



NEW SOUTH WALES
BAR ASSOCIATION®

PROTOCOL IN RESPECT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

The Uluru Statement

The New South Wales Bar Association supports the Uluru Statement.

Welcome to country

Protocols

Protocols for welcoming visitors to country have been a part of Aboriginal and Torres Strait Islander cultures for thousands of years. There are up to 700 First Nations groups/clans recorded with distinct boundaries separating them across Australia. Pursuant to Aboriginal law and custom, permissions are required to enter and cross another group's country. Hence, the Welcome to Country ceremony is a significant custom and gesture. It provides the visitor with safe passage. It also pays respect to and follows the protocols and rules of the land owner group while on their Country. A Welcome to Country occurs at the beginning of a formal event and can take many forms including singing, dancing, smoking ceremonies or a speech in traditional language or English.

Welcome to Country

Only a Traditional Owner of the land you are standing on can give a Welcome to Country. You will have to research and consult with the First Nations Committee to find an appropriate Elder or community representative to ask to deliver a Welcome to Country. For a large formal event, arranging for an appropriate First Nations person to welcome the meeting attendees to their country is recommended.

Acknowledgment of Country

An Acknowledgement of Country is an opportunity for the wider community to show respect for and acknowledge the Traditional Owners.

It is vital to acknowledge the First Nations people of the land on which you stand when you are holding an event or meeting. It is also advised to acknowledge Elders and community members. An Acknowledgement of Country should be given at the beginning of the event, before the commencement of any meetings, gatherings, seminars, forums, conferences, board, council or working group meetings.

Anyone can deliver an Acknowledgment of Country

There is no strict form of words. However, examples for Sydney CBD are:

- General – ‘I would like to acknowledge the First Nations people of the Sydney area whose land we are on today. I acknowledge all Elders past and present and thank you for attending’.

Specific – *‘I would like to acknowledge the Gadigal people, on whose land this meeting is taking place today. I pay deep respects to all Elders past and present and future.’*

As a general guide, the relevant First Nations lands in NSW may be identified from maps such as that produced by the NSW Reconciliation Council (see references below).

If you are unsure of the land on which you are standing, do not feel embarrassed to ask the local Aboriginal Land Council or contact the NSW Reconciliation Council.

Acting for an Aboriginal or Torres Strait Islander client

Generally

The following issues and matters are provided as background and general observations for barristers to consider when acting for an Aboriginal or Torres Strait Islander client.

- Recognise the diverse nature of Aboriginal and Torres Strait Islander communities;
- Diversity can include linguistic, cultural, geographic and familial diversity;
- Do not ask an Aboriginal or Torres Strait Islander person what percentage Aboriginal or Torres Strait Islander he or she is, or refer to a person as ‘part-Aboriginal’, as it is offensive. Similarly, do not ask whether a person is of Aboriginal or Torres Strait Islander ‘descent’ or ‘heritage’. If you are uncertain, just ask whether the person identifies as Aboriginal or Torres Strait Islander; and
- Familiarise yourself with, and respect, your client’s family and kinship responsibilities.

Disadvantage

- Do not assume disadvantage simply because a person identifies as Aboriginal or Torres Strait Islander. However, backgrounds of deprivation and disadvantage commonly feature in some Aboriginal and Torres Strait Islander communities;
- Be aware that the disadvantage commonly suffered by Aboriginal and Torres Strait Islander peoples manifests itself in many ways, for example, geographic dislocation from extended family/ community/ country, limited education, ill-health, grief, domestic violence (as either a perpetrator and/or victim), drug addiction, unemployment and poverty. Be aware that this disadvantage is commonly trans-generational;
- Familiarise yourself generally with the indicators of Aboriginal and Torres Strait Islander peoples’ disadvantage. The Judicial Commission’s *Equality Before the Law Bench Book*, Chapter 2, is a useful place to start;
- Be aware that early life trauma or trans-generational trauma may be present and have had an effect on neuro-cognitive development;
- In some disadvantaged communities there is a greater prevalence of Foetal Alcohol Spectrum Disorder (FASD) which may affect neuro-cognitive development; and
- Be aware that certain medical conditions which might interfere with easy communication, such as impaired hearing or FASD, are more prevalent in Aboriginal and Torres Strait Islander communities.

Linguistic diversity and communication with clients

- Recognise the cultural and linguistic diversity across different Aboriginal and Torres Strait Islander communities throughout Australia;
- Be alert to cultural and linguistic differences (yours and your client’s) in the use of language and concepts. Familiarise yourself with these by reading relevant available resources (see references below);

- Determine whether your client feels discomfort or has difficulty in speaking and providing instructions to you and, if so, identify in what way/s;
- Speak slowly and clearly but, unless your client has a hearing impairment, not loudly;
- Consider whether an Aboriginal interpreter, or other intermediary, is needed for communications with a client whose first language is not English;
- Be aware that your client might have limited literacy and numeracy but be too embarrassed to tell you;
- Be aware that dates and times, eg. when an offence took place or previous court dates, may have different significance to your client;
- Be aware of gratuitous concurrence¹, where your client appears to agree with all of your propositions although he or she may in fact not do so; and
- Be aware that for Aboriginal and Torres Strait Islander peoples, avoidance of eye contact is customarily a gesture of respect. Clients from some Aboriginal and Torres Strait Islander cultures might find direct eye contact confronting.

Your client might feel uncomfortable with:

- Any person perceived to be in a position of authority (lawyers, judges, court personnel);
- Dealings with police (which may be the reason your client was charged);
- The formality of barristers' chambers and/or a court room;
- The formality of language used in a legal setting, including in courts;
- The pressure of a limited time for conference;
- Making eye contact;
- The embarrassment (the 'shame') of the subject-matter and/or the embarrassment of the subject-matter being discussed openly in court; and
- A lawyer of a different gender.

Children

- Be aware that all of the issues referred to above are likely to be more pronounced if your client is a child. Special care will be necessary.

Strategies

Develop strategies to ensure you are obtaining complete instructions, providing complete advice and making sure that your advice is properly understood. Possible strategies include:

Conferences

- Allow ample time for conferences;
- Encourage your client to bring a support person to conferences (and to court);
- If relevant and possible, consider having conferences somewhere less intimidating than chambers or a court complex;
- At the outset, have a general, non-legal discussion with your client to develop a rapport;
- Always use plain English when speaking with your client;
- Explain your role as a barrister, in particular that you act on your client's instructions;
- Explain that you are working together with your client to get the best result for him or her;
- Explain the court process and the likely formalities of the court/ the role of the judge/ the jury/ your own role/ the role of the lawyer on the other side/ any experts;
- Ask your client to explain relevant information in narrative form;
- Ask your client open questions so as to allow your client to explain the situation in his or her own words;
- Limit the number of your leading questions so that you do not predominantly get 'yes' and 'no' answers;

- Clearly explain the relevant law;
- Clearly explain the consequences of different courses of action;
- Consider the use of diagrams to illustrate your explanations;
- If you are not sure whether your client has understood what you have said, ask your client to explain it back to you in his or her own words;
- If you obtain written instructions, (a) explain why you need written instructions, (b) make sure the written language you use is understood by your client and (c) read the instructions clearly to your client before asking him or her to sign;
- Obtain the contact details of a person who can make contact with your client if needed for future conferences or court attendances, eg. a family member, Field Officer or local community worker; and
- If you think it might assist, ask your client if you can speak to family members or other members of his or her community about the subject-matter of the court case.

Court attendance

- When you are in court, speak at a speed and in a manner to ensure your client understands what you are saying;
- Speak to your client before, in, and after court, or ask your solicitor to do so, to make sure your client understands what is happening;
- Try not to rush your explanations to your client about what is happening in court; and
- Ensure there is sufficient time after court to properly explain to your client the effect of the decision or outcome.

Criminal cases – evidence required in sentence proceedings

- Ask your client about his or her family, upbringing and day-to-day life around the time of the offence;
- Obtain evidence of any particular disadvantage suffered by your client. Do *not* assume that a court will take disadvantage into account in mitigation without *specific* evidence as to the way in which that disadvantage has impacted on your client;
- In addition to evidence of any specific disadvantage, consider the availability of evidence and information about the disadvantages that may be systemic in your client’s community, eg. low life expectancy, poor literacy and numeracy outcomes, high rates of domestic violence offending, youth drug and alcohol abuse, and child removals (see references below);
- Ask your client whether there is an extended family member or other person, eg. a friend, health worker or community worker, who can give you information about your client. Get the necessary permission and authorities; and
- If possible, adduce evidence (in the form of affidavits, references or oral evidence) from your client or from a member of your client’s family or community who can provide relevant evidence about your client’s life.

Family law cases

- Be mindful that some clients might be reluctant to access and engage the legal system to resolve private family disputes. This needs to be understood in the context of past government policies, including forced removal of children and settlement of communities, as well as other engagement with the legal system through criminal justice, domestic violence and child protection. Often engagement with family law will occur at a point of crisis, eg. child recovery orders;
- Ask your client about his or her country and tribal, skin and language group and be aware that the child’s other parent may belong to a different group. This might raise cultural protocol considerations for ‘growing up’ children;

- Ask about your client’s immediate and wider family structures. Decision-making and the care of children is often a whole of family/community responsibility;
- Be aware of the broader issues that often accompany family breakdown, eg. housing, finance, family violence and child safety. Clients might be involved in several overlapping legal systems, eg. personal protection orders, criminal proceedings, victims of crime, child protection and family law proceedings, and this legal complexity might cause clients to disengage;
- Ensure you refer clients to culturally appropriate services which provide appropriate physical environments, modes of communication and observance of cultural protocols relating to gender, and also have regard to substantive cultural norms, such as notions of kinship and child-rearing practices;
- Ask your client whether he or she wishes to opt-in to the Federal Circuit Court’s Indigenous List if it is available (currently available in Sydney, Melbourne, Adelaide, Alice Springs and Darwin) and
- Consider whether your client may need an interpreter and whether an interpreter in that language group is available and free of potential conflict.

Native title cases

- Native title rights are communally held rights;
- Learn and understand the decision-making processes of the claim group, native title holders or corporate rights holding body;
- Exercise care in ensuring the interests of the whole of the native title claimants or holders are taken into account in decisions regarding litigation and settlement; and
- Exercise care not to be seen as partisan to one sector of the native title claimants or holders.

Some suggested resources

Equality Before the Law Bench Book, Judicial Commission of New South Wales, Section 2

Overcoming Indigenous Disadvantage: Key Indicators 2016, Productivity Commission, Australian Government (www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage)

Taking evidence from Aboriginal witnesses speaking English: some sociolinguistic considerations, Diana Eades, Precedent issue 126, January/February 2015

Aboriginal Ways of Using English, Diana Eades, Aboriginal Studies Press, 2013

Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A handbook for Legal Practitioners, Diana Eades, Queensland Law Society, 1992

The Bar Book: www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx

The Bar Book Project: Presenting Evidence of Disadvantage, Sophia Beckett, Public Defenders Criminal Law Conference, 2019 www.publicdefenders.nsw.gov.au/Documents/The%20Bar%20Book%20Project%20Paper.pdf

Asking Aboriginal People Questions, Sophia Beckett and Felicity Graham, Conference of the Environment and Planning Law Association, 2015 epla.org.au/media/2015-epla-conference/Asking%20Aboriginal%20People%20Questions%20-%202015%20EPLA%20Conference.pdf

Improving the Family Law System for Aboriginal And Torres Strait Islander Clients, Family Law Council 2012 www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/Improving%20the%20Family%20Law%20System%20for%20Aboriginal%20and%20Torres%20Strait%20Islander%20Clients.pdf

Indigenous Australians and Family Law Litigation: Indigenous perspectives on access to justice, Stephen Ralph (Aboriginal Consultant Psychologist), assisted by Leisha Lister (Executive Advisor Family Court of Australia), peer reviewed by Chris Cuneen, 2011 www.familycourt.gov.au/wps/wcm/connect/03eec3e6-63e4-4060-a874-3cfb3dc125f7/IndigenousAustraliansFamilyLaw.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-03eec3e6-63e4-4060-a874-3cfb3dc125f7-lh-m9FQ

NSW Aboriginal Language Map – NSW Reconciliation Council www.facebook.com/nswreconciliation/photos/a.228062947928/10155563014877929/?type=3&theater

Endnotes

1. Gratuitous concurrence means a pattern of a person saying yes in answer to a positive question, or no in answer to a negative question, whether or not they agree with and/or understand the question being posed to them. It is common behaviour for people not comfortable with the language that is being used in conversation. It has also been identified as culturally-based for First Nations people who may withhold from disagreement or contradiction during an interaction and who prefer to approach differences of opinion in an indirect rather than a direct manner. This practice is consistent with the prevalent preference by First Nations people for narrative exchanges in conversation, with less direct questioning between parties to a conversation.