

2016

## Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?

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### Recommended Citation

Cavanagh, Vanessa I. and Marchetti, Elena, "Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?" (2016). *Faculty of Social Sciences - Papers*. 3683.  
<https://ro.uow.edu.au/sspapers/3683>

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### Abstract

Australian Indigenous focused cross-cultural professional development for the judiciary is an evolving area. In other professional service sectors, such as health and education, cultural safety is becoming the benchmark. However, for the Australian justice sector cultural awareness, and to a lesser extent cultural competency, dominate discussion, and cultural safety is only an emerging discourse. Most judicial officers (indeed most Australian public servants and legal practitioners) would be familiar with the concept of Indigenous cultural awareness as part of their standard professional development training, however, the significance of cultural competency, and the application of cultural safety principles are less well recognised. This paper documents the extent to which Australian judges and magistrates are trained or guided in accommodating the cultural needs of Indigenous courtroom participants. In particular, we review and critique the extent to which Indigenous specific cross-cultural education (in the form of short courses, seminars, conferences, cultural immersion tours, site visits, and as contained in bench books) is currently available for Australian judicial officers. In documenting current practice, we consider whether cultural awareness, cultural competency or cultural safety can be achieved by way of current judicial training and court practice guidelines. Taking into account the experiences of all Indigenous participants in the courtroom, as well as the fact that the over-representation of Indigenous offenders in the Australian criminal justice system continues to be a significant and complex issue, we conclude that it is necessary for judicial officers to be equipped with the capacity to ensure that their courtrooms are culturally safe when having to accommodate the needs of all Indigenous participants.

### Keywords

indigenous, cross-cultural, training:, judicial, available, improved?, good, can, be

### Disciplines

Education | Social and Behavioral Sciences

### Publication Details

Cavanagh, V. & Marchetti, E. (2016). Judicial indigenous cross-cultural training: What is available, how good is it and can it be improved?. *Australian Indigenous Law Review*, 19 (2), 45-63.

# JUDICIAL INDIGENOUS CROSS-CULTURAL TRAINING: WHAT IS AVAILABLE, HOW GOOD IS IT AND CAN IT BE IMPROVED?

Vanessa Cavanagh and Elena Marchetti\*

## I Introduction

Australian Indigenous focused cross-cultural professional development for the judiciary is an evolving area. In other professional service sectors, such as health and education, cultural safety is becoming the benchmark.<sup>1</sup> However, for the Australian justice sector cultural awareness, and to a lesser extent cultural competency, dominate discussion, and cultural safety is only an emerging discourse.<sup>2</sup> Most judicial officers (indeed most Australian public servants and legal practitioners) would be familiar with the concept of Indigenous cultural *awareness* as part of their standard professional development training, however, the significance of cultural competency, and the application of cultural safety principles are less well recognised. This paper documents the extent to which Australian judges and magistrates are trained or guided in accommodating the cultural needs of Indigenous courtroom participants. In particular, we review and critique the extent to which Indigenous specific cross-cultural education (in the form of short courses, seminars, conferences, cultural immersion tours, site visits, and as contained in bench books) is currently available for Australian judicial officers. In documenting current practice, we consider whether cultural awareness, cultural competency or cultural safety can be achieved by way of current judicial training and court practice guidelines. Taking into account the experiences of all Indigenous participants in the courtroom, as well as the fact that the over-representation of Indigenous offenders in the Australian criminal justice system continues to be a significant and complex issue,<sup>3</sup> we conclude that it is necessary for judicial officers to be equipped with the capacity to ensure that their courtrooms are culturally safe when having to accommodate the needs of all Indigenous participants.

Access to justice is an issue that Indigenous people face when working through a variety of contemporary legal issues, not just in the criminal justice sphere.<sup>4</sup> Research undertaken by the Law and Justice Foundation of New South Wales found that overall Australian Indigenous Peoples 'had high prevalence of multiple legal problems'.<sup>5</sup> For example, in discussing the shortcomings of native title law, Heather McRae et al. describe the native title legal system as 'arduous' and 'unproductive',<sup>6</sup> since it is unable to properly recognise the complex and intricate nature of Indigenous connection to land.<sup>7</sup> Similarly, Indigenous activist, Kado Muir, a Western Australian Tjarurru Ngalia man, notes that 'legal institutions do not understand Indigenous society ... [they do] not understand their relationship with the land, their belief systems, their history'.<sup>8</sup> Chris Cunneen and Melanie Schwartz note that Indigenous people fail to reach the same level of access to justice as non-Indigenous people in areas such as civil and family law.<sup>9</sup>

Initiatives such as Indigenous focused sentencing programs, and Indigenous focused legal aid are examples of attempts to mitigate the disadvantage and marginalisation experienced by Indigenous people when accessing the criminal justice system. However, further changes need to be made in order to transform the Anglo-centric nature of the Australian justice system into one that better serves the needs of Indigenous litigants, offenders, victims and witnesses, in both the criminal and civil spheres. In particular, there remains a need to direct greater attention to the non-Indigenous players who participate in determining Indigenous claims for justice. Elena Marchetti and Janet Ransley pose the following fundamental questions for this transformation to occur in the context of sentencing courts:

How can court practices and principles be adapted to reduce their criminogenic effects on Indigenous people who come into contact with them? How far have recent Australian innovations come in implementing culturally appropriate sentencing and inclusive processes for Indigenous offenders? In particular, how can the non-Indigenous judicial officers and legal practitioners who dominate the sentencing court landscape adapt their day-to-day practices to make the sentencing process more culturally appropriate and inclusive for Indigenous people and communities?<sup>10</sup>

Accounting for cultural difference in response to Indigenous disadvantage in the justice sector is not a new concept, and the history of work in this area reveals multiple attempts to shift the discourse from one of cultural awareness to cultural competency. Foundational initiatives were recommended in the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') Final Report, which was tabled on 15 April 1991. The recommendations highlighted the need for judicial officers to

participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today.<sup>11</sup>

Around the same time, Julie Stubbs, Chris Cunneen and Janet Chan delivered their report titled 'Cross Cultural Awareness for the Judiciary' to the Australian Institute of Judicial Administration,<sup>12</sup> and Anthony O'Donnell and Richard Johnstone argued for the need for legal education reform that would place law school curricula within an historical post-colonial context and bring to the fore the prevalence of systemic and institutional racism in the practice and administration of law.<sup>13</sup> These developments were shortly followed by the Judicial Conference of Australia announcing 'a plan to establish a National College to educate the judiciary', which would include, among other subjects, cross-cultural awareness training.<sup>14</sup> A decade later, national strategies such as the National Indigenous Law and Justice Framework 2009-2015,<sup>15</sup> and the National Justice Policy,<sup>16</sup> identified the need for improvement in justice service delivery for Indigenous Australians. The National Indigenous Law and Justice Framework ('the Framework') was endorsed in 2010 by the Standing Committee of Attorneys-General

Working Group on Indigenous Issues. The Framework presented a national response to address 'the serious and complex issues that mark the interaction between Aboriginal and Torres Strait Islander peoples and the justice systems in Australia', and is structured to support the Council of Australian Governments ('COAG') Close the Gap agenda.<sup>17</sup> The Framework called for the elimination of 'systemic racism where it exists within the justice system', listing the delivery and review of cultural competency and increasing cultural awareness within the justice sector as one action towards achieving this goal.<sup>18</sup> There is also strong support from Indigenous scholars, commentators and organisations, including the National Congress of Australia's First People for improving justice sector service delivery for Indigenous people. The National Congress developed their National Justice Policy in 2013, which highlights the importance of culturally competent justice sector staff by stating that there is an 'imperative that people working in the justice sector are sufficiently trained to work in a culturally sensitive way'.<sup>19</sup>

In 2010, Terri Farrelly and Indigenous scholar, Bronwyn Carlson, conducted a nation-wide survey to document what cultural competence activities existed within the justice sector, from which they concluded that each department should develop a cultural competence training policy that was monitored and evaluated.<sup>20</sup> The assessment of competencies was also recommended.<sup>21</sup> Similarly, Kamilaroi woman and academic, Marcelle Burns, in discussing how to improve cultural competency in higher education, specifically in law, states: 'Australian legal professional standards do not prescribe Indigenous cultural competency as a learning outcome for legal education nor as essential content of courses for admission as a legal practitioner'.<sup>22</sup> Burns notes that despite the fact that the RCIADIC and scholars such as O'Donnell and Johnstone had identified the need for increased cultural *competency* in legal sector services in the 1990s, not much has changed: 'While useful ... [Australian legal literature is limited in its scope as it does] not engage legal practitioners in the self-reflection necessary to move beyond cultural awareness and towards cultural competency'.<sup>23</sup>

Our analysis in this article builds on the work of Burns, Farrelly and Carlson by focusing specifically on one sector of the justice system, namely judges and magistrates. We conduct an assessment of judicial training programs and resources, including materials contained in various published bench books, with the aim of furthering our understanding

of how much a [non-Indigenous] judicial officer is equipped with the necessary cultural experience, and knowledge to assist them in delivering justice in a culturally appropriate and respectful manner, to an Indigenous person appearing in their court. Like Burns, we are interested in the extent to which the training provides the necessary support for the development of cultural competency, but we extend the critique further to consider also whether the training could support the development of cultural safety within the courtroom context.

In the next section of this paper we explain the different use of the terms, 'cultural safety', 'cultural competency' and 'cultural awareness'. We also address the importance of ensuring that topics of racism and white privilege are included in any cross-cultural training as well as attempting to avoid essentialising Indigenous experiences and traditions. Part III of the article then provides an analysis of what training programs and bench book content is available for judicial officers wanting to learn about Indigenous cultures and/or respond to the needs of Indigenous participants in their courtrooms. Our analysis uses cultural competency and cultural safety principles as benchmarks to assess the degree to which the training and guidance afforded to judicial officers goes beyond mere cultural awareness. Finally, we offer an illustration of how the lack of cultural safety and appropriate cultural understanding in criminal trials can jeopardise the attainment of justice for Indigenous Australians by reference to the Bowraville murder trials.<sup>24</sup>

## II Definitions and Background

### A Terminology

As a starting point, it is useful to note that, generally, cultural awareness, cultural competency and cultural safety are, in that order, regarded as cumulative points on a linear progression. Cultural awareness as the foundational idea proposes that individuals are introduced to other cultures,<sup>25</sup> (in this case Australian Indigenous cultures) to be made aware of how they might encounter Indigenous people in the workplace, and ideally, are encouraged to consider how personal biases might influence those encounters.<sup>26</sup> Cultural competency then further develops an individual's skills and knowledge so that their behaviours and interactions become more acceptable or appropriate in a cross-cultural sense.<sup>27</sup> Finally, for an individual to provide a culturally safe service, the culture of the client is respected and upheld as

the cultural norm informing the interaction as decided upon from the perspective of the client.<sup>28</sup> For a professional to provide a culturally safe service, or a judicial officer to run a culturally safe courtroom, they must as a minimum be both culturally aware and culturally competent.

#### (i) Cultural Awareness

Cultural awareness training is a concept that is widely used and understood in the Australian services sector in relation to cross-cultural professional development. The Health Education and Training Institute defines 'cultural awareness' as 'sensitivity to the similarities and differences that exist between two different cultures and the use of this sensitivity in effective communication with members of another cultural group'.<sup>29</sup> It is generally accepted that Indigenous focused cross-cultural training encourages 'culturally appropriate and effective systems provision and service delivery, ultimately resulting in better outcomes for Aboriginal and Torres Strait Islander peoples'.<sup>30</sup> However, cultural awareness training is often packaged in short courses or brief seminars that, in isolation, either do not sufficiently unpack the issues of colonisation and its effects in contemporary society, or do not demonstrate an individual's increase in knowledge and a change in behaviour that improves the experience of their interactions with Indigenous Peoples.<sup>31</sup> As stated by Robert Bean, '[s]hort workshops alone, while effective in the important areas of awareness and knowledge development, are considered largely ineffective in developing practical skills and professional competence'.<sup>32</sup> The Centre for Cultural Competence Australia also criticises cultural awareness training for the same reason, arguing that it fails 'to effect change in behaviour and therefore service delivery'.<sup>33</sup> Related to this is the observation made by Burns, which is that while the majority of Australians have strong opinions regarding Indigenous Australians, far fewer of them have had any meaningful engagement with Indigenous Australians, leaving their opinions open to the risk of being based on stereotypes and dominant (negative) discourse, rather than lived experiences and sound education.<sup>34</sup> This in turn presents a real challenge for any short course in cross-cultural professional development to unsettle the embedded assumptions individuals have of Indigenous Peoples.<sup>35</sup>

In relation to the justice sector, the RCIADIC specifically recommended that 'judicial officers and persons who work in the court service and in the probation and parole service and whose duties bring them into contact with Aboriginal

people' should 'participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding'.<sup>36</sup> The Final Report recognised that a lack of Indigenous specific cultural training might, in fact, lead to practices that entrench institutional racism:

An institution, having significant dealings with Aboriginal people, which has rules, practices, habits which systematically discriminate against or in some way disadvantage Aboriginal people, is clearly engaging in institutional discrimination or racism. Generally speaking, if an institution which has significant dealings with Aboriginal people does not train its officers in such a way as to permit them to give the same level of service to Aboriginal people as it does to others, it is discriminatory against its Aboriginal clients.<sup>37</sup>

In response to the recommendations of the RCIADIC, which was responsible for investigating the deaths and any relevant underlying social, cultural and legal issues surrounding the deaths of 99 Indigenous people in custody, several actions arose.<sup>38</sup> The Commonwealth Attorney-General in partnership with the Australian (now Australasian) Institute of Judicial Administration ('AIJA') progressed cultural awareness training for the Australian judiciary. This saw the creation of the National Aboriginal Cultural Awareness Committee within the AIJA. Justice Paul Seaman initially convened this committee and his support for cultural awareness training can be seen in his discussion of the recommendations and findings made by the RCIADIC:

In the light of [the RCIADIC] report and having regard to the history of our treatment of the Aboriginal people across the last two centuries and their present grossly disproportionate numbers in Australian prisons, the court system cannot ignore the one recommendation which is specifically directed to it.<sup>39</sup>

Williams-Mozley, a Western Arrente Indigenous man, who at the time was working for the Commonwealth Attorney-General's Department, was a member of this initial National Aboriginal Cultural Awareness Committee. Williams-Mozley prepared a report in 1999 reviewing the impetus behind cultural awareness training for the judiciary, and the types of cultural awareness training programs that were available to judicial officers in each jurisdiction. The Williams-Mozley report made recommendations

to evaluate current programs to better understand their successes and challenges, and for the creation of a register to identify Indigenous peoples with relevant expertise in judicial cultural awareness education.<sup>40</sup>

The National Aboriginal Cultural Awareness Committee changed its name in later years to the National Indigenous Cultural Awareness Committee. This Committee was superseded by the National Indigenous Justice Committee in 2007, which is now located within the National Judicial College of Australia ('NJCA'). Specific 'Indigenous Justice Committees' were developed in the various Australian jurisdictions, such as the South Australian Indigenous Justice Committee, the Queensland Indigenous Justice Committee, the Western Australian State Aboriginal Justice Congress and the New South Wales Aboriginal Justice Advisory Committee. Alongside these developments the New South Wales Judicial Commission commenced its Ngarra Yura Committee, which has operated since 1997.<sup>41</sup> The various committees progressed the development of resources to inform and guide judicial professional development. These resources include: Indigenous-focused bench books (such as the *Aboriginal Benchbook for Western Australia Courts* which is discussed later in this paper); a national curriculum for judicial professional development, which among other categories, includes a requirement that judicial officers become knowledgeable about the social context of the matters that come before them such as Australia's Indigenous people, equality and diversity, and family and domestic violence;<sup>42</sup> and a specific curriculum framework on Australian Indigenous Peoples authored by Anne Wallace, a member of the NJCA's National Indigenous Justice Committee.<sup>43</sup> The Wallace framework states that cultural awareness training within the Australian judicial system is necessary so that:

judges in a modern and culturally diverse society can be expected to know that there is a possibility that there are cultural issues that they are unaware of. They can also be expected to be aware that lack of information or awareness about cultural factors could affect their ability to perform their role in situations where they are dealing with people who come before their court from those cultural backgrounds.<sup>44</sup>

The Wallace framework highlights the need for: (a) Aboriginal community involvement in cultural awareness training; (b) the ongoing development of cultural

awareness training; (c) cultural awareness training to be locally applicable; (d) benchmarks for cultural competency, and (e) cultural awareness training evaluation.<sup>45</sup> The framework also provides details about recommended cultural awareness training content, cultural awareness training delivery methods, and cultural awareness training delivery format and activities.<sup>46</sup> At the same time that the National Indigenous Justice Committee was calling for increased judicial cross-cultural education, it was also being acknowledged from within the judiciary, as illustrated by the following comments by Justice Robert French in 2008:

Cultural awareness training does not provide an alternative to evidence. Rather it better equips the judicial officer to understand the significance of particular evidence or the way in which it is given. This is relevant not only to trials, but also to the sentencing process.<sup>47</sup>

French J was highlighting the need for cultural awareness training to develop the capacity of the judicial officer to adequately perform their job. To take the next step and establish cultural competence, a process would need to be implemented that assesses an individual's knowledge, skills and behaviours in delivering culturally appropriate services.

## (ii) Cultural Competency

Cultural competence takes cultural awareness and transforms it to an attainment of further skills and knowledge that improves behaviours and service delivery. The Centre for Cultural Competence Australia states that cultural competence is more appropriate than awareness training as it implies the need for accreditation to demonstrate an attainment of new skills and knowledge, and that '[f]rom an organisational perspective Cultural Competence focuses on the attributes of the service provider and service provision and is best viewed as an ongoing process that organisations continue to strive towards'.<sup>48</sup> Bean, a leader in cross-cultural and diversity management, who over the past three decades has researched and delivered cultural awareness training and cultural competency advice to the Australian government, and community and corporate sectors, describes cultural competency as:

the ability of systems, organisations, professions and individuals to work effectively in culturally diverse environments and situations. Cross-cultural training, which aims to develop the awareness, knowledge and

skills needed to interact appropriately and effectively with culturally diverse customers and co-workers, is an important element in the development of cultural competence.<sup>49</sup>

Cultural competence can be achieved through specific professional development involving formal training courses, workshops, seminars and ongoing personal experiences.<sup>50</sup> Cultural competency has been acknowledged across disciplines such as health and education, and in many multicultural regions of the world.<sup>51</sup> For example, the Australian College for Emergency Medicine ('the College') recognises that in the health sector, Indigenous Australians are a priority group with specialised needs born of their colonial history. In defining why cultural competency is required, the College states:

Aboriginal and Torres Strait Islander patients are relatively over-represented in Australian emergency departments and suffer considerable health burdens greater than the general Australian population. Culturally competent care has been shown to improve clinical outcomes and improve equity of access and use of health services.<sup>52</sup>

In 2009, Universities Australia and the Indigenous Higher Education Advisory Council commenced research on cultural competency within the Australian higher education sector for the purpose of creating higher education that provided 'encouraging and supportive environments for Indigenous students and staff, as well as to embed in non-Indigenous graduates the knowledge and skills necessary for them to provide genuinely competent services to the Australian Indigenous community'.<sup>53</sup> They defined cultural competency as:

[s]tudent and staff knowledge and understanding of Indigenous Australian cultures, histories and contemporary realities and awareness of Indigenous protocols, combined with the proficiency to engage and work effectively in Indigenous contexts congruent to the expectations of Indigenous Australian peoples.<sup>54</sup>

Their vision for cultural competency within the tertiary education sector reflects an intrinsically deep and interdisciplinary adoption of Indigenous cultural values that extends to every staff member and student and that is 'throughout the organisational fabric of institutions'.<sup>55</sup> Establishing levels of cultural competence is also advocated

for in Indigenous Justice Agreements and justice sector Reconciliation Action Plans and similar aspirational documents across jurisdictions,<sup>56</sup> however, how accreditation of this competency should be assessed is not discussed in these documents.

### (iii) Cultural Safety

Cultural safety arose first within New Zealand's Maori nursing community in 1989.<sup>57</sup> To behave in a culturally safe manner means to behave in a way that accepts and respects the culture of the person/client to whom the nurse is providing care, from the perspective of that person/client, and not from the perspective of the nurse.<sup>58</sup> Cultural safety principles requires service providers to acknowledge the history of colonisation, and the way that this history manifests in contemporary society and in the institutions that govern our society.<sup>59</sup> Overwhelmingly, these manifestations embody and empower whiteness: '[Whiteness] controls institutions, which are extensions of White Australian culture and it is governed by the values, beliefs and assumptions of that culture'.<sup>60</sup> There are four principles to cultural safety education as defined by the Nursing Council of New Zealand.<sup>61</sup> Broadly the four principles focus on: (1) emphasising positive health outcomes whilst acknowledging and respecting cultural difference;<sup>62</sup> (2) acknowledging the power dynamics present in interactions, empowering the client to express risks (perceived or real), and working within the culture as defined by the client;<sup>63</sup> (3) understanding, recognising and mitigating social inequalities and how they manifest in service delivery to ensure an acceptance and legitimisation of difference;<sup>64</sup> and (4) working to ensure that service providers are prepared with tools to identify, examine, negotiate, and mitigate power imbalances so that they can effectively and appropriately serve those who could otherwise be ostracised and alienated from services due to cultural or social barriers.<sup>65</sup> Thus cultural safety is about self-reflection on the part of the service provider, by actively acknowledging the dominance of their own culture (if they belong to the dominant culture) and/or the dominance of the institution that they represent, and understanding how white privilege and power manifests in day-to-day cross-cultural interactions. Culturally safe service providers must be self-aware, informed, skilled and flexible.<sup>66</sup> As the Nursing Council of New Zealand states: 'A nurse who can understand his or her own culture and the theory of power relations can be culturally safe in any context'.<sup>67</sup> Put simply, '[u]nsafe cultural practice comprises any action which

diminishes, demeans or disempowers the cultural identity and wellbeing of an individual' or family and community.<sup>68</sup> The incorporation of cultural safety has been discussed most frequently in Australian health and education sectors,<sup>69</sup> and, with the exception of some developments in the Legal Aid sector, is yet to feature in the Australian justice sector in any significant way.

## **B White Privilege, Racism and Essentialism in the Context of Cross-Cultural Training**

Arguably, the cultural safety approach has the capacity to address two of the key criticisms of both cultural awareness and cultural competency frameworks. That is, that they may not explicitly address the privilege that attaches to being a member of the dominant culture, and that cultural awareness programs in particular have a tendency to rely on essentialised versions of Indigenous cultures. This criticism of cultural awareness training and potentially cultural competence requirements draws on theoretical frameworks that identify how minority groups can be situated as the exotic (or deficient) 'other'.<sup>70</sup> For example, Murri scholar, Bronwyn Fredericks, identifies that awareness raising programs that focus on the disadvantage Indigenous people experience without balancing that with a thorough exploration of white privilege paints Indigenous society as needy, under-serviced and problematic.<sup>71</sup> This criticism highlights the tendency to examine the 'other' without considering the deeper fundamental issues at play. Thus, cross-cultural professional development must delve deeper into the systemic and institutional issues that underpin social and political inequalities rather than simply being a training session about other cultures.<sup>72</sup> Carol Swendson and Carol Windsor describe this as not simply learning about the difference of others (for example, gaining an understanding of language, custom and etiquette), but also challenging embedded prejudice.<sup>73</sup> They argue that '[t]he predominant focus on cultural differences avoids consideration of the dimensions of class and gender and seeks to present problems of minority groups as technical problems to be overcome through greater understanding and education'.<sup>74</sup> Swendson and Windsor argue that this misses the point, because gaining a better understanding of another culture does not mitigate and dismantle the embedded racial superiority that is at the root of any prejudice.<sup>75</sup> Fredericks agrees, arguing that with any portrayal of Indigenous people as underprivileged and disadvantaged, training must also investigate the white privilege and advantage that is upholding the status quo.<sup>76</sup>

Furthermore, cross-cultural training should challenge 'notions of racism and unearned white race privilege', since '[r]acism is embedded in Australia's colonial history, within Australia's institutions, policies and culture and within the psyches of Australian people.'<sup>77</sup> Racism maintains the continual marginalisation and disempowerment of Indigenous people.<sup>78</sup> Disapproving of racism and simply changing the organisational language that is used is not enough to challenge attitudes and behaviours, nor will it necessarily result in significant improvements for Indigenous people.<sup>79</sup> Swendson and Windsor propose:

Rather than encouraging the study of a couple of cultures in depth ... [cross-cultural] education would be better directed towards the development of critical understanding of the complex political and economic relations that have perpetuated racial divisions and the fundamental structural reforms required to address this situation ... cultural awareness does not equate with equality.<sup>80</sup>

They argue that awareness raising at a generic or basic level, obscures any 'understanding of the way in which *cultural* relations are embedded in, and are a manifestation of, capitalism'.<sup>81</sup> Racism needs to be everyone's problem not just a problem for Indigenous people.<sup>82</sup> Fredericks warns that to remain silent is to consent to the continuation of racism.<sup>83</sup>

Similarly, Indigenous and other scholars present clear warnings against cross-cultural development that essentialise and type-cast cultural groups into fixed defined homogenous units.<sup>84</sup> Any cross-cultural professional training must acknowledge the diversity that exists within cultural groups including Indigenous Australia, as well as the multiple subjectivities that individuals occupy.<sup>85</sup> The risk of essentialism is one that applies for all three forms of cross-cultural development discussed in this paper. Whilst cultural transformations within a service delivery system are necessary 'to make them culturally safe, responsive, competent and appropriate',<sup>86</sup> any essentialism risks further marginalising the minority group which is the target of improved standards of service.<sup>87</sup> In recognising heterogeneity within cultural groups, cultural competence education initiatives benefit from using intersectional theoretical frameworks to acknowledge the multiplicity of identities that individuals may hold at any one time.<sup>88</sup>

With these definitional and critical frameworks in mind, the next section provides an overview of the training programs

or educational tools that are currently available for judicial officers and critiques the extent to which they go beyond cultural awareness training.

### **III An Analysis of Cross-Cultural Training Programs and Bench Books for Judicial Officers**

#### **A Training Programs and Bench Books: What is Available?**

This section briefly presents the types of Indigenous-specific, cross-cultural professional development activities and court-specific resource materials that are available for judicial officers across jurisdictions. The information relating to training programs has been sourced by accessing web-based materials or by making direct contact with individuals working within relevant organisations or government departments. Direct communication was made with cultural awareness training program organisers and/or participants from each jurisdiction except the Australian Capital Territory. We located relevant web-based material from the AIJA, including the AIJA's National Indigenous Cultural Awareness Committee; the NJCA and its National Indigenous Justice Committee; the New South Wales Judicial Commission, specifically its Ngara Yura program; Legal Aid New South Wales; Queensland's Department of Justice and Attorney-General; the Northern Territory's Department of Justice; Western Australia's Department of the Attorney General; South Australian Courts Administration Authority ('CAA'); and Victoria's Department of Justice and Regulation. Published information on cultural awareness training for judicial officers was located across all states and territories except Tasmania where information was obtained via personal communication. We also obtained anecdotal information on the topic in numerous conference presentations and departmental reports and statements, such as Reconciliation Action Plans and annual reports. We then analysed this information according to various themes that emerge from the cultural awareness, cultural competency and cultural safety literature.

In summary, we found that a wide range of cross-cultural professional development programs is available to judges and magistrates. This training is available in the form of one or two day courses, workshops (which generally involve greater attendee participation), short guest speaker seminars, conference presentations, immersion tours and

community visits. Some of these activities may span several days and may involve intense engagement with Indigenous issues and communities, such as the South Australian immersion tour of the Anangu Pitjantjatjara Yankunytjatjara lands, which lasted for six days. This NJCA funded event saw 19 judicial officers immersed in Aboriginal communities to learn about Aboriginal life and culture, and Aboriginal experiences relating to the Australian justice system.<sup>89</sup> This was quite a unique event in terms of its duration. Similar shorter judicial immersion tours have been undertaken in New South Wales, Victoria, Western Australia and South Australia.<sup>90</sup>

One or two day courses are popular. They are facilitated by both Indigenous and non-Indigenous presenters, and focus on both general topics concerning Indigenous people and Indigenous justice specific issues. Activities during the one to two day courses often include role playing, listening to guest speakers, small group discussions, workshops and visits to local Indigenous communities or cultural places. According to information provided by the courts and departments of justice, these courses are available in all jurisdictions except Tasmania and the Northern Territory (although other forms of cultural awareness programs are available in those jurisdictions). No information could be obtained about whether or not such courses are available in the Australian Capital Territory.

Guest speaker seminars usually involve a single presenter, or address a specific issue, within a short space of time (for example less than three hours).<sup>91</sup> They are useful for generating debate and peer-facilitated learning opportunities. An example is the Victorian Koori twilight seminars organised by the Judicial Officers' Aboriginal Cultural Awareness Committee ('JOACAC'). These seminars target specific issues, such as mental health, sentencing outcomes and bail applications, as they relate to Indigenous people and the justice system in Victoria, and attendance counts towards a judicial officer's compulsory, annual accumulation of continued professional development hours.<sup>92</sup> The AIJA regularly hosts Indigenous specific conferences, such as the AIJA *Indigenous Justice Conference* and the AIJA *Indigenous Courts Conference*. More specifically, in 2002 the AIJA's National Indigenous Cultural Awareness Committee held a three-day national conference in Alice Springs titled *Future Directions: Courts and Indigenous Cultural Awareness Conference*, which aimed to:

- Explore the effectiveness of past cultural awareness programmes conducted or sponsored by the AIJA from both an indigenous and judicial perspective; and
- Examine ways of strengthening the judiciary's understanding of indigenous issues and strengthening the ongoing relationship between the judiciary and the indigenous community.<sup>93</sup>

The conference developed a discussion paper that identified what improvements were needed in judicial cultural awareness education. These included: knowledge sharing and increased promotion of available resources;<sup>94</sup> relationship building and increased interaction between the judiciary and Indigenous communities;<sup>95</sup> recognition that training needed to be ongoing, locally specific and capture judicial officers, who interact with Indigenous people;<sup>96</sup> and the creation of Indigenous employment initiatives and coordinated effective service delivery for Indigenous clients.<sup>97</sup> Many of these issues are still relevant today.

Bench books (including court specific handbooks or manuals) that have been developed in many jurisdictions are considered 'educational' or practice manuals that judicial officers can utilise when carrying out their judicial functions, and for this reason we analysed the extent to which various state, territory and federal court bench books discuss how judges and magistrates should manage cases or matters involving Indigenous offenders, witnesses or parties to litigation. We located 19 bench books across four jurisdictions. Six bench books were located in Victoria, two in Western Australia, three in Queensland (we know that a fourth Queensland bench book, *Aboriginal English in the Courts Handbook* exists, however, it was not easily accessible), and seven bench books in New South Wales. Finally, the *Solution-Focused Bench Book*, which is not jurisdiction specific, but which is published by the AIJA, provides nation-wide guidance.<sup>98</sup> The bench books in South Australia and the Northern Territory are not publicly available. No bench book was located for Tasmania or the Australian Capital Territory. Of the 19 bench books reviewed we located no content directly relating to Indigenous Australians in two bench books, the *Supreme and District Courts Benchbook of Queensland*<sup>99</sup> and the *Criminal Trial Courts Bench Book of New South Wales*. Five of the 19 bench books contained minimal references to Indigenous people. For example, the Victorian *Criminal Charge Book* makes a single reference to 'Aboriginal and Torres Strait Islander traditional laws and customs' as an exemption to the opinion rule in discussing admissibility

of evidence.<sup>100</sup> Similarly, Queensland's *Domestic and Family Violence Protection Act Bench Book* contains two references to Aboriginal or Torres Strait Islander people; one relates to the manner in which 'parent' is defined for the purposes of obtaining domestic violence protection;<sup>101</sup> and the other relates to a requirement that police applications to extend detention must state if 'the person is an Aboriginal or Torres Strait Islander person'.<sup>102</sup> The remaining 12 bench books are either entirely focused on or contain very detailed and substantial information about matters affecting Indigenous people. By far the most comprehensive of the bench books is the *Aboriginal Benchbook for Western Australian Courts*, which is 264 pages long and dedicated to Aboriginal people's engagement with justice.<sup>103</sup>

Six of the 19 bench books make direct statements relating to cultural awareness training for the judiciary.<sup>104</sup> For example, the New South Wales *Sexual Assault Trials Handbook* explicitly states that 'judicial officers must obtain and maintain a requisite degree of awareness of issues affecting particular classes of witnesses' including 'Aboriginal persons'.<sup>105</sup> The 19 bench books include varying degrees of general information about Indigenous people, such as descriptions of local Indigenous social structures, and demographic and statistical data, as well as justice specific topics, such as information about cross-cultural communication barriers, barriers to access to justice, the RCIADIC and Indigenous perceptions of the justice system. Some of the bench books contain insightful guidance about complex issues that may arise when dealing with matters concerning an Indigenous person. For example, Victoria's *Family Violence Bench Book* provides relevant and considered information about how fear of family and community isolation might prevent an Indigenous victim of domestic and family violence from reporting the abuse or seeking assistance.<sup>106</sup>

## **B To What Extent Does the Training Go Beyond Cultural Awareness Training**

### **(i) Degree of Critical Reflection and Assessment Criteria**

We found that the training materials and activities provide information about Indigenous people without requiring the judiciary to demonstrate an understanding of Indigenous culture that would indicate competency. The materials and activities did not include a process for the examination or evaluation of the extent to which judicial officers gained

new knowledge and of how their knowledge informed their understanding of how to improve the operation of the court so that it could better meet the needs of Indigenous users. Nor did the materials or activities include a requirement to assess or evaluate whether Indigenous people who come into contact with the courts perceived their culture to be focal, understood, protected or even relevant during proceedings.

The available training programs and bench books appear void in both critical self-reflection and any engagement with white privilege and racism, although one could argue that since the topic is cross-cultural in nature, that this engagement is implied. However, as Swendson, Windsor and Fredericks argue, cross-cultural professional development should not only focus on issues that affect the minority culture, but also on the reasons behind the existence of racial inequality with the aim to disrupt the status quo.<sup>107</sup> Therefore, the aims of cross-cultural professional development in the judiciary should not be to learn about the Indigenous court user or colleague, but rather to learn about how, as an active or passive participant, each individual contributes to white privilege.

For example, if we take the bench book that most comprehensively explores Indigenous issues, the *Aboriginal Benchbook for Western Australia Courts*, we find that it contains examples of directions to the jury given by judicial officers on how to accommodate cultural differences and erase prejudicial stereotyping.<sup>108</sup> These directions are not, however, mandated, but instead are provided in an appendix at the end of a rather long chapter that deals with criminal proceedings. With the silent norm of white privilege ever present in court, it would be necessary for juries to be directed on how to understand Indigenous cultural norms and language differences. On the other hand, this Western Australia Benchbook makes clear reference to a Victorian Court of Appeal decision that ruled that an Indigenous defendant cannot challenge a jury on the ground that it contains no Indigenous jury members.<sup>109</sup>

In order to ensure that judicial officers can quickly respond to the entrenched whiteness of court proceedings, their familiarity with, and depth of understanding of, the contents of the bench books and training programs need to be assessed. Without this self-reflection there is no guarantee that a judicial officer can make appropriate decisions that transcend the systemic and institutional racism of the Anglo-centric justice system.

## (ii) Is the Training Compulsory or Voluntary?

Although in some jurisdictions participation in cultural awareness training is strongly encouraged and contributes to the accumulation of a judicial officer's professional development, only South Australia and Victoria have compulsory cultural awareness training for judges or magistrates. South Australia leads the other jurisdictions, since its judicial officers attend a compulsory two-day cultural awareness training at induction, which is delivered internally by the CAA's Senior Aboriginal Justice Officer with assistance from other CAA staff.<sup>110</sup> Victoria has compulsory cultural awareness training only for new magistrates who will be presiding over a Koori Court.<sup>111</sup>

Indigenous and non-Indigenous scholars have highlighted the difficulties of recruiting unwilling participants to undertake Indigenous cross-cultural professional development.<sup>112</sup> There is an awareness that not every service provider will want to challenge themselves to change their attitudes and behaviours; however, 'those who generally fail to attend are ones most in need of the training', and for this reason Farrelly and Lumby argue that generic and specialised cross-cultural training should be mandatory.<sup>113</sup> Interestingly, the New South Wales *Sexual Assault Trials Handbook* advocates for ongoing judicial professional development to encourage 'a fair trial and procedural fairness', however, it notes that this should not be *forced* upon the judiciary.<sup>114</sup> Not all judicial officers agree, however, with some, like the former Chief Justice of the Supreme Court of Tasmania, Peter Underwood, advocating that judicial officers who do not embrace life-long learning 'about the society to whom he or she is accountable' should be 'disqualified from holding judicial office, no matter how learned in the law he or she might be'.<sup>115</sup>

## (iii) Frequency and Duration of Training

Farrelly and Carlson recommended ongoing cross-cultural training as opposed to one-off short courses to aid in embedding people's new knowledge into their normal work practices.<sup>116</sup> Similarly, Fredericks argues that short courses cannot guarantee a change in negative attitudes and behaviours towards Indigenous people.<sup>117</sup> In terms of frequency we found that South Australia and Victoria are, again, ahead of the other jurisdictions by providing cultural awareness training in short courses three times each year, with additional optional sporadic events such as seminars, presentations, workshops and visits to local Aboriginal

places occurring throughout the year.<sup>118</sup> The shortest cultural awareness activity may be as brief as a one or two hour workshop session within an overarching orientation program or comprising a guest speaker seminar or isolated conference presentation. Examples of short cultural awareness training workshops are those that occur within the NJCA and AIJA coordinated orientation programs for the judiciary. The NJCA, often in conjunction with state committees and the AIJA, hold professional development and orientation programs such as the Phoenix Magistrates Program, Magistrates and Tribunals Orientation Program, and National Judicial Orientation Program, which include components of general cultural awareness training on topics such as Indigenous populations, demographics and statistical data, definitions and understanding Indigenous diversity, Indigenous communities and family structures and Indigenous experiences of colonisation, and also some justice specific material such as sentencing Indigenous offenders, customary law, communication barriers in the court and available resources regarding Indigenous people and the justice sector.<sup>119</sup> These types of judicial orientation programs have been occurring since 1994. They are useful if they form components of larger or ongoing cultural awareness training programs or continuing professional development; however, they cannot provide adequate cultural awareness education in isolation. Indeed, as Underwood notes, 'no real progress will be made in the field of judicial education' until there is a 'widespread, genuine acceptance by judicial officers of a need to embrace learning well beyond an initial judicial orientation program. A complete sea-change is what is needed'.<sup>120</sup>

## (iv) Indigenous Engagement in Programs

Recommendation 97 of the RCIADIC encourages Indigenous community involvement in 'devising and implementing' cross-cultural awareness courses.<sup>121</sup> One way that this can be achieved is by involving local people in cultural awareness training delivery and facilitation. South Australia and New South Wales use internal Indigenous staff to deliver their training, whereas Victoria and Western Australia make use of both internal staff and external providers, stipulating that Indigenous presenters are preferred. The South Australian CAA employs 10 Aboriginal Justice Officers who, along with local Elders, provide on-going advice and information to the judiciary and staff about Aboriginal culture, communities and defendants appearing before the courts.<sup>122</sup> Recognising the value of engaging in less-formal interactions, the JOACAC

encourages participation in local guided Indigenous tours, such as the Indigenous River Walk (November 2014).<sup>123</sup> During this tour the judicial officer learns about local Aboriginal history and heritage from an Indigenous person, something that is not associated with legal matters; however, it is intended that participation will expand the judicial officer's depth of knowledge about contemporary and historical Indigenous issues.<sup>124</sup> Undoubtedly, without Indigenous engagement in judicial cross-cultural training, little can be achieved in terms of attaining knowledge that is more than a superficial understanding of Indigenous cultural awareness.

#### (v) Cultural Safety Actions

Support for elements of cultural safety practice were found in the bench books. These types of practices encourage the use of protocols that accept and respect Indigenous cultural ways of living. An example of such practice appears in the *Aboriginal Benchbook for Western Australia Courts*, which states that '[w]here evidence relating to Aboriginal men or women's "business" is to be adduced, it may be appropriate to empanel a single-sex jury'.<sup>125</sup> This recognises that for an Indigenous person to be comfortable with giving certain types of evidence, cultural protocols need to be put in place while court processes are conducted. Mark Lauchs, however, argues, that bench books are only useful if judicial officers use them.<sup>126</sup> In his report on the efficacy of Queensland's *Aboriginal English in the Courts Handbook*, Lauchs found that judicial officers and other legal players may not be aware of, or may not have read, resources such as bench books.<sup>127</sup>

Generally, the cross-cultural judicial training or education that is (or has been) available reflects cultural awareness criteria as opposed to achieving cultural competency or cultural safety. An example of guidelines that reflect cultural safety principles can be found in the Legal Aid New South Wales Aboriginal Cultural Safety Standard Checklist ('the Checklist').<sup>128</sup> The preamble to the Checklist states that Legal Aid

is culturally safe for staff and clients, is well connected to local Aboriginal and Torres Strait Islander communities and responds to the identified needs of Aboriginal and Torres Strait Islander people. The organisation is accessible to Aboriginal and Torres Strait Islander communities and people and provides services in a culturally safe and appropriate manner.<sup>129</sup>

There is no definition of cultural safety, but the Checklist provides for annual Aboriginal and Torres Strait Islander cultural awareness training, which includes the completion of a workbook; the creation of a physical environment that is welcoming, culturally sensitive and culturally safe by displaying Indigenous artwork, posters and paraphernalia inside the premises, and an Indigenous mural and flags outside the premises;<sup>130</sup> engagement with local Indigenous communities by way of participation at community cultural days and maintaining an Indigenous advisory board to be involved in strategic planning;<sup>131</sup> the recruitment of Indigenous staff; and the ongoing monitoring, evaluation and development of cultural safety and responsiveness strategies by way of client satisfaction surveys, client feedback, reporting on Reconciliation Action Plan progress, reporting to the Community Legal Centres Board and reporting to Legal Aid New South Wales. Furthermore, Legal Aid New South Wales has in recent years worked in partnership with independent cultural competency providers to deliver training to legal practitioners. They claim to have captured some magistrates in this training.<sup>132</sup> The extent to which culturally safe principles are reflected in the Checklist was not found in educational materials used in the training and education of judicial officers. Although some guidelines in bench books appear to support the creation of a culturally safe environment, they do not go as far as suggesting changes to matters such as court room space or staff employment strategies, and most of the strategies that appear in the bench books are framed as suggestions rather than directives.

#### IV Case Study: The Bowraville Murders

An example of how a lack of cultural awareness, let alone the acquisition of cultural competency or knowledge about how to implement cultural safety can preclude Indigenous Australians from attaining justice is found in the criminal prosecution of Jay Thomas Hart for the Bowraville children murdered in late 1990 and early 1991. Recently, the Standing Committee on Law and Justice tabled its report, *The Family Response to the Murders in Bowraville*,<sup>133</sup> which was the result of an inquiry into the effects on the families of the police investigation and ensuing criminal trials of the murders of three Aboriginal children, Colleen Walker-Craig, Evelyn Greenup and Clinton Speedy-Duroux. Hart was charged only for the murders of Evelyn and Clinton, but he was acquitted at both trials, which were conducted separately. Evidence relating to the other two deaths was not admissible in each of the trials. One of the main areas of concern for

the families of the murdered children has continued to be the decision to separate the prosecutions for the murders. The Director of Public Prosecutions originally sought to join the indictments for the prosecution of the murders of Clinton and Evelyn; however, during the pre-trial process the trial judge determined that the trials should be separated because there were insufficient similarities in the evidence for the two murders.<sup>134</sup> The Committee's terms of reference did not include the power to 'investigate or comment on the allegations made or the veracity of those allegations' in relation to the murders; nor did the Committee have the 'capacity to make representations on the families' behalf in their pursuit of justice', but it did have the power to make recommendations in relation to how criminal justice investigations and trials could be improved to better suit the needs and experiences of Indigenous communities.<sup>135</sup>

Aside from finding the original police investigations lacking, the Committee also concluded that they were concerned about the manner in which the families and witnesses were treated during and after the trials. Evidence provided by witnesses at private roundtable and public hearings, and in submissions made by interested parties and organisations indicated that the families were provided neither with adequate information about the legal processes, nor adequate support during the trials, which resulted in the families being confused about why the trials were separated and why certain evidence was not able to be presented during the prosecutions. In a submission made by the Jumbunna Indigenous House of Learning, the lack of culturally appropriate support and information about the legal processes was viewed as demonstrating a 'cultural and empathetic insensitivity'.<sup>136</sup>

The Jumbunna Indigenous House of Learning and Dr Diane Eades' submissions pointed to a number of omissions in Clinton's trial, which in their view, affected the likelihood of a successful prosecution, including the omission of appropriate jury directions to help them assess evidence of Aboriginal witnesses and to counteract prejudicial stereotypes of Indigenous people and their ways of living. In her Answers to Questions on Notice, Eades noted that the New South Wales, *Equality Before the Law Bench Book*, 'highlights the importance of alerting the jury to "relevant cultural differences"' and stated that this should happen "early in the proceedings".<sup>137</sup> However, in her submission to the inquiry, Eades noted that such jury directions are not seriously considered in New South Wales, mainly because

of 'the mistaken view that Aboriginal people [in New South Wales] ... are somehow not sufficiently distinct from other Australians'.<sup>138</sup> Eades also discussed how Indigenous witnesses could communicate their evidence-in-chief during a trial, recommending that it be done in narrative form, rather than in a question-answer format as usually happens in court hearings. Section 29(2) of the *Evidence Act 1995* (NSW) allows a court, 'on its own motion or on the application of the party that called the witness' to direct that the evidence be given 'wholly or partly in narrative form'; however, according to Eades, 'this is rarely used'.<sup>139</sup>

The Committee reported that members of Evelyn's family, particularly her mother Rebecca, felt that they were on trial rather than the person of interest due to the questions they were asked as witnesses. The trial judge (in either Clinton or Evelyn's case) did not rely on s 41 of the *Evidence Act 1995* (NSW) to disallow questioning that:

- (a) is misleading or confusing, or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- (d) has no basis other than a stereotype.<sup>140</sup>

Rebecca explained in her submission to the inquiry, that she did not understand the questions she was asked and felt that they were more focused on her lifestyle than the disappearance of her daughter.<sup>141</sup> Other family members provided similar evidence to the Committee. An Indigenous psychologist who worked for the Indigenous Psychological Services and who was present at Evelyn's trial noted in her submission that

[i]n the Bowraville trials the bereaved family were portrayed in both a racially stereotypical and inherently biased fashion. This included the portrayal of Aboriginal parenting styles as deficient relative to westernised practices and specifically that children were only allowed to wander the streets unattended for hours and often days at a time, but that the parents themselves seemed generally unconcerned with their whereabouts. ... [T]he presentation of the community in this light served a singular purpose and that was to damage the credibility of Aboriginal witnesses. Unfortunately this portrayal largely went unchallenged. The additional portrayal of chronic alcoholism and violence as being endemic also compromised the ability of the jurors to

separate fact from fiction. Given also that all jurors were of non-Aboriginal descent this would have limited the cultural information that they had available to them and made it more likely that they would be distracted by the portrayal of witnesses in this way.<sup>142</sup>

This, coupled with difficulties in language and communication styles on the part of Indigenous witnesses during the trials, made it even more difficult for the prosecution to secure a conviction of the person of interest, an outcome which ultimately left the families of the three murdered children feeling traumatised and without a sense of justice.

These accounts led the Committee to conclude that 'a courtroom could be an intimidating and unwelcoming environment for anyone, particularly for Aboriginal witnesses who come to the environment with the backdrop of entrenched racial and cultural tensions within the criminal justice system',<sup>143</sup> and to recommend that 'the NSW Department of Justice consider and report on the merit of requiring lawyers who practise primarily in criminal law, as well as judicial officers and court officers, to undergo Aboriginal cultural awareness training'.<sup>144</sup>

## V Conclusion

Indigenous disadvantage and marginalisation in the Australian legal system continues to occur, as does the over-representation of Indigenous people in custody. Despite numerous inquiries and reforms, there are arguably very few initiatives that have been introduced to try to improve the experiences of Indigenous people when accessing legal services and appearing in court as either defendants or witnesses. One area that has had little attention is the role that judicial officers play in changing normative courtroom values and practices. This paper goes some way in raising awareness about the extent to which Australian judicial officers can attain knowledge and understanding about the substantive inequality that might exist within the hegemonic legal system for an Indigenous person seeking to access justice. This has become increasingly important in the area of sentencing, since a report prepared for the AIJA recently found that without adequate information about an Indigenous offender's background being presented in Pre-Sentence Reports, judicial officers are unable to hand down appropriate sentences and counter any 'prejudicial notions of Aboriginal criminality'.<sup>145</sup> There are currently no national standards to guide the provision of cultural awareness

training for judicial officers in Australia. The lack of national guidance contributes to the ad hoc manner in which training and guidance is currently provided, leaving the regularity of programs, attendance requirements and content up to the judicial governing body in each state and territory. Often this results in the extent of training being left to the discretion of individual chief magistrates or judges/justices, who may or may not have a sound understanding of Indigenous cultural norms and values, and how the role of a judicial officer can be more effective in achieving a culturally safe courtroom environment. Our study has, indeed, uncovered that not much has changed since the 1999 Williams-Mozley national review of Aboriginal cross-cultural awareness training for judicial officers. Similar to Williams-Mozley's findings, our research uncovered that South Australia is now, and has been in the past, a very active jurisdiction undertaking cross-cultural development, and that there is still a paucity of Indigenous focused cross-cultural professional development in the Australian Capital Territory, the Northern Territory and Tasmania.

As this analysis shows, the training and guidance provided does not satisfy standards commensurate with cultural competency, let alone cultural safety. Although judicial officers, through conferences, seminars, specialised training programs and bench books would no doubt attain a better understanding of the issues that an Indigenous litigant, accused, victim or witness might experience when coming into contact with the justice system, their training lacks the measures and standards required for the attainment of cultural competency or an understanding of how to implement cultural safety in court. Such training would require assessment to determine the level of understanding and knowledge acquired, regular compulsory on-going attendance and input of Indigenous local community members. It shifts the outcomes from mere awareness to the attainment of new skills and knowledge in the same way one would expect of a graduate completing a law degree. Only in this way would non-Indigenous courtroom players be able to fully understand and appreciate how their interactions with an Indigenous court participant might be experienced, which would, one would hope, lead to more informed decisions regarding jury directions, treatment of witnesses, admissibility of evidence and interpretation of substantive laws. Cultural competency, and certainly the application of cultural safety, should impact on each of these different domains similarly, in that the ultimate goal is to better accommodate cultural needs. That is, although they entail

different decisions and each comes with its own challenges, a decision about how to interpret the substantive law can be informed by cultural subjectivities and epistemologies just as much as a decision about how to question an Indigenous witness. Indeed, as was described in this paper, an example of the ways in which a lack of cultural awareness impacted on each of these types of decision is found in the Bowraville murders trials.

The degree to which cultural competency (or at the very least, cultural awareness) training should be forced upon disinterested or unwilling participants needs consideration. We can draw from the wisdom of feminist legal scholars who argued that unless material of particular concern to women is included in standard compulsory law courses, '[t]he fledgling lawyer, whether male or female comes out of the law school unprepared to grapple with problems of sex discrimination in the law or even to recognise them'.<sup>146</sup> In the same way, it could be argued that cultural competency training should be required as a compulsory component in an undergraduate law degree, so that all legal players, not only judicial officers, can be exposed to knowledge that may inform them of better ways of applying legal rules and processes to more effectively meet the needs of Indigenous Australians accessing the justice system. This may, in fact, occur sooner than expected, since the New South Wales Department of Justice, in implementing the recommendations made in *The Family Response to the Murders in Bowraville* report, recently called for the nomination of attendees to a roundtable to discuss the further development of cultural awareness training in law curricula.

This paper provides an overview of what cultural awareness information is currently available for judicial officers. However, it does not fully assess the extent to which the content of what is available aligns with Indigenous world views and values. Further research is needed to gain a better understanding of the experiences of Indigenous court participants and to determine the degree to which judicial officers contemplate the difficulties experienced by Indigenous Australians appearing in their courtrooms. Additionally, as Marchetti and Ransley recommend, the views of Elders and community representatives already involved in courtroom processes should be canvassed to gain a better understanding of 'what it means for a non-Indigenous legal player to be culturally appropriate and inclusive'.<sup>147</sup>

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