FAIRNESS IN THE LAW

Speech presented at the 2018 Sir Ninian Stephen Lecture: 14 November 2018, Brisbane

Thank you for inviting me to speak this evening.

May I first acknowledge the traditional custodians of the land on which we meet today and pay my respects to their elders past, present and emerging. I am sure we are part of a long tradition of people meeting here to discuss the ways in which fairness and the law intersect.

I am honoured to be speaking at an event named for a figure as significant as Sir Ninian Stephen. As you will all be aware, Sir Ninian served as a Justice of the Supreme Court of Victoria, a Justice of the High Court of Australia and as Australia's Governor-General. Sir Ninian was also Australia's first Ambassador for the Environment, a Judge *ad hoc* on the International Court of Justice and a Judge on the International Criminal Tribunals for Rwanda and the former Yugoslavia. He was a man who made significant contributions to Australia and the world, in making it a fairer place.

I had the honour and pleasure of meeting him and Lady Stephen in 1986 when I was the Associate to Sir Gerard Brennan of the High Court and the Stephens' youngest daughter was the Chief Justice's Associate. He was a man of immense

charm as well as learning; a person with a deep understanding of Australia's constitutional conventions, necessary after some bruising times in our political history, and an ability to talk to, and bring out the best in people because he was genuinely interested in their lives, concerns and areas of expertise. It is therefore a particular privilege for me to be speaking on this topic tonight and in honour of him.

The focus of my address will be law reform and the ways in which it can be used as a tool to make the world a fairer, more equitable place. I will talk first about the work the Queensland Law Reform Commission was able to engage in when I was its Chair and then will discuss the aims and effects of the Equal Treatment Benchbook of the Supreme Court of Queensland.

Queensland Law Reform Commission

I had the good fortune to chair the Queensland Law Reform Commission between 2002 and 2013. However, my involvement with the Commission started much earlier, in 1990, when I was a member of that body, and we were asked to review the law governing de facto relationships in Queensland.

In October 1991, the Commission released a Discussion Paper on Shared Property. The Paper focused on legal difficulties which can arise where people, other than married couples, live together and share property.

The following year, the Commission released a Working Paper focused on de facto relationships. That Working Paper, and the reports which followed it, in 1993 and 1994, included in its definition of a de facto relationship, de facto relationships between people of the same gender. That was significant as the only legislation addressing de facto couples at the time (the New South Wales *De Facto Relationships Act 1984*) only applied to de facto relationships between a man and a woman.

Furthermore, the Reports were official recognition of the fact that people in same sex relationships were disproportionately disadvantaged by their de facto status. Breakdowns of de facto relationships were resolved at the time via the operation of equitable principles, which were ill-suited to domestic relationships and caused injustice.

The Commission noted that for same sex couples, the injustice was worse, as they had no option of receiving the protections afforded by the *Family Law Act 1975* (Cth). The work of the Commission at the time took account also of the recent introduction of anti-discrimination legislation in Queensland and elsewhere in Australia.

The Working Paper suggested that legislation should be introduced in Queensland to facilitate the resolution of disputes between all de facto couples. The Report, released by the Commission in June 1993, set out a draft *De Facto Relationships Act* which would overcome those common law deficiencies. This

Act, like the Reports which had given rise to it, was inclusive of same sex relationships.

The Draft Act, however, was not immediately implemented by the Queensland Government. It appeared unlikely that the law would change.

However, the following year, the Draft Act was adopted in amended form as the *Domestic Relationships Act 1994* (ACT) in the Australian Capital Territory. Importantly, this ACT Act, based on the Commission's Report, retained its gender and sexuality-neutral approach to de facto relationships.

The success of the ACT Act soon spread to other states and territories: in 1999, both New South Wales and Queensland introduced amending legislation to provide same sex de facto couples to resolve their property disputes. In 2004, the Northern Territory amended legislation to include same sex de facto couples.

South Australia and Tasmania also introduced legislation during this time (in 1996 and 1999, respectively) but the definition of a *de facto* relationship used in those States' legislation was restricted to a relationship between a man and a woman.

Eventually, however, all states and territories in Australia enacted legislation allowing same sex couples to resolve property disputes arising out of the breakdown of a relationship and in 2008, following references from each State

and Territory (except Western Australia), the *Family Law Act* was amended to confer jurisdiction on the Family Court of Australia for the resolution of property disputes in de facto relationships.

On 6 March 2016, the Attorney-General indicated that the Coalition Government, if re-elected, would hold a plebiscite on the issue of same sex marriage. A bill was introduced in 2016 to hold a plebiscite, but it was defeated in the Senate. In 2017, the Federal Government again attempted to pass legislation enabling a plebiscite, but was unsuccessful. It ultimately used a voluntary survey by postal mail.

As you all know, the results of the survey were returned in late 2017 and granted victory to the "yes" campaign, which won 61.6% of the vote and passed in every State and Territory.

An Act was passed on 7 December 2017 and received royal assent on 8 December 2017, officially becoming law. The first legal same-sex weddings under Australian law were held on 16 December 2017.

The protection of same sex couples under the law had been completely transformed. From the beginnings of legal protections for same sex couples in the early 1990s to last year, a journey of almost 30 years, it was difficult at times to remain optimistic that the law would change.

However, the law did change to make the world fairer and, importantly, the role of state law reform commissions was there at the very forefront of that change.

As Chair of the Queensland Law Reform Commission, the last report for which I was responsible was *A Review of the Trusts Act 1973*, Report 71. It included a comprehensive review of the *Trusts Act* and draft legislation. Unfortunately it has not yet been implemented. Perhaps that is because, apart from lawyers working in that area, there is really no obvious lobby group that wants the *Trusts Act* to be made simpler and more comprehensive.

It can be seen that the law regarding succession, trusts and guardianship has been a very fruitful area for law reform both in Queensland and throughout the common law world in the past decades. There are areas of the law that affect ordinary people as so many now die with assets and often with complex family arrangements as a result of blended families and other societal changes.

In addition to their importance in legislative law reform, the reports and working papers of the Law Reform Commission are a most useful resource in terms of the learned discussion of the law and the cases. That Judges as well as practitioners find them useful is shown in the number of cases in which these reports are explicitly referred to in the Supreme Court of Queensland.

One such recent example was the matter of *Sadleir v Kahler*[1] decided on 6 April 2018. This is one in a line of cases regarding whether or not a document which was not properly attested as a Will could nevertheless be regarded as a Will and entered into Probate. In that case I made reference to s 18 of the *Succession Act* which gave effect to the recommendations of the consolidated report to the standing committee of Attorneys-General on the Law of Wills by the National Committee for Uniform Succession Laws. The QLRC observed that the requirement that there must be "substantial compliance" with the formal requirements of a Will, which was the test which had previously existed, had proven to be so great a stumbling block that the provision had had poor success. A recommendation was made that the new power of dispensation be uniform across Australia. It followed a model first introduced in South Australia in 1975 and refined in subsequent model legislation. As I observed in that case the remedial nature of this legislation has meant that a liberal approach has been taken to the construction of s 18. Examples of documents that have been declared to be Wills which can be admitted to Probate have included a copy of a Will;[2] documents created in an iPhone;[3] a DVD;[4] unwitnessed handwritten amendments to a previous Will;[5] and even an unsent text message.[6] There are numerous

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1 [2018] QSC 67.
2 *In the Will of Dianne Margaret Cardi* [2013] QSC 265.
3 *Re Yu* [2013] QSC 322.
4 *Mellino v Wnuk* [2013] QSC 336.
5 *Fraser v Melrose* [2016] QSC 213; Re Buchanan [2016] QSC 214.
6 *Re Nichols; Nichol v Nichol* [2017] QSC 220.

occasions on which an unwitnessed handwritten Will has been admitted to Probate.[7] As a result a person's testamentary intention is now much more likely to be given effect.

Another fertile area of litigation has been the making of a statutory Will. The recent decision of Brown J in *Re CGB*[8] followed the decision in *Sadler v Eggmolesse*[9] which also referred to one of the areas of succession law that was seen as a deficiency in Australia in that there was no provision for a court to make, or alter or revoke a Will on behalf of a person who lacked or had lost testamentary capacity. The making of a statutory Will is governed by ss 22 to 24 of the *Succession Act* which were introduced in Queensland in the *Succession Amendment Act* of 2006. The explanatory memorandum refers to that Act being "to implement the recommendations of the National Committee for Uniform Succession Laws regarding the law of Wills." Unfortunately our hope that the laws introduced would be uniform throughout Australia has not been comprehensively achieved; nevertheless, this reform is an important one in for providing that a person who has never had or has lost testamentary capacity is not left with an unjust and unfair distribution of their assets when they die.[10]

Construction and rectification of a will have also been the subject of statutory reforms by the Law Reform Commission referred to by Mullins J in *McPherson*

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7 *Re Grindrod (deceased)* [2014] QSC 158 and *Re Tinker (deceased)* [2016] QSC 217.
8 [2017] QSC 128.
9 [2013] QSC 40.
10 But see also *GAU v GAV* [2014] QCA 308.

v Byrne[11] citing *Public Trustee of Queensland v Smith*.[12] So too has the modern anti-lapse rule referred to in *Re Thomson*.[13]

Although the QLRC's latest report on the Trusts Act has not yet been implemented, its 1971 report on the law relating to trusts, trustees, settled land and charities has been referred to as an aid to interpretation most recently by Jackson J in *Lanai Unit Holdings Pty Ltd v Mallesons Stephens Jacques (No 2)*.[14] Also of use to practitioners is the discussion paper published by the Queensland Law Reform Commission entitled "A review of the *Trusts Act* 1973 (Qld)" WP No 70 published in 2012 and the Commission's interim report, WP No 71. These papers were referred to by the court both in *Coore v Coore*[15] and *McIntosh v McIntosh*.[16] The legal analysis found in the 2013 *Report on the Review of the Trusts Act* was relied upon by Fraser JA, with whom the Chief Justice agreed, in the Court of Appeal in *Re Tracey*.[17]

The guardianship reports were most recently referred to by Bond J in *Zuecker v Bruggmann*[18] to determine whether or not a person with impaired capacity required a litigation guardian.

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11 [2012] QSC 394; see also *Palethorpe v The Public Trustee of Queensland* [2011] QSC 335 per Philippides J; and *Rose v Tomkins* [2018] 1 Qd R 549.

12 [2009] 1 Qd R 26.

13 *Re Thomson & Anor (as trustees of the trusts established pursuant to the will of Shine (deceased))* [2010] QSC 167; see also *Donald v Guillesser* [2015] QCA 92.

14 [2016] QSC 242.

15 [2013] QSC 196; cited by the Court of Appeal in *Ban v The Public Trustee of Queensland* [2015] QCA 18.

16 [2014] QSC 99.

17 [2016] QCA 194.

18 [2016] QSC 53.

Another report which has been referred to in litigation is the Law Reform Commission's review of the law in relation to the final disposal of a dead body. In *Pike v Pike*[19] this report was referred to for the settled principle, known as the forfeiture rule, that at common law a person who unlawfully kills another person is precluded from taking a benefit as a result of that crime, including as a beneficiary under the person's Will or on the person's intestacy. That report was also referred to in the interesting case of *Laing v Laing*[20] where the question arose as to who should be responsible for the disposal of the body of the deceased; his adult children or his widow whom he married whilst under a guardianship order.

The influence of law reform to make the law fairer and more responsive to the needs of our modern society was therefore one of the most meaningful parts of my role in the Queensland Law Reform Commission and I hope that commissions in the future have a similar influence on judicial and legislative decision-making.

The Equal Treatment Benchbook

Another law reform project which I was privileged to be involved in was the development of the Equal Treatment Bench Book, a resource which, firstly with Justice Philip McMurdo, and then later with Justice Boddice and Justice Henry, I was responsible for coordinating.

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19 [2015] QSC 134.
20 [2014] QSC 194.

This Bench Book follows the model of the United Kingdom's Equal Treatment Bench Book and the Aboriginal Benchbook for Western Australian Courts. The Equality Before the Law Bench Book of New South Wales was based on the Queensland publication. These benchbooks are not academic theses on the idea of fairness, but rather day-to-day practical instruction in how to ensure fairness and equal treatment before the law by litigants, defendants and witnesses alike.

For example, one of the key practical tools of ensuring equal and fair treatment in the courtroom is the avoidance of the appearance of marginalisation. This is achieved in many ways, but one key way in which it is achieved is in the correct pronunciation of witnesses', victims' and defendants' names. This is a small step, easily achieved through a question being asked of the particular person, by instructing solicitors or counsel, but one which acknowledges the person's dignity and marks the person as inside, rather than outside, the world of the courtroom. If you do this, the practitioner assists the judge to get it right, something we all strive to do.

It should be remembered that the world of the courtroom is an unfamiliar and unnatural place for people outside of the legal profession. This is true *a fortiori* for people whose first language or main language is not English. The formal English we speak in courtrooms is less accessible than standard Australian English, a language that many multicultural and Indigenous witnesses and defendants may only speak occasionally, often exclusively in interactions with

the state and its agencies. This may mean that memories and sensations are difficult to render in formal Australian English, particularly in circumstances fraught by community attitudes towards the justice system.

However, this is a factor too often overlooked or minimised by counsel. A number of years ago, I was involved in a criminal trial in Cairns relating to a murder which had occurred in Aurukun. The witnesses in that case were largely trilingual, speaking a variety of different languages in different social contexts. People tended to speak Wik Mungkan to each other in ordinary social situations, Torres Strait Creole in interactions with people of higher social status within their community and Aboriginal English in interactions with non-Indigenous people. They were people of highly developed and nuanced language skills. However, crucially, the languages generally spoken did not include standard formal Australian English, particularly not the form of that language we use in courtrooms.

And yet, each witness was required to give their evidence in formal Australian English. This meant that they were giving translations of their memories of conversations. One particular witness gave evidence that the defendant had told her that he had murdered the victim. I intervened, asking the witness if those were his exact words, if that was the language in which this conversation had taken place.

As could be expected, those were not the words used by the defendant in their conversation. The exchange had occurred in Wik Mungkan, not in formal Australian English with the technical meaning attached to the term 'murder' used in that language. The witness was translating for the courtroom, knowing that the only people taking part in the conversation who would understand would be her and the defendant. In that case, it was incumbent on counsel and those instructing them to have prepared for this obvious issue and have prepared the witness's testimony in light of such circumstances.

It is important, in my view, for all legal practitioners to understand that Aboriginal English is a distinct form of English, which may only be superficially understood by those who do not speak it. In particular, Aboriginal English renders tenses differently: for example, a speaker of Aboriginal English may say 'they lock him up' or 'they bin lock him up' when meaning 'they locked him up'. This is significant given the importance of chronology and timing in oral testimony.

Similarly, the language structure of Aboriginal English differs from formal Australian English and may result in subjects (for example, the perpetrator of a crime) and objects (for example, the victim of the crime) being misidentified or confused by the jury, which would also be of major significance in the context of criminal proceedings. Another example given in the Equality before the Law Bench Book prepared by the New South Wales Judicial Commission is the use

of the word ‘kill’ to mean ‘hurt’ in Aboriginal English, which could clearly result in misunderstandings by jurors.

In addition to this, in traditional Aboriginal culture, direct questioning is unusual and may be perceived as inappropriate or discourteous. Conversations instead occur via the volunteering of information in a narrative fashion and responses in the form of silence, hints and indirect questions. Hence, the direct questioning which occurs in court, particularly in cross-examination, is an unfamiliar experience for Aboriginal complainants, witnesses and defendants and may mean that the person is not able to express all that they know about the particular event or issue.

Therefore, even where a person may seem *prima facie* able to speak and understand formal Australian English, counsel and instructing solicitors should in conferences confirm the scope of their ability to be involved in court proceedings conducted in Australian English and seek the assistance of an interpreter in court, if one will be required. This is now a requirement in proceedings involving dangerous prisoners in Queensland, as set out in Practice Direction 6 of 2012 of the Supreme Court of Queensland.

One final note on the role of interpreters is to ensure that the interpreter chosen to act for the client is suitable given all the circumstances. The Equality before the Law Bench Book notes that it may be appropriate, for example, to ensure that

a complainant in a case involving sexual activity, sexual assault or domestic violence has an interpreter of the same gender to minimise cultural discomfort.

Another example given is where it is desirable to have someone from the witness's own ethnic or religious background (for example, a Serbian Serbo-Croatian speaker as opposed to a Croatian Serbo-Croatian speaker) or from the same linguistic background (for example, an interpreter who also speaks Quebecois French rather than Swiss French or an interpreter who speaks Brazilian Portuguese rather than European Portuguese).

A recent Queensland Court of Appeal decision, *R v Savage* [2017] QCA 139, demonstrates another linguistic difficulty that may be encountered in cases involving Aboriginal and Torres Strait Islander witnesses and may endanger the fairness of a trial involving such persons. In that case, the trial judge had noted that the Aboriginal and Torres Strait Islander witnesses, who were to be called in that case, were 'probably more intimidated than any other category of society in giving evidence'. The trial judge explained to the jury that the inconsistent statements made by an Aboriginal and Torres Strait Islander witness were not necessarily evidence of dishonesty, but rather simply a way of expressing oneself caused by that witness's difficulty in expressing events sequentially, a factor that the trial judge noted was more common among Aboriginal people and Torres Strait Islanders.

The Court of Appeal considered that this was not an impermissible class warning to the jury, but rather that the trial judge was simply taking account of the different style of expression by the witness. Instead of being the type of jury warning which sought to diminish the effect of the witness's evidence, the trial judge made allowance for the jury's potential lack of familiarity with this phenomenon so that any reliability analysis performed by the jury was not coloured by cultural ignorance. Lawyers appearing in court should be sensitive to these different linguistic aspects and seek appropriate directions from a trial judge at the earliest convenience.

Another aspect of court procedure when examining Aboriginal witnesses is the understanding that asking leading questions of such a witness may lead to gratuitous concurrence. The phenomenon of gratuitous concurrence was demonstrated most starkly in *R v Kennedy*, an unreported case in the Supreme Court of the Northern Territory from 1978 where the accused repeatedly agreed to conflicting or opposing statements put to him by police as yes or no questions, responding 'yes' to one question and then again to a question phrased as the polar opposite.

This demonstrates clearly the issues with direct, closed questioning of Aboriginal people and its ability to obstruct their capacity to tell their stories in police interviews and in court. Injustices have been occasioned by this failure to account

for the differences in approach required in questioning Aboriginal people and care should be taken in future to prevent such unfairness.

This phenomenon has also been observed in the context of the difficulties which Aboriginal women face in reporting domestic and family violence. In *R v Kina* [1993] QCA 480, the defendant had been found guilty at trial of the stabbing murder of her *de facto* husband. On appeal, evidence was produced for the first time in the proceeding of the significant physical and sexual violence which the defendant had suffered at the hands of her husband, giving rise to a defence of provocation. The Queensland Court of Appeal found that the defendant had experienced 'exceptional difficulties of communication' in speaking with her male legal representatives, due to her Aboriginality, battered woman's syndrome and the shame that she felt in relation to the abuse she had suffered, which had meant that she was unable to communicate the details of the abuse.

The case of *Kina* demonstrates the intersection between cultural and linguistic diversity in criminal trials. Abuse may also be underreported because of the demarcation in the Aboriginal community of 'women's business' and 'men's business'. It has been noted that Aboriginal women traditionally do not discuss matters concerning sex or sexuality which may mean that Aboriginal women are reluctant to give evidence concerning sexual offences in the presence of men. Such women may also be deterred from making complaints or giving evidence by the desire to avoid bringing shame to their families. As in *R v Kina*, this may

mean that it is appropriate to allow a female Aboriginal complainant to speak with another woman, and preferably, if available, a female Aboriginal lawyer or support person so cultural factors do not obstruct their ability to give full and frank testimony.

An increasingly important factor which legal practitioners should also be aware of is the role that non-verbal communication plays in other cultures. Traditionally in a courtroom setting, avoidance of direct eye contact or silence have been interpreted as indicators of dishonesty or discomfort. However, in Aboriginal society, avoidance of direct eye contact is an indicator of politeness and respect, frequently used in interactions with members of the community who carry authority. Similarly, silence is an important linguistic tool in the Aboriginal and Torres Strait Islander communities used to express concentration or consideration of a particular topic. Therefore, it may be appropriate to seek a direction or comment by the trial judge that this behaviour is not to be interpreted adversely to a complainant, witness or defendant if they are giving oral evidence, as the behaviour may have other explanations.

The style of communication is also relevant to many other cultural backgrounds. As has been noted in the Equal Treatment Bench Book prepared by the Judicial College in the United Kingdom, in many Eastern Asian cultures, the concept of ‘saving face’ is fundamental. This may mean that witnesses or defendants will

say that they understand questions put to them in an attempt to 'save face' for either the person or the legal practitioner asking the question (or both).

Another example noted in the United Kingdom's Equal Treatment Bench Book is the style often used by speakers of South Asian languages to provide context first and then move to the direct answer at the end of their answer. This narrative style is an integral part of literacy in Indian culture and a misunderstanding of this cultural style may result in vital information being missed or a witness being wrongly understood as evasive or unhelpful. It is important to phrase questions and remarks to such witnesses in a way that is sensitive to their style of communication and enables them to tell their story.

Cultures may also differ in the appropriateness (or not) of conveying emotion in public. Juries may struggle with the testimony, for example, of a complainant who speaks about an alleged crime without ostensible emotion, which may simply be the result of that complainant's reticence to express emotion in a public setting, particularly in the company of people outside their cultural group or gender. By contrast, the Judicial College's Bench Book notes how African-Caribbean witnesses have voiced concern that their testimony is adversely perceived by juries as they have a tendency to express a large amount of emotion when engaged in story-telling or narrative. This demonstrates the importance of cultural sensitivity in preparing witnesses so that counsel can adopt the in-court

techniques which best allow the witness to tell their story in their words and their style.

Another aspect of ensuring that Indigenous and multicultural witnesses and defendants are able to fairly and equally participate in the criminal justice process is in the acknowledgement and accommodation of religious practices. For example, while the traditional oath taken in courts around Australia remains a Christian oath, there is an increasing proportion of Australians who are either non-religious or practise a non-Christian religion.

The Equal Treatment Bench Book in use in Queensland now includes appropriate alternate oaths for people who practise Islam, Buddhism, Hinduism, Sikhism and Judaism, as well as providing guidance on other, less common, belief systems. This practice will be of special significance in cases involving defendants, victims, witnesses and interpreters who all come from religiously and culturally diverse backgrounds, which may require many different oaths to be administered. Researching the necessity of different oaths and obtaining copies of the relevant sacred texts or objects is an essential part of your pre-trial preparation and any special requirements should be communicated to the Court to allow arrangements to be made.

In addition to the conduct of the court proceedings, a major factor in ensuring equal treatment for multicultural defendants and witnesses is the timing of court appearances. The major holy days of each major religion practised in Australia

are included in the Equal Treatment Bench Book and should be considered when planning court appearances. In two criminal matters involving Muslim defendants over which I have presided, it has been important for the Court to ensure that prayer times were accommodated in the court day and to avoid if possible a court sitting on a Friday, which is a Muslim holy day.

These matters should be familiar to counsel and should be raised at pre-trial hearings and mentions to ensure that arrangements may be made, where possible, with the Court at the earliest convenience to accommodate the person's religious and cultural practices. Similarly, an observant Jewish person may need to leave court early on a Friday so as to be able to be home before sunset.

Counsel and instructing solicitors should discuss these issues with their clients and be able to raise with the Court any religious issues arising from a defendant's period in custody at the court, including the availability of food according with their religious practices, the ability to pray at their chosen time and their ability to dress appropriately and in accordance with their beliefs. It also may be necessary to discuss with a defendant or defence counsel the applicable court etiquette and ascertain from the defendant whether standing and bowing to a Judge accords with what they regard as their religious and cultural beliefs and advise the Court accordingly.

Over the years, many of our assumptions about the criminal justice system have been displaced by the growing diversity of Australian society. We understand

now that particular actions will have significance in some cultural groups where they will not in others. A few years ago, my Associate was a Vietnamese-born Australian. She explained to me that while generally, family presence in a courtroom is interpreted as a sign of support for a defendant which has significance for rehabilitation, it is common practice in the Vietnamese community not to attend a court appearance of a family members due to considerations of honour and shame. While this may not be true for all people in that cultural group, it indicates that many of the norms which we take for granted in courtrooms are not neutral, but rather culturally specific to mainstream Australian culture. It may be appropriate therefore to tailor submissions made in sentencing hearings to the particular cultural context to which a defendant belongs.

When speaking of a person's cultural context, consideration may also be given to whether the matter is 'men's business' in the Aboriginal community. In the recent case of *Johnson v George* [2018] QSC 140, an Aboriginal man applied under the *Succession Act 1981* (Qld) for the body of his father to be released to him for the purposes of a funeral and burial. The rest of the applicant's siblings were split on whether to support the burial in Charters Towers as the applicant intended or hold a burial 'in country' at Townsville as the respondent suggested.

One of the key issues in the case was the religious and cultural issues which surrounded this decision. Factors included the fact that burial arrangements for a

deceased Aboriginal man were said to be ‘men’s business’ and the deceased’s connection with the Wulgurukaba People and role as an elder of that group on Magnetic Island. While this was a civil case, it shows the importance of counsel and instructing solicitors bringing to the judge’s attention all the cultural issues which are involved in a case.

Similarly, while homicide victims’ names are published as a matter of course in criminal trials, if the victim was an Aboriginal person or a Torres Strait Islander, consent and advice should be obtained from their community to use the deceased’s name and image. This is now included in Practice Direction 6 of 2013 of the Supreme Court of Queensland, which covers case management in complex criminal trials. Similarly, warnings should be used in court to protect family members of the deceased from the distress caused by the publication of the name or image.

It is rare that the names of deceased persons would be able to be completely suppressed – they are formally required to be published in indictments or order sheets – but I note that the Aboriginal Benchbook for Western Australia Courts discusses the case of *R v Bara Bara* (1992) 87 NTR 1 where orders were made suppressing the publication of the name of the deceased in a manslaughter sentence. This represents the importance of fairness and equity not being immutable concepts, but being those which move and adjust to the particular facts of their cases.

Conclusion

Each and every one of us should strive to ensure that as far as humanly possible we practise the law in whatever area we work in, fairly and justly in accordance with the law and thereby make a real contribution to the world being a more fair and just place for all.

The Honourable Justice Roslyn G Atkinson AO

14 September 2018