Speech at the Cultural Diversity and the Law Conference, Panel on the Role of Judgecraft in a Multicultural Society, 14 March 2015

May I first acknowledge and pay my respects to the traditional owners of the land on which we meet, the very heart of where Aboriginal societies were first disrupted by the arrival of Englishmen who did not understand and failed to respect their law and culture.

I wish my contribution this afternoon to be about an initiative of the Supreme Court of Queensland which has endeavoured to redress some of the imbalances in our legal system or at least in people's experience of the courts that belong to all of us.

The Equal Treatment Bench Book was first launched in Queensland in 2006. Its creation was a considered process, the idea having first been agreed by Judges of the Supreme Court in 2003. Over the next two years, Justice Philip McMurdo and I co-ordinated its development, through research and consultation with a broad variety of community and government bodies. The aim of the Bench Book is to assist Judges to deliver justice according to law in a manner cognisant of the diversity of Queensland's present-day population.[1]

As its name suggests, the Bench Book strives to ensure that all who come before the courts are in fact treated equally. At the same time, its creation was driven by an acknowledgement that participants in the justice system come from all parts of our diverse society and judges need to be informed of particular circumstances affecting certain types of participants. Equal treatment does not equate to the *same* treatment.[2] The issue is one of fairness, aiming to ensure the appropriate conduct of each individual case, having regard to the situation at hand. It therefore contains information in relation to ethnic diversity; religion; family diversity; Indigenous persons; persons with disability; self-represented parties; children; gender; and sexuality and gender identity.

The Bench Book does not seek either to homogenise or to create concrete distinctions between groups of participants. It points to matters more likely affect certain people than others. The Bench Book considers the issue of intersectionality,[3] such as arises, for example, where a participant is an Indigenous person with a disability or a woman from a culturally and linguistically-diverse background. It is for each Judge, knowing of these issues,

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[1] Supreme Court of Queensland *Equal Treatment Bench Book*, Brisbane, Supreme Court of Queensland Library (2005) xi, 13-14 <www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf> ('Bench Book').
[2] Ibid 14.
[3] See, e.g., ibid 236-7.

to determine what role, if any, they play in the particular case.[4] Ensuring that the judiciary is aware of problems facing particular groups also increases the likelihood that justice will not only be done, but will be seen to be done by community groups affected as well as by the community as a whole.[5]

Although four chapters of the Bench Book specifically address issues of concern to Aboriginal and Torres Strait Islander people, the drafting process exposed the great diversity and geographical spread of Queensland's Indigenous population. The Bench Book therefore gave rise to a separate project aimed at informing the judiciary about the particular circumstances of Indigenous people from Saibai Island in the Torres Strait to Cherbourg in the South Burnett region. This series of Indigenous community Justice Resources is now available online to the judiciary, the legal profession and the public, and is a valuable information source in its own right.[6]

It would not be possible to canvass all of the issues covered by the Bench Book in depth this afternoon, but in the context of this conference, some seem particularly pertinent.

Chapter Five of the Bench Book focusses specifically on Oaths and Affirmations. While this may not seem the liveliest of topics, it is of great significance from the perspectives both of evidence and equality. Although Australia is a secular nation, its British colonial heritage brought with it strong Judeo-Christian traditions. In Court proceedings, the most obvious instance of this cultural history is in the standard forms of oath taken by witnesses, jurors and interpreters in civil and criminal matters, each of which ends with the words, "So help you God".[7] This standard form derives from the Christian belief in a God that sees bearing falsehood as wrongful. It was posited that the fear of divine punishment compelled an individual to act honestly in their role.[8]

It remains true that the most common religious affiliation in Queensland today is to some form of Christianity.[9] However, a significant proportion of the population adheres to some other faith, or to none at all.[10] In a secular, multi-

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[4] Ibid 13.
[5] Ibid 14.
[6] See Department of Aboriginal and Torres Strait Islander Partnerships, Queensland Government, *Justice Resources* (24 November 2014) <https://www.datsima.qld.gov.au/publications-governance-resources/justice-resources>.
[7] *Oaths Act* 1867 (Qld) ss 21-30.
[8] Bench Book, above n 1, 51; *Omychund v Barker* (1745) 1 Atk 21; 26 ER 15.
[9] See Australian Bureau of Statistics, *2011 Census QuickStats* (28 March 2013) <http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/3?opendocument&navpos=220> ('QuickStats').
[10] Ibid.

faith society, it is fundamental that the word of each individual is weighed equally and its credibility determined on the facts. No participant in the justice system should be made to feel that their beliefs render their contribution any less valid or credible.

While the *Oaths Act* 1867 (Qld) makes provision for a non-religious affirmation,[11] people of particular faiths may prefer to swear an oath fitting their religion. Indeed, the Act does not preclude this; an oath must simply be "to the like effect" of that stated in the Act.[12] The Bench Book suggests appropriate alternative oaths that may be sworn by adherents of Buddhism, Islam, Hinduism, Sikhism and Judaism, all religions with large followings in Queensland, and also comments upon other less-common belief-systems. Chapter Five provides further information to explain why these particular forms of oath may be used, while a separate chapter on religion describes in more detail major aspects of these belief systems and the ethnic cultures with which they are often associated. The correct holy books and their manner of treatment are also specified, to ensure that appropriate respect is accorded to each religion.

The Bench Book notes that provision for alternative oaths should be made ahead of time, to ensure that the correct holy book is available and that individuals are informed that the choice of oath is theirs. While the judiciary is not always aware of such matters before proceedings commence, steps may still be taken once they have. Judges may appropriately intervene, as I have, where it appears that the witness has not been properly advised that they are under no obligation to swear an oath on the Bible, and that no negative consequence will flow if they choose not to.

Effective Communication in Court Proceedings is dealt with in Chapter 6. This is perhaps one of the more obvious areas in which issues of access to justice arise. In order to engage in courtroom processes, an individual must understand those processes. In an already complex legal system, that task becomes all the more difficult when the individual cannot comprehend or communicate in the language of its operation.[13] While this is a problem for persons with disability as well, my focus today is on persons of culturally and linguistically-diverse backgrounds.

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[11] See section 17.

[12] *Oaths Act* 1867 (Qld) ss 23-30. Sections 21 and 22 require the oaths of jurors to be "in a form to the same effect" as those stipulated.

[13] Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) [2.2]-[2.3].

According to the 2011 national Census, 1.1 per cent of the Queensland population, or around 40,000 people, do not speak English well or at all.[14] The Bench Book observes that this presents not only linguistic issues in court, but also difficulties arising from the comprehension of cultural norms associated with the dominant language. In addition, it is noted that an ability to speak English sufficiently well for day-to-day life will not necessarily translate into the capacity to effectively navigate court proceedings.[15]

As we know, one of the main strategies available for overcoming a linguistic barrier is the use of an interpreter. The Bench Book underlines the importance of having appropriately accredited interpreters, capable not simply of converting the words used but also of transmitting the correct meaning to the court. The Bench Book explains how interpreters work so that the judiciary may be aware of what should be expected of interpreters and can also accommodate their needs to ensure efficacy and accuracy.

Body language and behaviour as non-verbal means of communication also have a significant role in court proceedings. The demeanour of a witness may constitute evidence in a proceeding, being relevant to her or his credibility. The Bench Book draws attention to particular conduct with an assumed meaning in Anglo-Australian culture – from which the majority of the Australian judiciary still derives – but which may be differently interpreted by others. These examples were mentioned by Chief Justice French in his keynote address this morning. Answering questions clearly and with direct eye contact is, in Anglo-Australian culture, considered positively, while in other cultures, this may be deemed challenging or offensive. The examples given in the Bench Book are not hard and fast rules. However, a judiciary aware of these possibilities is more likely to be alive to nuances in speech and behaviour and to take steps to ensure that all communication is effective and understood.

My own Associates have often shed light on issues of access to justice within their life experiences, including physical disability, gendered perspectives, and ethnic and religious backgrounds. For example, in the drafting of the Bench Book, my Vietnamese-Australian Associate educated me regarding the symbolism of family presence in court. This is often regarded as a positive sign of support for an offender changing their behaviour. However in her

[14] Department of Treasury and Trade Office of Economic and Statistical Research, Queensland Government, *Census 2011: Diversity in Queensland* (2012) <http://www.qgso.qld.gov.au/subjects/census/census-2011/reports/diversity-qld-c11/index.php>.

[15] See further *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 (Kirby P), as quoted in Bench Book, above n 1, 70-1.

experience, as confirmed by local community groups, considerations of honour and shame often keep families away from the courtroom. It is important that we all have these kinds of conversations and ensure that doors are open to people of the varied experiences that enrich public life. If it still needs to be made clear that difference is to be cherished in our society, that point is made by the remarkable achievements of young people like my Associates whose diversity has, on occasion, been accompanied by overcoming considerable adversity.

On the occasion of the Bench Book's launch in March 2006, I asked, "What are the elements of a society that are essential to a democracy?"[16] One such pillar of democracy, as incontestable now as it was then, is the rule of law governed by equality before the law. In a society as diverse as that of Australia today, equality must be taken seriously, not for granted. Today, in its south-east, Queensland plays host to one of the fastest-growing regions in this country.[17] In recognition of this dynamism and almost a decade on from its launch, the Bench Book is undergoing a complete review to ensure that it continues to provide an up-to-date reflection of the society the Queensland judiciary serves.

The Equal Treatment Bench Book is therefore not a gesture towards political correctness. It is an operational tool that seeks to equip the Queensland judiciary with practical knowledge and the means of addressing disadvantage in access to justice through the Queensland courts. Its impact on the judiciary is demonstrated by the fact that it has been referenced in judgments of the Queensland District Court and Court of Appeal.[18] But its true success lies in the experiences of those who have benefited from the judiciary's increased appreciation of the manner in which they live and the impact of that on their courtroom experience.

[16] Justice R G Atkinson, 'The Equal Treatment Bench Book' (Speech delivered at the Launch of the Supreme Court of Queensland Equal Treatment Bench Book, Brisbane, 15 March 2006) 2.
[17] Department of State Development, Infrastructure and Planning, *South East Queensland Regional Plan Review* (July 2014) <http://www.dsdip.qld.gov.au/resources/factsheet/regional/seq-regional-plan-fs4.pdf> 1.
[18] See *R v Casey* [2014] QDC 151; *MAC v MMV* [2009] QDC 276; *R v SAW* [2006] QCA 378.