, in the eyes of the court it may be of benefit to an accused that his or her family members are present during proceedings, however in Chinese and Vietnamese families, support is more often expressed via absence. The honour of the family as a whole is threatened by the individual’s transgression and therefore, family members may not be present not because they do not support the individual but because it is too shameful to do so publicly.

Oaths and Affirmations

Chapter 5 considers the issue of administering oaths or affirmations in an appropriate form and manner to members of the community who may not find the standard oath binding on their conscious due to their religious beliefs. It includes all the relevant statutory provisions on oaths and affirmations, the relevant practice directions and helpful guidelines where alternative oaths are more appropriate. It is critical that witnesses are able to take an oath or affirmation according to their own beliefs.

Effective communication in court proceedings

Chapter 6 is probably one of the most important chapters for Judges and decision makers, as it explores the myriad of issues relating to effective communication in court proceedings. Many people in the Australian community who were born and raised in Australia lack an appropriate

level of knowledge about their legal system. The Australian Law Reform Commission acknowledged this its *Multiculturalism and the Law* report, but also noted that people from a non-English speaking background face an additional barrier to acquiring such information.[4] This barrier may come in the form of a lack of understanding of the English language, or it may present in subtler forms due to the litigant's lack of familiarity with general Australian cultural norms.

The chapter focuses on the issues which Judges may encounter when dealing with cases which involve people from a non-English speaking background, as well as practical strategies which Judges may choose to employ to address these issues. These are issues of which all legal practitioners should be aware. The first part of the Chapter discusses the use of interpreters and translators in Court, while the second part turns to the evaluation of non-verbal forms of communication.

As one would expect, legal interpreting is a much more specialised field than generalist interpreting, and the chapter outlines the different qualifications and skills necessary as outlined by the National Accreditation Authority for Translators and Interpreters (NAATI). In Queensland, the trial judge retains discretion as to whether an interpreter may be used. If an incompetent interpreter is used, an accused person's right to a fair trial may be comprised. To avoid this situation, professional NAATI-accredited practitioners should, wherever possible be used.

The Benchbook also outlines Australia's international obligations, pursuant to the International Covenant on civil and Political Rights.

[4] Australian law Refrom Commission *Multiculturalism and the Law* Report no 57 Canberra, Australian Government Print Service, 1992 at [2.3].

Article 14(1) of the Covenant guarantees the right to a “fair and public hearing”, which includes the “minimum guarantees” that an accused person must “be informed promptly and in detail in a language which he [or she] understands of the nature and cause of the charge against [them]and must have the language used in court.”

In a civil trial, the provision of an interpreter, either for a witness or a party, is generally considered to be the responsibility of each party, and a trial Judge is unlikely to interfere with a party’s assessment of this. This of course can place an additional barrier to access to justice for people from a non-English speaking background.

Non-verbal communication is also an area which Judges, decision makers and practitioners need to be well-informed. When Judges or juries need to make factual determinations based on observations of witness they must assess the believability of a witness based on that person’s behaviour and demeanour, as well as the actual words which he or she says. Eye contact is the typical example. In many cultures direct eye contact is considered rude or challenging, whereas according the Anglo-Australian culture this might be seen as evasive or suspicious on the part of the witness.

Given the multicultural nature of contemoporary Australian society it would not be possible for a judge to be fully aware of the nuances of every culture. Judges and decision makers do however need to be alert to the dangers of ethnocentrism – using one’s own cultural assumptions to interpret other people’s behaviour. Areas of potential misunderstanding are likely to include politeness, body language, power dynamics, metalinguistic factors such as pitch, volume and silence, and the difference between individualistic and collectivist cultures.

The benchbook also provides a guide to appropriate terminology, provides some useful contacts in this area and information on names and forms of address.

Indigenous Queenslanders

The 2001 census recorded 460,140 persons of Aboriginal or Torres Strait Islander descent in Australia. This is 2.4 per cent of the total estimated resident population of Australia. In Queensland 3.5 per cent of the population identify themselves as being of Aboriginal or Torres Strait Islander origin. Importantly, a quarter of Australia's Aboriginal population and over half of the Torres Strait Islander population live in Queensland.

Chapter 7 contains a number of statistics on geographic distribution and socio-economic status of indigenous Queenslanders. Socio economic factors include housing, community infrastructure, health and education and employment.

Chapter 8 provides background information on fundamental aspects of indigenous culture, family and kinship. Australia has two Indigenous peoples: the Aboriginal peoples and the Torres Strait islander peoples. The two are ethnically and culturally distinct.

The benchbook notes that the source of spirituality for each of the indigenous peoples differs: for Aboriginal Australians it derives from stories of the Dreaming, whereas for Torres Strait Islander Australians it comes from stories of the Tagai. However, fundamentally the essence of spirituality for indigenous peoples is linked to the land. Aboriginal people

believe the land gives life and is central to their culture, heritage and identity.

The Benchbook also importantly covers kinship systems, the role of elders in indigenous communities the different roles of men and women and the importance of visual art, literature, songs and dancing. Aspects of contemporary Indigenous Australia are also included which may be important for decision makers to be aware of such as cultural identity, cultural survival, reference to deceased persons and the constructive cooperation between various indigenous communities and the courts on a number of projects within Queensland that have led for example to the establishment of the Murri courts.

Indigenous Language and Communication

Chapters 9 and 10 outline sone of the more serious difficulties that Indigenous Queenslanders may experience within our legal system. As the Hon Justice Mildren has said, the trial process could operate "unfairly to Aboriginal witnesses and accused, because that process is often outside their experience, either linguistically or culturally."[5]

The Benchbook aims to provide a working guide for judges in their dealings with Aboriginal people and Torres Strait Islanders. It provides an overview of some of the languages and dialects spoken by Indigenous Queenslanders with a particular focus on Aboriginal English. It also discusses cultural barriers to effective communication, the use of interpreters in court, and other strategies for enhancing communication. It includes a glossary and a list of useful contacts. Appendix A to this

[5] Hon. Justice Mildren 'redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7 at 12.

chapter contains a list of issues and difficulties arising for Indigenous people in their contact with the courts prepared by Judge Bradley of the District Court. The CJC *Report into Aboriginal Witnesses in Queensland's Criminal Courts* recognised that Judges have a significant role in ensuring proceedings involving Aboriginal witness are conducted fairly. In these kinds of situations, the need for an Equal Treatment Benchbook becomes even more obvious.

Some of the cultural barriers to effective communication between Aboriginal and non-Aboriginal people include family and kin loyalty, the unfamiliarity of direct questioning and gratuitous concurrence and suggestibility. As a consequence, there a number of practical difficulties in Aboriginal interpreting, and unfortunately there is a lack of trained interpreters in many traditional Indigenous languages.

Indigenous people and the criminal justice system

Chapter 10 deals with a number of issues which may have particular impact on Aboriginal people or Torres Strait Islander people. These issues include: the admissibility of confessions; difficulties for Indigenous women; children; imprisonment, and the use of Community Justice Groups.

Indigenous person may be particularly susceptible to suggestion when questioned by police. This premise has been accepted by the courts and guidelines in the form of the *Anunga Rules* were developed to specifically deal with the manner in which an Indigenous person should be interviewed by police.

In addition to issues facing Indigenous people regardless of gender, Aboriginal women may face particular difficulties giving evidence in court. There is a high incidence of domestic violence and sexual assault again Aboriginal women, particularly in remote communities. Common effects of long-term violence, including low self-esteem and feelings of fear and shame are exacerbated by other cultural factors.[6] It is also particular difficult for an Aboriginal woman to give evidence concerning sexual assault in the presence of men,[7] and will often be deterred from pursuing a complaint because of pressure from the community or fear of bringing shame upon themselves and their families.

Disability

People with a disability may play a number of different roles in a court setting – lawyers, litigants, witnesses, jurors, judges and court staff. Chapter 11 is aimed at assisting judges and court staff in dealing with issues that arise in court in relation to disabilities. The benchbook covers a number of important points in relation to people with disabilities including a guide to terminology, trial management, interpreters, Jury issues and information about the everyday challenges people with a disability must confront.

In 1998, approximately one in every five people living in Queensland had a disability.[8] It is recognised that disability is a complex subject area and the purpose of the chapter is provide a general overview and offer practical and helpful information about dealing with people with a disability within the Supreme Court of Queensland. It includes

[6] Criminal Justice Commission (Queensland) *Aboriginal Witnesses in Queensland's Criminal Courts* Brisbane, GoPrint, 1996.
[7] Above note 5 at 94.
[8] Australian bureau of statistics (ABS) *Australian Social Trends 2001: Disability among Adults* Canberra 2002.

comprehensive notes on the relevant statutory provisions and provides a number of useful contacts in the area.

By way of a quick summary, there are a number of key elements which a judge or decision makers may need to consider when a person has a disability for example:

- such persons may need more time
- the stress of coming to court may exacerbate their symptoms
- making any special arrangements in advance will save time and embarrassment at the trial
- the person with a disability may not be able to hear, read or be understood whilst in court, or fully to comprehend what is taking place
- some ailments may make it impossible to attend court at all.

Self represented parties

All litigants have the right to appear in person. As the Chief Justice recently observed, "The right to represent oneself in court proceedings is fundamental to accessible justice." But his Honour also warned that, "…in many instances, exercising that right will inevitably reduce your changes of securing justice."[9]

The appearance of self represented parties in courts and tribunals is increasing and issues arise when a party appears without legal representation which affects the capacity of the court to administer justice both fairly and efficiently. Judges should generally aim to maintain a

[9] Paul de Jersey CJ *Legal Educators' State Conference Keynote Address* delivered on 13 August 2004 at http://www.courts.qld.gov.au/publications/articles/speeches/2004/dj130804.pdf

balance between assisting the self represented litigant and protecting their represented opponent from problems arising from the self represented party's lack of legal knowledge.

The Benchbook attempts to provide a working guide for judges and decision makers, outlining the major areas for consideration including evidentiary issues, maintaining impartiality and matters specific to civil proceedings. In addition the benchbook lists further sources of information relating to self represented litigants which may be helpful.

Children

The general topic of children and the law has been the subject of law reform in recent years. Chapter 13 of the Benchbook examines the issues which the Supreme Court faces when dealing with proceedings involving a child including: the receipt of evidence from child witnesses in both criminal and civil proceedings; issues relating to communication with child witnesses; case management procedures for proceedings involving children, issues relating to the conduct of criminal proceedings against juvenile defendants.

The chapter outlines the various relevant statutory authorities, including the new provisions inserted by the Evidence (Protection of Children) Amendment Act 2003 and the court facilities available for children to give evidence in compliance with those new provisions.

Communication with child witnesses is also covered in the chapter. The difference between an experienced barrister, sophisticated in the use of the English language, and a child witness may be extreme and this may put the child at a heightened disadvantage vis-à-vis as adult witness.

Problems occur when negatives used, when there is a juxtaposition of unrelated topics, unduly long and complex questions and repetition of questions.

In addition also contains information on children as defendants and the trial and sentence of juvenile defendants. The chapter contains as appendices practice directions involving the trial of children and young persons and the charter of juvenile justice principles.

Gender

Chapter 14 covers the topic of gender. Whilst there is no singular “female experience” of life or the legal system just as there is no “male experience”, women’s experiences generally may differ from men’s experiences in a number of areas including employment, health, education and family.

Women are engaged in paid employment less than men and earn less than men. Women provide the majority of unpaid work in Australia. This means that women are more likely to be financially dependant and also shoulder the bulk of responsibilities caring for children and domestic activities. Women are less likely to be able to afford access to the legal system and the absence of childcare facilities further hinders access to justice.

The Benchbook covers a number of areas where they may be difficulties for women in court for example many women find it extremely difficult giving evidence as a complainant in rape or sexual assault cases. Women who choose to prosecute perpetrators of domestic violence face several obstacles in brining the matter before a court. They may have had

previous negative experiences in seeking help from police, doctors, or other professionals. They may fear that taking legal action will serve no purpose and may in fact lead to further violence by the perpetrator.

Queensland has a number of a initiatives operating which provide emotional and legal support to victims of domestic violence who are involved in court proceedings, and the benchbook attempts to outlines those initiatives. There is also a number of statistics on the prevalence of rape and sexual assault including the vast number of assaults that go unreported.

Criminal defences where there is a long history of abuse are also examined in this chapter of the benchbook in addition to a brief outline of battered women syndrome. There are also a number of factors raised for Judges to consider when sentencing women such as the effect of female incarceration on children and the adverse effect fines have on women in the event of non-payment.

Gender is also of broader relevance, in areas of law such as family, discrimination, personal injury and crime, and also plays a part in understanding the experiences of men and women generally in our community and these experiences may differ.

Sexuality and Gender Identity

The final chapter of the Equal Treatment Benchbook deals with issues of sexuality and gender identity. As the book outlines, the experience of being gay or lesbian differs from the experiences of other groups who may be the subject of discrimination. It appears that the harassment and discrimination a gay or lesbian person experiences is directly proportional

to their openness about their sexuality. This puts many gay men and lesbian women in an everyday dilemma.

The Benchbook provides information on prejudice suffered by Lesbian women and gay men, the legal recognition of same sex relationships and domestic violence in gay and lesbian relationships. The chapter also provides background information on bisexuality, transgender, cross dressing and inter-sex persons as well as outlining some useful resources for further information on this area.

Conclusion

Hopefully now, you can appreciate just what an immense and valuable project this was for the Supreme Court to undertake. As editors Justice Phillip McMurdo and I were assisted by many people and organisations who contributed by writing or agreeing to review or contributing their views to the publication.

The publication was officially launched at the Supreme Court in March of this year and we were fortunate enough to have the Hon John Von Doussa, President of HREOC, as the guest speaker. Albert Holt, an Aboriginal Elder of the Bidgera people, gave the acknowledgment of country and the Attorney-General, Linda Lavarch presented the vote of thanks. The feedback we have received from many in attendance has been excellent; with more than a few saying they felt this was one of the most important and enjoyable events held at the Supreme Court.

You will see from the format of the Benchbook that it is a work in progress. It is available electronically via the Supreme Court Library website, on CD by request and also in loose leaf form and we welcome

any feedback on errors, additional information that might be included, any disagreements or areas that need to be further explored or emphasised.