

**AUSTRALIA'S INDIGENOUS  
PEOPLE - A CURRICULUM  
FRAMEWORK FOR  
PROFESSIONAL DEVELOPMENT  
PROGRAMS FOR AUSTRALIAN  
JUDICIAL OFFICERS**

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National Judicial College of Australia

# **CONSULTATION DRAFT**

**NOTE: THIS DOCUMENT HAS BEEN PRODUCED AS DRAFT BASED ON THE EXPERIENCE OF PAST PROGRAMS AND INPUT FROM JUDICIAL OFFICERS AND INDIGENOUS PEOPLE INVOLVED IN THOSE PROGRAMS.**

**THIS DRAFT IS RELEASED FOR THE PUPOSE OF CONSULTATION, TO BE CONDUCTED SEPARATELY IN EACH STATE, WITH INDIGENOUS PEOPLE AND JUDICIAL OFFICERS AND OTHERS WITH AN INTEREST IN INDIGENOUS CULTURAL AWARENESS PROGRAMS FOR THE JUDICIARY. THE DRAFT WILL BE REVISED BY THE NJCA INDIGENOUS JUDTICE COMMITTEE AND THE COUNCIL OF THE NJCA ON THE BASIS OF COMMENTS RECEIVED DURING THE CONSULTATION PROCESS.**

**IN THE FUTURE THE CURRICULUM WILL REMAIN OPEN TO ADAPTATION AND DEVELOPMENT AS THE IMPLEMENTATION OF PROGRAMS IN THIS AREA PROCEEDS AND IT WILL REMAIN SUBJECT TO FURTHER CONSULTATION**

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## Abbreviations and terminology used in this report

Course	Normally a single topic seminar which may have a number of sessions but has a single overall topic
Curriculum	An operational plan to systematically guide the development and delivery of learning programs
National Curriculum	The NJCA's National Curriculum for Professional Development for Australian Judicial Officers published in January 2007
NJCA	National Judicial College of Australia
Professional development	Activities in which learning takes place and through which the participants' professional capacity is developed or enhanced
Program	A professional development activity comprising a range of courses or sessions, possibly dealing with a number of topics or on a single theme with related topics
Session	A part of a seminar or course, on a single topic and usually delivered by the one presenter or group of presenters

# Introduction

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The NJCA published its National Curriculum in January 2007.<sup>1</sup> It provides for a series of professional development programs designed to help judicial officers perform their judicial role.

2 For the purposes of the National Curriculum, the judicial role is seen as encompassing a number of different aspects –

- applying the law
- managing cases, the court room and one's work
- making decisions and giving reasons for decisions
- displaying appropriate standards of judicial conduct
- understanding the relationship between the judiciary and society
- keeping abreast of developments in knowledge and in public policy that impact on the law
- using technology, in and outside the courtroom
- managing one's health and well-being.

3 The programs in the National Curriculum are divided into eight modules, each of which reflects one of these aspects. Module 5 addresses the importance of judicial officers having an understanding of the relationship between the judiciary and society, or the social context in which the judiciary does its work.

4 The Social Context module is intended to assist judicial officers by providing them with –

- information about the social contexts against which and out of which particular issues and particular litigants come before the courts; and
- examples of the application of the principles of equality and fairness in a diverse society.

5 It encompasses 4 programs:

- Program 5.1 Equality and Diversity
- Program 5.2 Australia's Indigenous People
- Program 5.3 Disability and Impairment
- Program 5.4 Family and Domestic Violence

6 This report was commissioned to develop a curriculum framework for Program 5.2: Australia's Indigenous People. It builds on the content suggested for that program in the National Curriculum, proposing a series of specific topics to be addressed in professional development programs.

7 It makes suggestions about the methodology to be adopted in devising and delivering programs in this area, with particular emphasis on the importance of meaningful consultation with, and involvement of, Indigenous people. It also suggests a program for implementation of professional development activities using this framework.

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<sup>1</sup> Christopher Roper AM, *A Curriculum for Professional Development for Australian Judicial Officers* (NJCA, 2007).

## Background

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8 Under the auspices of a project conducted by the Australian Institute of Judicial Administration ('AIJA') since 1993, Indigenous cultural awareness programs have been made available in all Australian States and Territories. Those programs were designed and developed by local State and Territory Committees and generally overseen by a National AIJA Committee which administered funds provided by the Commonwealth Attorney-General's Department and ATSIC. In New South Wales, funds were administered jointly with the Judicial Commission of New South Wales. Programs were developed and run by the Commission and a committee formed under its auspices.

9 The AIJA project was a response to the recommendations of *Royal Commission Into Aboriginal Deaths in Custody*, specifically Recommendation 96:

That judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasize 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. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding."<sup>2</sup>

10 A number of courts and court departments also conducted education and training programs, for judicial officers and court staff in the wake of the RCIADC report and subsequent developments in relation to issues affecting Indigenous people and the law. Both the Federal Court of Australia, particularly in relation to its native title jurisdiction, and the Family Court of Australia have been active in this area. Programs for judicial officers and court staff have also been run in several State jurisdictions.

11 The past decade has seen the development of specialised Indigenous courts in a number of jurisdictions. They include the Aboriginal courts in South Australia, the Koori Court in Victoria, the Circle Sentencing Project in New South Wales, the Ngamba Sentencing Circle in the Australian Capital Territory, the Murri Court in Queensland and, in Western Australia, a circle sentencing court at Yandeyarra, an Aboriginal Community Court at Norseman and an extended pilot Aboriginal Community Court at Kalgoorlie which will be the subject of evaluation.

12 Professional development programs have been run in conjunction with a number of these initiatives. They have involved judicial officers, court staff and representatives of the Indigenous community who are involved in those courts, as members of community justice groups, respected persons, or community elders.

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<sup>2</sup> *Final Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Chapter 3, par 79.

## **An approach to developing this curriculum framework**

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13 As noted in the National Curriculum, a curriculum is a description of what a learning activity is intended to achieve (aim), what its subject matter will be (content), and how it will be carried out (method). Professional development is a term used to describe activities in which learning takes place and through which the participants' professional capacity is developed or enhanced. Those terms will be used consistently with those definitions in this report.

14 The National Curriculum began with the observation that the task of developing a curriculum for professional development for judicial officers in Australia faces the challenge of reflecting the diversity of their work and the particular contexts of the matters that come before them. As a constitutional federation, Australia consists of a number of separate, but inter-related court systems. While judicial officers in different States and Territories and those in Commonwealth courts perform similar tasks in many respects, they apply and interpret different laws, for different communities, in widely different parts of the country. There is often also considerable variation in the work of judicial officers within the same jurisdiction.

15 Issues in relation to Australia's Indigenous people may be encountered by judicial officers working in native title, juvenile justice, summary and indictable criminal offences, family law and other areas of civil law. Different areas of knowledge may be relevant, or more relevant than others, in relation to those differing jurisdictions.

16 Australia's Indigenous population is also a diverse community, linguistically, culturally and politically. The main distinction that is generally drawn is between Aboriginal and Torres Strait Islander peoples. However, the significance of family and clan structure in Indigenous society means that in reality there are many Indigenous groups or communities in Australia. There are also similarities and differences between those communities, as well as within them. The importance of land, or country, to Indigenous Australians is one example of a factor that is, at the same time, both a unifying principle, and one that contributes to the diversity of Indigenous communities, both in terms of geographical location and cultural identity.

17 Any approach to developing a curriculum in this area must, necessarily, take account of the diversity within both the Indigenous community and the judiciary. It also needs to focus on their intersections; the points where they come into contact; the places where they need to be able to understand each other. It also needs to recognise that those places and the circumstances in which those understandings may be required are not fixed; they will change over time and between locations.

18 By their very nature, social context programs must be flexible and adaptable. As the National Curriculum makes clear, the focus of all the

programs proposed in Module 5 is on that aspect of the judicial role that requires understanding of the relationship between the judiciary and society and of changes in society.

19 For these reasons, any attempt to cast a curriculum for this module needs to be set in broad terms, as indicative of the content that might be covered, rather than to set it in fixed terms. This curriculum is designed to establish a framework within which course and programs might be designed and tailored to meet the needs of particular judicial officers and the Indigenous communities they serve. Critical to that process of program design will be consultation with and the involvement of those judicial officers and communities.

20 Experience with past programs in this area suggests that this consultation will be most effective where it takes place at a local, or regional level. The next section in this report recommends the creation of local or regional committees, constituted by Indigenous people and judicial officers, to develop programs in this area.

21 This Curriculum Framework should be regarded as a consultation draft. It is expressly subject to consultation through the local or regional committee process, as supplemented in ways that may be particularly useful or appropriate at local level, for example, with representatives of a local Aboriginal Legal Service or Aboriginal community group/s.

22A This Curriculum Framework will be subject to ongoing evaluation, again in consultation with Indigenous communities and relevant Indigenous services, with a view to being adapted and further developed as the implementation of programs proceeds. It will also remain subject to further consultation.

## Using this curriculum framework

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### *Australia's Indigenous People - Consultation and Involvement*

22 The National Curriculum is predicated on the assumption that judicial officers themselves are best placed to determine their professional development needs. Applying this principle to social context programs, in particular to programs designed to promote cultural awareness, might be considered problematic. If lack of knowledge of cultural factors is something that is to be addressed in their professional development programs, it would simply be unrealistic to expect judges to be able to determine, with any specificity, the contents of those programs. In simple terms, judges cannot be expected to know what it is they do not know.

23 However 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.

24 To determine what those factors are requires expertise. Acquiring that expertise requires knowledge of what the judicial task entails. It also requires knowledge of Indigenous culture and society. Those are separate skill sets, unlikely to be combined in any one individual or class of individuals. (Those few judicial officers of Indigenous background may be an exception to that statement, but the diversity of the Indigenous community and its regional variety means that even they are unlikely to possess all the relevant information.)

25 This framework suggests that the best way to acquire that expertise is for professional development programs in this area to be devised by experienced judicial officers working together, from the outset, with members of the Indigenous community. This is necessary to ensure a sound educational methodology for program design.

26 Consultation is also necessary as a matter of principle. To attempt to devise education programs that address cultural issues pertaining to any section of the community without consulting that community is simply paternalistic and disrespectful. In the case of Australia's Indigenous community, where an historical legacy means that there is a well-founded distrust of the justice system, consultation is particularly important.

27 Solutions to the problems self-evidently require communication, co-operation and mutual respect. Experience in jurisdictions that have developed programs in this way suggests that the process of working together at this stage can, in itself, be an important educative process for both the judicial and the Indigenous participants.

### *Facilitation*

28 Facilitating communication between judicial and Indigenous participants, and providing an appropriate environment within which it can occur in a meaningful way, and one that is respectful of both groups, is a skilled task. It will be important that those who undertake the task of convening or chairing local planning committees have those skills and the identification of individuals, both Indigenous and non-Indigenous, who have that expertise can be an important part of the planning process for programs

29 In Canada, which has successfully implemented social context programs for the judiciary in a number of areas, peer leadership is seen as a critically important part of the process of both designing and delivering these programs. The Canadian National Judicial Institute has offered faculty development and curriculum design program for judicial officers specifically to assist them with in that regard. Similar programs have been run by the AIJA in relation to other social context programs.

30 The role of Indigenous faculty members will also require careful thought and preparation. This may involve briefings for participants and a level of ongoing support during the program.

31 In many jurisdictions there is a wealth of experience that can be drawn on, which has developed as a result of previous programs and as a result of the various Indigenous court and community justice initiatives developed over the past decade. The development of programs should draw on those existing resources and networks.

### *Designing for Diversity*

32 The diversity of Australia's Indigenous population, both culturally and in terms of geographical distribution, and the differing needs and experience of judicial officers, are significant factors in program design and delivery. They suggest that programs are most likely to be successful when they are developed with a focus on the interaction between judicial officers and Indigenous people in regional locations.

33 Programs that are offered at too broad a level are unlikely to be able to cater adequately for that diversity. They run the risk of offering information that is too general either to adequately reflect the issues in particular Indigenous communities or to be of sufficient utility to judicial officers dealing with those communities. In seeking to reduce complexity for a larger audience, they may also run the risk of reinforcing stereotypes and ignoring more difficult issues.

34 Those regional locations that may form an appropriate focus for programs may not necessarily coincide with State and Territory borders. For example, judicial officers from the Northern Territory, South Australia and Western Australia all deal with matters involving Indigenous people of the Western Desert Region. There could be considerable advantages in a combined program that involved judicial officers from each of those

jurisdictions, who might be expected to have common needs and who are dealing with communities who may have common issues and concerns. There may be different needs in relation to programs devised in different areas within States or Territories, for example, between programs designed for metropolitan and rural areas.

35 The National Curriculum was specifically cast in terms that provide a framework within which there can be considerable flexibility. As noted above, this Curriculum Framework is designed on a similar principle. As with the National Curriculum, there will be an ongoing developmental process as it is refined, restructured and, at times, expanded. Much of that will occur, at a local, regional level, as judicial officers and Indigenous communities come to terms with specific issues that they wish to address.

36 Much of the work that is being done in Indigenous justice at the current time revolves around the Indigenous court initiatives in various States and Territories. Most of those initiatives are being implemented locally in partnership with Indigenous communities. The networks and partnerships being developed in association with those initiatives would also be a useful structure for developing these programs and it is notable that much of the current training being done in this area is already focussed around these initiatives.

37 There may also be benefit in considering a targeted approach to the provision of professional development in this field. Suggestions have been made in some jurisdictions that judicial officers who participate in Indigenous court initiatives be required to undergo professional development programs to fit them with particular skills necessary for that work. Whether or not participation is required or is a matter of individual choice, it would seem logical to concentrate resources on those judicial officers who are regularly dealing with Indigenous people.

38 However, that approach should not overlook the need to provide programs at all levels of the judiciary or the needs of courts whose judicial officers who are required to deal with Indigenous people in more than one location, for example, District Court judges who travel on circuit. The needs of appellate court judges also require careful consideration. Consideration could also been given to providing judicial officers who are not able to attend a particular program with elements of information contained in it.

39 The fact that a judicial officer may deal with Indigenous people less often does not make it any less important for that individual to have all relevant knowledge and expertise available on those occasions when he or she does so. The significance of appellate court decisions for the work of courts below also suggests that there is great merit in appellate court judges having ready access to these programs.

40 A regional or local focus does not mean that programs should be confined to members of particular courts, or even judicial officers from a court at a particular location. As is the case for professional development programs

generally, there is much to be said for the exchange of information, experiences and dialogue across jurisdictions and between the various courts, who together, deal with member Australia's Indigenous community.

41 For these reasons, cross-jurisdictional programs and participation in regional programs by circuit, and appellate, judges should be encouraged.

42A Consideration should also be given to strategies to promote programs and encourage participation and broad take-up of programs.

### *Program Development and Topic Selection*

42 Particular topics may be selected from this Curriculum Framework according to the needs identified in consultation between the judiciary and Indigenous people in a region or jurisdiction. Those topics themselves and the issues enumerated under each of them are not set in stone. Other relevant issues and new topics may be identified in the planning and consultation process; others may require adaptation to suit local circumstances; some may not be relevant at all to a particular jurisdiction.

43 The topics might be used in any one of a number of ways. Some may be the subject of individual sessions; others might be combined together in a different ways, into courses or programs, depending on the outcome of the local consultation and planning process.

44 The content might also vary depending on its intended audience. A new judicial officer, or one who has had little experience dealing with matters involving Indigenous people, may benefit from a program that contains topics that are different from those appropriate for an individual with more experience, or who has already participated in one or more programs.

45 This report discusses an Outline Curriculum Program which suggests an order of progression in relation to the various topics. Again, it is envisaged that this will be adapted to suit local or individual needs.

### *Incorporation of Topics in More General Programs*

46 One issue that arises in relation to social context programs for the judiciary is whether or not they should be delivered in stand-alone form or incorporated into 'mainstream' or general programs. There are arguments in favour of both approaches and some jurisdictions have taken a staged approach. Canada, for example, began with stand-alone programs and in a later stage has moved to incorporate their content into general judicial professional development programs.<sup>3</sup>

47 In relation to Australia's Indigenous People, some of the suggested topics may lend themselves to incorporation in general programs. For example, Topic One, Cultural Awareness, may be suitable for incorporation in a judicial orientation program. Topic Eight, Communication, may be suitable

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<sup>2</sup> See National Judicial Institute, 'Social Context Education' at <http://www.nji.ca/nji/Public/category.cfm?CategoryID=12> accessed 12 April 2007

for incorporation into a more general continuing judicial professional development program, where it is offered to judicial officers who have already participated in programs incorporating some of the earlier topics (as suggested in the Outline Curriculum Program).

48 Some topics may overlap with topics suggested in other areas of the National Curriculum. For example, Program 2.14 (Interpreters in Court) may involve consideration of the use of Indigenous interpreters as suggested in Topic 8 of this Curriculum Framework. Program 5.1 (Equality and Diversity) may address some of the issues suggested in Topic 1. A program on Family Violence (5.4) may incorporate an Indigenous perspective (Topic 7).

49 However, it is suggested the majority of the topics in this Curriculum Framework would be better delivered as part of stand-alone programs, rather than being incorporated in more general programs for judicial officers. Many of these topics involve complex, and inter-related, issues which may simply not be able to be considered adequately if they are dealt with as single sessions amidst a larger, more general, course of professional development. The specific issues unique to Australia's Indigenous population may be lost within a larger program. A larger program may also not provide the opportunity to engage in interaction with Indigenous people; a significant component of professional development programs in this field.

### *A Holistic Approach*

50 The interaction between an Indigenous person and the court system begins well before the individual appears before a judicial officer, either as a party or a witness. Court staff play a critical role in the process.

51 Some jurisdictions have adopted a holistic approach to training programs, in which court registrars, court clerks and associates participate in programs alongside judicial officers. A number of courts have also created specific Indigenous Liaison or Authoritative Aboriginal Justice Officer positions, and those individuals are also often involved in professional development programs of this nature.

52 The holistic approach can have great merit, particularly in courts that are looking to consider or implement new approaches. The involvement of court staff can also assist the learning process of judicial officers, by providing additional information and expertise, which may be outside the immediate knowledge of the judge or magistrate.

53 The work of both court staff and judicial officers contributes to the overall court environment in which Indigenous parties and witnesses find themselves; it can be important for both groups to have an understanding as to how their activities interact to create that environment, from an Indigenous perspective. Many issues that arise may involve aspects of court practices or procedures, where both judicial and administrative input will be important.

54 It may be that some issues and topics would be better dealt with in programs, or individual sessions, that are confined to judicial participants. For

example, this might be the case with topics that involve detailed consideration of legal issues.

55 The extent to which an holistic approach could be achieved having regard to the NJCA's objects and powers would require further consideration. However, a broad interpretation could support the inclusion of court staff where their participation will assist judicial officers in developing skills and expertise.

### *Factors in Program Design*

56 Issues to be addressed in the planning process include:

- Who should devise and present the program? What consultation will be necessary to effectively undertake those tasks? Who will control or manage the process of program design and presentation?
- Should programs be voluntary or conducted on the basis that all judicial officers in particular court/s or location/s will attend? (For example, there have been suggestions that all judicial officers who deal with Indigenous people should be required to attend programs aimed at providing them with additional information and skills to assist them in that task.)
- What are the program's objectives? Is designed to provide general background information? Is it directed to a specific issue or problem (for example, dealing with juvenile offenders)? What outcomes are sought to be achieved? (For example, increased cultural sensitivity when dealing with Aboriginal witnesses in sexual assault cases.)
- Which topics will be covered? Selection of topics should be carefully considered in relation to program objectives, above.
- Will the program be evaluated, and if, so how? (See discussion of evaluation to follow).
- To whom should the programs be offered? Judicial officers only? Judicial officers and court staff? (See discussion in relation to the holistic approach, approve.)
- How long should the program be? Should it be a residential program? Should it be conducted on Indigenous land, court premises, or another forum? Might particular venues be better suited to particular topics? What teaching approach/es should be used? (See discussions on holistic approach (above) and methodologies (to follow)).
- Does the program appropriately balance the provision of knowledge or information with opportunities for judicial officers to gain first-hand experience of life in Aboriginal communities and the operation and impact of the justice system in practice?

57 Consideration of many of these issues will involve discussion of the appropriate methodology for presentation of particular topics (see below). For example, a methodology that aims to encourage effective interaction between judicial and Indigenous participants may require the judicial participants to have time to 'digest' and consider knowledge provided in information

sessions. That, in turn, may suggest that a program that extends over two days may be more effective than a shorter one. A residential program will generally be more appropriate for a program in a regional location.

58 Interaction can also be encouraged by conducting programs away from court buildings and on Indigenous land or premises. Selection of an appropriate Indigenous venue will require consultation with the local community.

### *Evaluation*

59 Evaluation by participants can be important both for assessing the utility of a particular program and for providing feedback into the overall process of program design and implementation. For this reason, evaluation needs to be considered at the stage of program design.

60 Generally speaking, it should be a matter for each local or regional committee to consider what evaluation strategy might be appropriate for a particular program. However, any approach to evaluation also needs to consider the College's general education policies, in particular:

The College's role is not to standardize judicial approaches to problems or issues or to label any acceptable approach as "right" or "wrong", nor should there be any public comment upon the extent to which any judge, in his or her work, has complied with, or failed to comply with approaches suggested in the course of any program.<sup>4</sup>

61 The aims and objectives of the program will be the starting point for any evaluation, so that what is being evaluated will be the extent to which those objectives have been achieved. For that reason, as noted above, it is important that they be clearly defined.

62 Evaluation could take place at both individual and institutional level. It could examine both changes in theory (knowledge, attitude) and in practice (skills, application of knowledge). It could encompass both short-term and long-term developments resulting from the program.

63 For example, a simple evaluation at an individual level would concentrate on the effect of a particular program on an individual judicial officer. What impact did it have on that judicial officer's knowledge or skills? Their approach to dealing with Indigenous people or to particular issues affecting Indigenous people in the court system? A short-term evaluation conducted shortly after a program might, for example, ask the judicial officer about the extent to which the program had increased their knowledge, or suggested to them new ways of dealing with a particular issue in the courtroom involving an Indigenous person. That type of evaluation might use a simple methodology, such as an 'exit' survey.

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<sup>4</sup> National Judicial College of Australia, *National Judicial College of Australia, Annual Report, 2005-2006*, p. 24.

64 Similarly, Indigenous participants may be asked about their experience of the program. Did they feel comfortable with the format? Was the arrangement and layout of the venue appropriate? Was there an opportunity for interaction with judicial officers at a personal level? Was that useful/productive? Has their participation impacted on their confidence in the court system or understanding of the judicial role?

65 A longer term evaluation strategy might follow up judicial officers after a period of time to ask them what changes in practice had resulted from their participation in that program. It might explore with them, either individually, or as part of a group, what strategies were needed to put new knowledge into practice and what barriers existed. It might ask them whether they had felt more confident in dealing with particular issues, greater job satisfaction and/or better understanding of arguments put to them. Again, a survey would be a useful way of obtaining feedback on these points. However, other methodologies, such as a focus group interviews might also be useful for conducting that type of evaluation. Indigenous participants, and representatives from Indigenous organisations who regularly engage with the courts, might provide valuable feedback on a longer-term basis about the impact of a particular program.

66 An evaluation strategy directed towards institutional outcomes might consider the extent to which a particular program had achieved a particular objective, for example, of encouraging more culturally sensitive treatment of witnesses in a particular context, by a court in general. That might involve a number of evaluation strategies that would move beyond self-assessment, for example, to include examination of reported cases, transcripts of proceedings, interviews with counsel, court staff, lawyers as well as judicial officers.

67 Such an approach would be challenging and would need to be very carefully considered in light of the College's policy, noted above. It might provide a valuable opportunity for a court to make an overall assessment of its performance, but its success would perhaps depend on the willing co-operation of all judicial officers concerned in an exercise that was focussed constructively, rather than on critiques of individual performance. For that reason, it is suggested that any attempt at institutional evaluation should be a matter for individual courts and their judicial officers.

# Australia's Indigenous People: A Curriculum Framework

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## *Aim*

- 1 The aim of Program 5.2 as identified in the National Curriculum is:  
[To] provide judicial officers with information about matters in which the role or involvement of Aboriginal people might call for particular skills or a different approach. They include Aboriginal courts, sentencing options, traditional Indigenous law.

The matters referred to in that statement are examples of the type of information that might be relevant. They are not an exclusive list. Other matters which would be of equal relevance include information about Aboriginal communities, communication, health issues and the experience of Aboriginal people.

## *The judicial role*

- 2 As the National Curriculum makes clear, while each of its programs deal with at least one aspect of the judicial role, they are not mutually exclusive. In some programs one of the elements will be the major or primary theme, and one or more of the other elements will be secondary themes.
- 3 While the focus of this program is obviously on that aspect of the judicial role that requires an understanding of the relationship between the judiciary and society and of changes in society, it also obviously touches on other aspects of the judicial role as well. For example, its content might also be relevant to the task of applying the law, or managing cases or the courtroom, in matters in which Aboriginal people are involved.

## *Content*

- 4 In broad terms, it is suggested that these programs could encompass the following areas:
  - Equality issues in general;
  - The social and cultural construction of culture generally;
  - The Aboriginal family, community and culture – the context of decision making;
  - The availability and approach to the use of benchbooks, including those dealing with Indigenous people, specifically and equal treatment benchbooks;
  - Legislation and legislative history;
  - Relevant caselaw - singular Supreme Court and High Court decisions;
  - Evidence and language in Aboriginal cases;
  - Aboriginal courts - including, for example, sentencing courts, Native Title hearings; and
  - The role and impact of Indigenous customary law.

5 These areas, or themes, are based on the suggestions made in the National Curriculum, as developed in consultation with the NJCA's Indigenous Issues Committee.

6 Again, it is important to note that they are subject to the consultation process and to review and revision as programs are implemented and evaluated.

7 It is also important to note that the identification of broad themes does not mean that programs themselves need to be of a general nature. Structuring programs around particular, contemporary issues, such as the welfare of children, juvenile offending or family violence, can be a useful way of engaging participants and directing the focus of the program to addressing current problems.

8 The following framework incorporates those suggestions, together with additional topics that have proven to be useful and well-received in programs that have been previously run for judicial officers in Australia. As emphasised above, they are subject to consultation at local and regional level. The order in which they are set out does not have any particular significance, other than to reflect the broad areas suggested above.

**Topic One: Cultural Awareness**

- Attitudes and values in decision-making
- Ways of learning
- Barriers to cultural awareness
- "Culture" a living entity rather than an historical artefact
- Use of materials, including benchbooks and other resources

**Topic Two: The Indigenous Community in Your Jurisdiction**

- Indigenous Identity
  - Factors that constitute or define Indigenous identity, for example, the importance of "country"
  - Identity & diversity – avoiding stereotypes
- Origins
- Population and distribution
- Aboriginal groups, clans and families
- Demographics – age, health, education, economic (employment and community development)
- The location and role of Aboriginal organizations
- The interface between government bureaucracies and Aboriginal communities
- Diversity – differences between Indigenous communities in cities, regional and remote locations
- Mobility of (some) Aboriginal families and Aboriginal people

***Topic Three: Understanding Indigenous Society Today: the lessons of history***

- Indigenous communities prior to white settlement
- Post settlement history – Indigenous & non-Indigenous perspectives
- Past legislation & policies
- Contemporary legacies
  - Personal and community experiences
  - Attitudes to the legal system
  - Family structures
  - Interactions between the Indigenous and non-Indigenous community.
- Social & Kinship structures
  - Family relationships
  - Community allegiances and responsibilities
  - Roles of immediate and extended family
  - Conflict between groups
  - Decision-making structures
  - Gender and culture – the experience of Indigenous women

***Topic Four: Indigenous people's experience of the criminal justice system***

- Causes of Indigenous over-representation in the criminal justice system
- Policing practices and statistics, investigation, arrest, bail
- The court system – understanding the process, impact of cultural factors and cultural obligations, relationship between court and the community, legal representation, the courtroom environment
- Judicial perceptions and concerns.

***Topic Five: The impact of health issues in the justice system***

- Alcohol and substance abuse
- Medical conditions, for example, the incidence of diabetes and otitis media in Indigenous communities
- The role of the health system in supporting Aboriginal communities and sustaining a non-custodial sentencing plan

***Topic Six: Specific legislation or legal changes affecting Indigenous people***

- For example, Native Title, Indigenous courts legislation, justice agreements, and significant court decisions.

***Topic Seven: Family violence***

- Community attitudes to violence, family violence and racism
- The role of the court and the judicial officer

- Determining culturally acceptable behaviour
- Legal and procedural delays
- The impact of alcohol and drugs

**Topic Eight: Communication**

- Cross-cultural communication - language, protocols, communication styles, non-verbal communication
- Barriers to communication
- The use of Indigenous languages, Aboriginal English and TSI Creole
- Indigenous notions of time, mobility and place
- Interpreters
  - Identifying the need
  - Qualifying & training interpreters
  - The role of the interpreter
  - Using interpreters effectively

**Topic Nine: Sentencing of Indigenous Offenders**

- Sentencing statistics for Indigenous offenders
- Aims of sentencing and motivations of offenders
- Cultural issues and sentencing
- The impact and relevance of customary law
- Effects of Imprisonment
- On the offender
- On families
- Royal Commission into Aboriginal Deaths in Custody
- Post-release support
- Sentencing alternatives:
  - Youth diversion schemes/programs for young offenders
  - Community based orders
  - The role of community elders in the sentencing process
  - Sentencing where the victim is indigenous
  - Indigenous courts
  - The role of Aboriginal organisations
  - The role of other services (such as transport) in supporting Aboriginal communities and sustaining a non-custodial sentencing plan
  - The relationship of the Aboriginal offender to the community in your jurisdiction
- Diversionary programs: the most appropriate Aboriginal Court

**Topic Ten: Customary Law**

- Its place in the Australian legal system
- Relevance to matters concerning the court

- Amendments to the *Crimes Act 1914 (Cth)* in relation to bail and sentencing
- Traditional Aboriginal legal and criminal concepts and processes
- Regional variations
- Whose 'customary law' ['bullshit customary law']?

### **Topic Eleven: Resources for judicial Officers**

- Aboriginal legal services & other organizations
  - Roles
  - Relevance to the judicial task
  - Contact and liaison
- Readings on specific issues (See sample list in Appendix 1)
- Benchbooks dealing with Indigenous people and equality issues generally.<sup>5</sup>

### *Methods of Presentation*

9A As outlined in the section 'Using this Curriculum Framework' it is guiding principle of this Curriculum Framework that programs delivered under it be developed and delivered in a consultative and co-operative arrangement between judicial officers and the Indigenous communities they serve.

9 The National Curriculum emphasised that methods of presenting programs in that curriculum should reflect their aims. Relevantly for the purposes of this program, the National Curriculum observed that:

Where the aim is purely the enhancement of knowledge, lecture style methods could be appropriate. Where the aim is also reflection or analysis, a method that will permit that should be employed. This could include question and answer sessions, or discussion sessions in small or larger groups.<sup>6</sup>

10 The design and delivery of social context programs for the judiciary generally has received a great deal of consideration both in the United States and Canada. Experience in those jurisdictions also supports the importance of careful consideration of the appropriate methods depending on the aims and of particular programs.<sup>7</sup>

11 In addition to the acquisition of knowledge, a significant aspect of social context programs generally is that of facilitating attitudinal change. This can be a sensitive issue for judicial officers, who may fear forms of 'cultural brainwashing'. For that reason, it is sometimes shied away from in discussions and terms such as 'awareness' or 'sensitivity' are avoided in preference to references to 'knowledge' and 'information'.

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<sup>3</sup> For example, the *Aboriginal Benchbook for Western Australian Courts*, Australian Institute of Judicial Administration, 2002, Judicial Commission of New South Wales, *Equality Before the Law Benchbook* (2006), Supreme Court of Queensland, *Equal Treatment Benchbook* (2003).

<sup>6</sup> Christopher Roper AM, *A Curriculum for Professional Development for Australian Judicial Officers* (NJCA, 2007)

<sup>7</sup> See, for example, The Judicial Education/Adult Education Project (JEAEP) at <<http://jeritt.msu.edu/documents/JEAEPManualonline.htm>>

12 In fact, what these programs are designed to do is to encourage participants to examine their own knowledge, attitudes and belief systems. It is then for the judicial officer to make their own critical assessment of the extent to which that knowledge, attitude or belief may influence (generally unconsciously) the way in which they approach their judicial task,

13 For that process to occur, participants obviously require exposure to knowledge, opportunities to test and evaluate that knowledge, and opportunities for reflection and analysis.

### **Personal Interaction**

14 An important part of that process is the opportunity for judicial officers to engage in direct communication with Indigenous people; an opportunity often not available in the course of either their professional or social environment. This was recognised by the Royal Commission into Aboriginal Deaths in Custody in Recommendation 96, where it stated that wherever possible the methodology of cultural awareness programs should include the participation by judicial officers “in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.”<sup>8</sup>

15 The experience of those who have conducted programs in this area in Australia, and overseas, and feedback from participants, suggests that the opportunity for judicial officers to meet with and speak with Indigenous people (and vice versa) is often seen as a critically important part of these programs. Personal interactions can be as effective in conveying information, as more formal methods, such as lectures, and have the added advantage of providing opportunities for creating working relationships between judicial and indigenous representatives in the justice system.

16 The use of a ‘welcome session’, in which all participants, judicial and Indigenous, are invited, individually, to briefly provide the group as a whole with some information about their background and role, can be important in setting the scene for useful and mutually respectful dialogue. Dialogue might then be facilitated, for example, by presentations from local Indigenous speakers, followed by interactive sessions that enable discussion between judicial and Indigenous participants.

17 Interaction may also take place, less formally, in discussions during breaks, mealtimes and social activities. Experience suggests that creating opportunities for those interactions is an important part of program design. Residential programs, by their nature, tend to provide greater opportunities for informal interaction generally, and feedback from judicial officers in jurisdictions that have employed that format suggests that they find it very beneficial.

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<sup>8</sup> Johnson, E. (1991) *National Report Overview and Recommendations*. Royal Commission into Aboriginal Deaths in Custody, AGPS, Canberra.

18 Experience also suggests that opportunities for useful interaction are enhanced when programs are conducted on Aboriginal lands, or in Aboriginal premises.

19 Several jurisdictions have also designed programs that have involved opportunities for judicial officers to visit Aboriginal communities and to visit prisons to talk with Aboriginal prisoners. Again, these types of program formats have been well received by judicial participants. Community visits can be useful ways of promoting interaction and developing ongoing working relationships at urban, regional or remote locations.

20 Community visit programs also provide opportunities for judicial officers to talk to members of the non-Indigenous community whose role makes their views particularly relevant, for example, police, representatives from Aboriginal or community organisations, people from government departments working with Indigenous people, representatives of local government.

## **Format and Style**

21 In designing programs, careful thought needs to be given to creating environments in which useful interaction between judicial officers and Indigenous participants can occur. Avoiding undue formality in forms of address, using a set-up or room layout that promotes inclusiveness, encouraging casual, rather than formal dress, and ensuring that there is a reasonable balance in numbers between judicial and Indigenous participants, can all be important in this regard.

## **Context**

22 Any professional development program design needs to contain a careful balance of theory or background and practice. Historical perspectives are particularly significant in relation to indigenous issues and their contemporary significance cannot be over-estimated.

23 Experience from past programs suggests that it can be useful to explicitly draw that link by commencing programs with some discussion of contemporary problems, issues or solutions, in order to set the context for background or historical material.

24 Experience also suggests that for most judicial officers, as for most experienced adult learners, programs need to go beyond the provision of knowledge or information, to produce quantifiable outcomes. Participants will want to 'take away' something of value that will assist them in their work. Programs that are strategy-based, or directed to achieving particular outcomes in terms of skills or abilities, may be more appropriate for particular types of topics.

25 Techniques such as simulations, or problem-solving exercises, can be useful to assist participants to move beyond the acquisition of knowledge and consider ways in which it may be practically applied. Examples from past programs have included small group exercises where judicial officers and Indigenous representatives discussed ways in which culturally appropriate diversionary schemes could be incorporated in sentencing options, or developed a strategy to provide judicial officers with information about relevant Aboriginal organisations in their region.

26 Work done, and dialogue established, in those types of sessions can also be useful building blocks for ongoing contact and liaison activity.

# Australia's Indigenous People: Outline Curriculum Program

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27 This section considers the way in which the Outline Curriculum might be implemented in each jurisdiction, over a period of time. Its purpose is to encourage each jurisdiction to develop a benchmark against which to measure their activity in relation to this program.

28 Given the diversity in type of work undertaken by judicial officers that may bring them into contact with Indigenous people, the diversity in experience, background and existing knowledge of judicial officers, and the differing experiences and needs of Indigenous communities, it is considered that it would be difficult to establish a meaningful national benchmark.

29 As an overall objective, it is suggested that over time, all relevant members of the judiciary (those who have contact with Indigenous people, as defendants, appellants, parties to other litigation or as witnesses) should complete all of the suggested topics (as modified or adapted to suit the needs of their particular jurisdiction.)

30 In establishing a benchmark to suit their particular regional needs, it is suggested that each local committee consider which of the topics contained in the Curriculum Framework might be regarded as:

Foundation (or core) topics:  
Essential; or  
Ongoing.

31 'Foundation' topics are suggested as those that should be undertaken by all judicial officers, regardless of the extent to which they deal on a regular basis with Indigenous people. It is suggested judicial officers who deal with Indigenous people on a regular basis should undertake those topics regarded as 'Essential' as an initial step. Those topics have been placed in an order that suggests the degree of concentration they might receive, Communication, for example, obviously being seen as a critical issue. 'Ongoing' topics could be incorporated as part of the professional development for judicial officers who deal with Indigenous people on a regular basis, or who are dealing with specific issues in Indigenous communities, e.g. youth programs, family violence. These classifications are obviously subject to consultation at a local level; for example, a topic that is seen as suitable for 'ongoing' programs in one place, may very well be seen as 'essential' in another,

One example, of a particular approach to setting a benchmark would be as follows:

## 1. FOUNDATION TOPICS:

**Topic One      Cultural Awareness**

*Methodology:*

- Information Session
- Question & Answer
- Facilitated small group discussion

2. ESSENTIAL

**Topic Eight:    Communication**

*Methodology:*

- Information Session
- Question & Answer
- Demonstrations
- Performance-based activities (exercises)

**Topic Two:    The Indigenous Community in Your Jurisdiction**

*Methodology:*

- Information Session
- Question & Answer
- Facilitated small group discussion
- Community visits

**Topic Three:    Understanding Aboriginal Society Today: the lessons of history**

*Methodology:*

- Information Session
- Question & Answer
- Facilitated small group discussion
- Community visits

**Topic Four:    Indigenous people's experience of the criminal justice system**

*Methodology:*

Information Session  
Question & Answer  
Facilitated small group discussion  
Community Visits  
Prison visits

***Topic Nine: Sentencing of Indigenous Offenders (& Aboriginal Courts)***

*Methodology:*

Information Session  
Question & Answer  
Community Visits  
Prison Visits  
Performance-based activities (exercises)

3. ONGOING

***Topic Five: The impact of health issues in the justice system***

*Methodology:*

Information Session  
Question & Answer  
Small group discussion  
Community Visits

***Topic Seven: Family violence***

*Methodology:*

Information Session  
Question & Answer  
Small group discussion  
Community Visits

***Topic Ten: Customary Law***

*Methodology:*

Information Session

Question & Answer

Community Visits

***Topic Six: Specific legislation or legal changes affecting Indigenous people***

*Methodology:*

Information Session

Question & Answer

***Topic Eleven: Resources for judicial Officers***

*Methodology:*

Information Session

On-line resources

Question & Answer

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- The Judicial Education/Adult Education Project (JEAEP) at <http://jeritt.msu.edu/documents/JEAEPManualonline.htm> accessed 10 April 2007
- Williams-Mozley, J., *Overview Report on the National Aboriginal Indigenous Cultural Awareness Program 1993-2000* (AIJA, 2002)

## Appendix 1:

### Readings for Judicial Officers

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**EXAMPLE (Provided by Magistrate Dr Kate Auty).**

#### **Research in relation to issue of cultural excuse**

Approachable and accessible anthropological guidance in relation to the use and relevance of 'cultural' matters e.g. by way of defence or mitigation:

- Bolger, Audrey, 1991, *Aboriginal women and violence. A report for the criminology research council and the Northern Territory Commission of Police*, Darwin ANU, Northern Australian Research Unit.
- Bell, Diane, 1983, *Daughters of the dreaming*, Melbourne McPhee Gribble.
- Bell, Diane, 1989, 'Speaking up about rape is everyone's business', in *Womens Studies International Forum* 12:4: 403-416.
- Bell, Diane, 1994, 'Representing Aboriginal women: who speaks for whom?' in Oliver Mendelsohn and Upendra Baxi, eds., *The rights of subordinated peoples*, Delhi, Oxford University Press.
- Bell, Diane and Pam Ditton, 1980, *Law: the old and the new*, Canberra, Aboriginal History Press.
- Daylight, P., and M. Johnstone, 1986, *Women's Business*, Canberra, Australian Government Printer.
- Langton, M., 1990, 'Too much sorry business', paper annexed to RCIADIC Final report.
  - Toussaint, S., 1995, *Cultural realities and partial truths: gendered ethnographies in Northern Aboriginal Australia*, PhD thesis Department of anthropology University of Western Australia.

Case law about such matters as the weight to be given to an Aboriginal victim's reluctance to prosecute and have an Aboriginal accused gaoled for personal violence offences (i.e. *R v Stanley Edward Fernando* (1992) 76 A Crim R 58).