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Cultural diversity: reflections on the role of the judge in ensuring a fair trial*

*The Honourable Justice Helen Wood, Supreme Court of Tasmania***

Cultural diversity is a feature of contemporary Australian society. The author, a member of the Judicial Council on Cultural Diversity, identifies some barriers to justice that people from culturally diverse backgrounds experience in their interactions with the legal system and identifies practical ways that judicial officers can diminish these barriers in criminal trials. A foundational principle for trial judges accommodating such barriers is the obligation to ensure a fair trial.

Important and pressing issues confront trial judges arising from Australia's increasing cultural diversity. I reflect on some of these issues and the duty to ensure that criminal trials are conducted fairly.

My discussion begins with a consideration of principle that has application in the day-to-day work of trial judges. I then explore some practical issues and challenges that confront judges in trials involving culturally and linguistically diverse accused and witnesses. Some key themes that emerge are the importance of jury directions, modification of those directions to allow for cultural differences and to avoid pre-judgment and stereotypes, the essential role of counsel in identifying potential unfairness, the importance of cultural awareness, and the need for a culturally inclusive approach in fact-finding.

First, a word on the increasing diversity and cultural complexity of our community and barriers to accessing the justice system.

Australia's cultural diversity at a glance

A snapshot of contemporary Australia was provided by the Australian census in 2011:[1]

- 26% of Australia's population was born overseas.
- Migrants who arrived in Australia in 2010–2011 came from over 200 countries.
- After the United Kingdom and New Zealand, China and India are now the third and fourth largest contributors to Australia's overseas born population.

* Based on a paper presented at the Judicial Council on Cultural Diversity Conference, 13–14 March 2015, Sydney.

** Justice Wood was appointed to the Supreme Court of Tasmania on 9 November 2009. Prior to this appointment, her Honour served as a magistrate. Previously, Justice Wood practised in criminal law as Crown Counsel with the ODPP (Tas) and later in civil litigation as a barrister and solicitor with a Hobart law firm. Her Honour has a longstanding interest in human rights and equal opportunity matters, having served as Chair of the Anti-Discrimination Tribunal (1999–2009). Her Honour is a member of the Judicial Council on Cultural Diversity.

1 Judicial Council on Cultural Diversity, Submission No 120 to Productivity Commission, *Inquiry into Access to Justice Arrangements*, 29 November 2013, pp 1–2.

- More than 300 different languages are spoken in Australian households.
- Of the most recent arrivals, Mandarin, Punjabi, Hindi and Arabic are the most commonly spoken languages, other than English.
- Linguistic diversity is characteristic of Australia's Indigenous communities. About 11% of Aboriginal people speak an Indigenous language at home.

Barriers to justice

It is well-known that persons from culturally diverse backgrounds experience barriers in their access to and participation in the legal system. Specific barriers include lack of knowledge of the law and available services, limited or no English proficiency, and countries of origin having a different legal system or different law. The life experiences of some migrants give rise to mistrust of government agencies, and/or the police or lack of confidence in the legal system. There are also issues of multiple disadvantage, such as social isolation and limited financial resources.

The duty of fairness: cast in stone

In *Dietrich v The Queen*, there are emphatic statements on the requirement of fairness as a "central pillar of our criminal justice system".[2] Gaudron J stated "courts are duty bound to ensure that trials are conducted fairly".[3]

Sometimes a trial may be unfair, even though conducted strictly in accordance with law. "The expression 'fair trial according to law is not a tautology.'"[4] Fairness transcends the strict requirements of the law.[5]

In considering fairness, and the content of the duty, as well as remedies and solutions, *Dietrich* provides valuable guidance which resonates.

Of interest is the explicit reference in *Dietrich* to the provision of interpreters as an essential feature of a fair trial. Deane J expressly acknowledged the provision of interpreter services for an accused and his or her witnesses as inherent to a fair trial, so that if they "were withheld by the government, a trial judge would be entitled and obliged to postpone or stay the trial ...".[6]

The inherent power to prevent an abuse of process is a useful addition to a judge's tool kit for the exceptional case. In insisting upon the need for adequate provision of interpreters, it is useful to have not only the high ground of principle, but a power which can be invoked, if necessary, to prevent an unfair trial from proceeding. If the only trial that can be had is one that involves a risk of the accused being improperly convicted, there can be no trial at all.[7]

It is impossible, in advance, to formulate exhaustively or even comprehensively what constitutes a fair trial.[8] The judgments emphasise that "the inquiry as to what is fair must be particular and individual."[9] That is not to suggest that the attributes of a fair trial involve "idiosyncratic notions of what is fair and just".[10] Importantly for our purposes, the inquiry as to what is fair enables trial judges to have regard to the circumstances of each case and the cultural background of an individual accused.

Relevantly, this case-by-case approach permits consideration of the existence of multiple disadvantage. Gaudron J recognised that the difficulties faced by an unrepresented person "may be exacerbated by problems such as illiteracy, language difficulties, and class or cultural differences."[11]

Another important tool is the rules governing procedure and evidence, giving trial judges the capacity to remove the source of the unfairness.[12] After all, fairness is often the purpose of these procedural rules.[13] We have rules that may require the exclusion of evidence that is unduly prejudicial, an order for separate trials or to change the venue of the trial, or special directions to the jury.

Generally, these procedural rules are sufficiently flexible to enable the trial judge to address specific prejudice or unfairness that may arise in an individual case. The duty of the courts to ensure that only fair trials are had may involve "tempering" rules and practices to accommodate the case concerned.[14]

The guidance provided by *Dietrich* is invaluable, but what are some of the practical issues that trial judges are concerned with, particularly given the dimension of the jury as the decision-maker?

Practical issues concerning jury trials

Every day, in court rooms across Australia, juries are invited to assess the credibility of witnesses and, in deciding veracity and truthfulness, they consider the demeanour of the witnesses when responding to

2 *Dietrich v The Queen* (1992) 177 CLR 292, Mason CJ, McHugh J at 298. See also Gaudron J at 362, Deane J at 328.
3 *Dietrich,* at 365.
4 *Dietrich*, Gaudron J at 362.
5 *Dietrich*, Deane J at 326.
6 *Dietrich*, at 331. See also Mason CJ and McHugh J at 300.
7 *Dietrich*, Gaudron J at 365.
8 *Dietrich*, Toohey J at 353.
9 *Dietrich*, Gaudron J at 364.
10 ibid.
11 *Dietrich,* at 367, citing N C Steytler, *The undefended accused on trial*, Juta & Co, 1988, p 1.
12 *Dietrich*, Brennan J at 323.
13 ibid at 325.
14 *Dietrich*, Gaudron J at 363, 365. See also, Brennan J in *Jago v District Court* (NSW) (1989) 168 CLR 23 at 49.

questions. There are cases in which credibility is the deciding factor. Integral to the jury's role is that they make findings of fact about an individual's conduct and state of mind. They need to make decisions about what the accused did and why, and also make findings about victims and witnesses. They are required to stand in the shoes of accused, complainants and witnesses and apply their common sense and experiences of life and assess an account in light of their expectations. Jurors may reject evidence because it is not in line with their expectations of how the person would react if the account were true. A premise of our legal system is that juries are well-equipped for the task of judging human behaviour.

It is interesting to reflect on the jury's task in the context of culturally and linguistically diverse accused, complainants or witnesses. Some of the issues that warrant consideration are:

- our expectations of juries, given judges and magistrates attend cultural awareness education programs while jurors walk in off the street, with no education or training in cultural awareness
- the impact of different cultural norms upon the jury's assessment of a witness's credibility, namely, the risk of the jury misunderstanding demeanour because of cultural difference
- the accused or witness may belong to a culture or race which has a negative image or stereotype in some parts of the broader community. There is a risk that the jurors may have a negative bias, or that prejudice or assumptions may intrude in their fact-finding
- cultural norms may influence a witness's out-of-court conduct which is misunderstood by the jury, leading to adverse findings.

Cultural awareness

It is well accepted that judicial education and programs informing judicial officers about cultural awareness issues are invaluable. These programs provide knowledge of cultural differences and insight regarding barriers and disadvantages that impact on access to justice. They also open our eyes to the limits of our own life experiences, biases we may harbour, or assumptions that we all subconsciously make to some degree, even despite our best efforts.

At all stages of the trial process, judges must be able to identify stereotypes and false assumptions regarding racial and cultural issues. Section 41(1)(d) of the uniform evidence legislation provides a stark example of this obligation. The court has a duty to intervene to disallow improper questioning, as defined, whether or not an objection is raised (s 41(5)). Questions which have no basis other than a stereotype must be disallowed. In applying the section, the court is to take into account various factors, including ethnic and cultural background, and language background and skills.

An incidental benefit of a trial judge's vigilance about the impermissibility of this questioning is that it sends an important message to counsel and the jury. It emphasises the need for awareness of the limits of knowledge, the need for evidence-based reasoning, and that care is expected by the court.

It is interesting to consider the standard of cultural awareness that jurors should have to properly discharge their responsibilities. We can draw on bench-marking that is sometimes used in the context of court administration and public and community sectors. A "culturally competent" individual is someone who "comprehends key cultural values but recognises the limits of their knowledge and competence".[15] This individual has some knowledge of cultural differences, an awareness that they may have subconscious biases and may be making assumptions, an awareness of the limits of their experience, and an open mind to the possibility of difference. Surely, we need our juries to be culturally competent?

The trial judge's directions assume importance when it comes to the jury acquiring an awareness of the limitations of their knowledge and the existence of subconscious biases they may have. In some cases, there will be a need for the jury to be equipped with some specific knowledge of cultural differences.

Critical role of counsel

The court's capacity to produce as fair a trial as practicable in the circumstances of each case is dependent on our knowledge of the individual circumstances and background of the accused. Counsel have a critical role in identifying issues that could lead to unfairness and bringing them to the attention of the trial judge.

Defence counsel have an obvious role in relation to the accused, but so too do Crown counsel in relation to witnesses and complainants. Counsel need to be well informed about the cultural background of the individual and alert to difficulties that may emerge in the courtroom and procedures that may be invoked.

There may be measures that can be put in place with adequate notice in advance of the trial. It is preferable that counsel raise issues as early as possible to allow adequate time to effectively address them and organise any necessary resources, such as interpreters. Perhaps a special listing before the trial judge, or the involvement of the registry may be warranted. Counsel's role extends to identifying procedures to address the vulnerabilities of witnesses from different cultural backgrounds. For example, a procedure that exists in some jurisdictions is the availability of special measures for children and other witnesses, enabling evidence to be given from a remote room or permitting a support person to be present. A witness's cultural background is specifically mentioned as a relevant statutory consideration in some jurisdictions.[16] It is important for courts to promote a culture of conversation and to ensure that there are pre-trial opportunities for counsel to raise concerns.

15 Family Law Council, *Improving the Family Law System for clients from culturally and linguistically diverse backgrounds*, 2012, p 91.

16 *Crimes Act* 1914 (Cth), s 15YAB(1)(b)(i); *Evidence Act* 1906 (WA), s 106R(3)(b); *Evidence Act* 1977 (Qld), s 21A(1); *Evidence (Children and Special Witnesses) Act* 2001 (Tas) s 8(1)(b).

The importance of trial directions

In *Jago v District Court of NSW*, Brennan J stated that often when an obstacle to a fair trial is encountered, it can be addressed by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.[17] The giving of "forthright" directions to the jury is an especially effective means of eliminating, or virtually eliminating, unfairness.

I agree with the importance attributed to the trial judge's directions in combatting potential prejudice to an accused. However, I must mention the powerful force of closing addresses. I have heard many fine and passionate addresses to juries, skilfully tapping into the jury's innate sense of fairness and justice, and the reality or perhaps ideal, of Australian values. I am sure some of those closing addresses have been decisive.

Having said that, trial judges' directions are potent — they carry the weight of the law.

Countering stereotypes and prejudice

Particular concerns arise in criminal trials if the accused's race or culture has a negative image in the community. The potential for prejudice is compounded if the criminal activity that is alleged "fits" the stereotype.

A trial judge's obligation to ensure a fair trial extends to countering any prejudice or stereotyping in this respect, whether subtle or extreme. It would likely require a direction to the jury to avoid making stereotyped or false assumptions. The potential for unfairness or a miscarriage of justice will mean the direction must be "forthright", and I add, compelling.

The timing of the direction may be significant. If it is a lengthy trial, the jury may have locked in a biased view of a witness and, by the end of the trial, the direction is just too late.

What about circumstances when the bias may operate to the forensic advantage of an accused because it attaches to a Crown witness's cultural or ethnic background? In the adversarial contest, there is a risk that defence counsel may seek to exploit negative biases. Judges have a role in identifying counsel's reasoning or addresses to the jury that are contaminated with assumptions or cultural stereotypes that the jury may be invited to adopt. Appropriate responses may include alerting counsel to the flaws in the reasoning, correcting counsel, or a direction to the jury.

Directions need to guard against jurors' subconscious prejudices that are capable of influencing jury deliberations, but which have not been endorsed or perpetuated in the courtroom. Trial judges are able to provide guidance in isolating and putting to one side these prejudices. Of course, it is not an easy task for jurors to self critically identify their own prejudices. Perhaps, it may assist to provide examples of biased thinking.

If the task facing trial judges in countering prejudices and biases seems monumental, we can find some comfort in the inbuilt safeguards in our criminal justice system. There are 12 decision-makers drawn from the community. It is likely that some jurors will have had experience with difference or disadvantage stemming from cultural or linguistic diversity, or be related to, or know someone who has had that experience.

The *Equality before the Law Bench Book* suggests that directions guiding the jury in specific ways may be necessary, such that jurors must try to avoid making stereotyped or false assumptions based on cultural norms.[18] Further, it is suggested that appropriate directions may include that the jury should treat each person as an individual and base their assessments on what they have heard or seen in court in relation to the specific person, rather than what they know, or think they know, about people from that background. It may be appropriate to direct the jury that, in assessing a witness's evidence, they need to consider what they may have learned in court about the culture or background of the individual and use this knowledge, rather than comparing how they might act in the circumstances. It is suggested that it may be helpful for the trial judge to be specific in directions about particular aspects of cultural difference.[19]

Informing the jury

The guidance from the *Equality before the Law Bench Book*, with its emphasis on the individual and evidence-based knowledge about cultural differences, is sound. However, it presupposes the jury will have acquired knowledge and some understanding of any relevant cultural differences during the trial.

A distinction can be drawn between instances where knowledge of a court user's culture or language is needed to put in place, and perhaps modify, court procedures, and where the accused or witness's cultural background should be evidence before the jury. In the former case, the information may be provided to the court informally, such as from the bar table or at the trial judge's initiative. In the latter case, I reiterate the important role of counsel, this time in identifying evidence that is needed to ensure the jury is adequately informed.

At this time of social change, while we are still learning about cultures represented in Australia, there may be a particular need for evidence. It is interesting to reflect that in past decades, assumptions and myths abounded in the courtroom about domestic violence and child victims of sexual crimes. It was a time when defence counsel would say to the jury in closing, "the fact that the complainant did not leave her partner demonstrated her account was false" or "if that had really happened, surely the child would have told someone". A vacuum of knowledge in the community allowed false assumptions to flourish and evidence was needed to counter

17 (1989) 168 CLR 23 at 47.

18 Judicial Commission of NSW, *Equality before the Law Bench Book*, 2006–, Sydney, at [3.3.7]. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 1989–, Sydney, at [1-900]–[1-910].

19 ibid.

speculation. In some cases, expert evidence was led to explain why children may not complain, or why women may continue to live with their violent partners. Over time, juries and judges became knowledgeable and intolerant of such misconceptions and we rarely hear them in the courtroom now. Perhaps we can expect that that will eventually happen with cultural diversity. Ultimately, there may be a sufficiency of community knowledge which will protect against biases and prejudices.

Modifying well-settled directions

Another question for judicial officers is whether well-settled trial directions should be amended to take account of the cultural diversity of the accused, the complainant or other witnesses? If we consider an example from the suite of directions in relation to complaint evidence:

> … the question you should ask yourself is, did [*the complainant*] act in the way you would expect [*him/her*] to act if [*he/she*] had been assaulted as [he/she] said [he/she] was? Is what [he/she] did the sort of conduct you would expect of a person who has been assaulted in that way? ... On the other hand, if [the complainant] has not acted in the way you would have expected someone to act after being assaulted as [he/she] described, then that may indicate that the allegation is false. But bear in mind when considering this issue that there may be good reasons why [the complainant] did not raise the allegation immediately following the alleged assault and that a failure to do so does not mean that the allegation must be false.[20]

This direction highlights the difficulties that may arise from cultural differences impacting upon a complainant's trust of authorities, the acceptability of speaking about matters of a sexual nature, or a complainant's familial structure. A direction which asks "what would you expect?" naturally invites a comparison with the juror's own cultural expectations. It is arguable that the basic content of these directions should shift in light of available cultural information to ensure the trial judge does not invite a comparison with the jury's (culturally dependent) expectations.

A trial judge could also reinforce to the jury that there is no text book response to the events in question, to bear in mind that we are all different and have different responses, and that there may be cultural differences that affect how a person reacts.

Demeanour

It is a legitimate part of the jury's role, in assessing a witness's credit, to take account of observations that are made of a witness's demeanour and behaviour in the witness box. However, behaviour and demeanour are influenced by culture. Demeanour that may seem evasive or uncertain to a dominant culture may, in fact, be courteous and deferential responses for individuals from other cultural backgrounds. If the jury is not aware of these differences in cultural norms and behaviour, there is a risk that they may mistakenly and unjustly make adverse findings.[21]

The *Equality before the Law Bench Book* provides a useful discussion of demeanour, behaviour and body language that is culturally-conditioned.[22] It may be the norm in some cultures to avoid direct eye contact, such as Vietnamese people and women from South East Asian backgrounds. Some cultural groups tend to nod or shake their head for "yes" and "no" responses in the opposite way to Anglo-Celtic Australians. Silence may indicate lack of understanding, that the matter is considered too personal or intimate, or that the question should not be answered in front of someone of the opposite gender. The *Equality before the Law Bench Book*[23] and the Queensland *Equal Treatment Bench Book*[24] identify difficulties in relation to communication between Aboriginal and non-Aboriginal people. Direct questioning may be seen as offensive. Long silences are a positive and meaningful means of communicating. There are also particular linguistic and cultural impediments such as "scaffolding" and gratuitous concurrence.

In light of this discussion, is it time for a more subdued weight to be suggested regarding demeanour?[25] Is it better to inform juries that demeanour in the witness box may not be a useful marker of credibility because of cultural and other differences? This is in line with part of a suggested direction regarding assessing witnesses in the Victorian *Criminal Charge Book*:

> In making your assessment, you should appreciate that giving evidence in a trial is not common, and may be a stressful experience. So you should not jump to conclusions based on how a witness gives evidence. Looks can be deceiving. People react and appear differently. Witnesses come from different backgrounds, and have different abilities, values and life experiences. There are too many variables to make the manner in which a witness gives evidence the only, or even the most important, factor in your decision.[26]

There may be value in a direction at the opening stages of the trial, even before the evidence commences, informing the jury that demeanour may not be a helpful guide.

A broader cultural perspective

I raise a question whether in the directions that are given, the dominant culture should be reinforced as the norm or the juries' standard for human behaviour. After all, we

20 *Criminal Trial Courts Bench Book*, above n 18, at [2-570].

21 For discussion about fallibility of demeanour and reference to culture see Kirby J in *SRA v Earthline* (1999) 160 ALR 588 at 617–618. See also P McClellan, "Who is telling the truth? Psychology, common sense and the law" (2007) 19 *Judicial Officers' Bulletin* 75.

22 Above n 18, at [3.3.2.2]. See also Supreme Court of Queensland *Equal Treatment Bench Book*, 2005–, "6.5 Non-Verbal Communication" at pp 74–76.

23 Above n 18, at [2.3.3].

24 Supreme Court of Queensland, 2005–, Ch 9.

25 See *Fox v Percy* (2003) 214 CLR 118, Gleeson CJ, Gummow and Kirby JJ at [30]–[33] for caution regarding demeanour in assessing credibility and reliability.

26 Judicial College of Victoria, *Victorian Criminal Charge Book* at [1.6.2], at www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#1289.htm, accessed 28 April 2016.

should expect culturally diverse juries. If we are not more inclusive, at the very least we risk alienating jurors. If we adopt a broader cultural perspective and acknowledge cultural differences, we promote confidence in our legal system and acceptance of the law.[27]

Should we be more explicit about our roles?

As a final question: if we are to have an inclusive cultural ethos within the court that acknowledges the life experiences of culturally diverse individuals who may have a mistrust of authority and acknowledges ignorance that exists about our legal system, should we all, judges, counsel and court staff, be more explicit in what we do?

Should trial judges take opportunities to inform the jury and the accused about how our system works? Some individuals from culturally and linguistically diverse backgrounds are unfamiliar with our trial process and find the adversarial system confusing and alien. Our explanation might include the impartiality of judges, our duty to deliver equal justice, to treat all people equally, to ensure that the accused's trial is fair, and the valuable role of defence counsel in challenging evidence — things we take granted. In explaining trial processes we could refer to the rationale for the particular process such as procedural fairness. It is likely that if trial judges are more explicit about fundamental aspects of the legal system, there will be advantages to others in the broader community, such as accused who have a poor understanding of the criminal justice system.

Judicial Council on Cultural Diversity

There are limits to what the courts can achieve on a case-by-case basis. There is a need for research, identification of barriers experienced by Australia's culturally and linguistically diverse communities, and public consultation including feedback from key participants in the trial process. The judiciary and court administrators need independent advice on protocols and best practice guidelines for dealing with cultural diversity issues. These objectives are all part of the brief of the Judicial Council on Cultural Diversity.[28] The Council was formed under the auspices of the Council of Chief Justices and is chaired by Chief Justice Wayne Martin AC. It comprises judicial officers from all Australian jurisdictions, as well as other members with relevant expertise, some from culturally diverse backgrounds. The Council is concerned with issues arising from cultural diversity of Aboriginal and Torres Strait Islander communities, as well as arising from migration.

The Council's work includes finalising a national protocol for interpreters, which responds to widespread and immediate concerns about adequate availability of interpreters, accreditation and skills, and conflicts of interest. The protocols will provide guidelines and minimum standards that must be met by courts, judicial officers, the profession and interpreters. Other initiatives include judicial education to increase knowledge and understanding of cultural diversity issues. A Cultural Diversity Working Group[29] is developing an online cultural diversity training template specifically designed for judicial officers. Topics include barriers to inter-cultural communication and strategies, non-verbal communication, assessing the need for interpreting assistance and how to work effectively with interpreters. It is anticipated that the online training program will be available in early 2017.

Conclusion

In drawing from *Dietrich*, the principles provide a foundation for trial judges in accommodating the difficulties faced by culturally diverse litigants. The principles give centre stage to the obligation to provide a fair trial. There is power to prevent a miscarriage of justice. They recognise that the court's obligation in eliminating unfairness involves more than merely following rules of procedure and trial process.

Undoubtedly, the solutions to unfairness will arise from a focus on the individual in individual cases. But that is not to suggest that we are to work in isolation. In fact, in order to ensure a fair trial for accused from culturally and linguistically diverse backgrounds and to adequately respond to the complex challenges that arise, collective knowledge and understanding is essential. I can see great benefits in sharing our insights, the awareness we will acquire, and the solutions we find.

27 R S French, "Speaking in tongues: courts and cultures" (2008) 17 *JJA* 203 at 210–211.

28 See www.jccd.org.au, accessed 28 April 2016.

29 Consisting of representatives from the Judicial Commission of NSW, the Judicial College of Victoria, the National Judicial College of Australia and the Family Court.