



# Indigenous Protocols for Lawyers in the Northern Territory

First Edition 2004

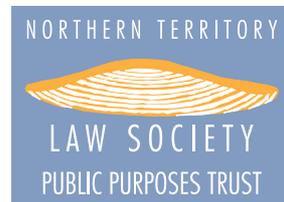




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Please submit your comments and suggestions for future editions of the Protocols to The Law Society of the Northern Territory on (08) 8981 5104.

*Kristina Karlsson*



## Table of Contents

Introduction .....	1
The Three Protocols .....	2
Protocol 1 .....	3
Protocol 2 .....	4
Protocol 3 .....	5
Aboriginal Interpreter Service User Guidelines .....	7
Aboriginal Languages in the Northern Territory .....	9
The Lawyer's Obligations .....	10
Two Cultures Meeting .....	13
The Law .....	17
Useful References .....	21
End Notes .....	22



## Introduction

Many lawyers in the Northern Territory act for and provide advice to Indigenous people. For lawyers who are not Indigenous, including many who are new to the Territory, communicating with Indigenous clients poses some special challenges. For example, because of the significant differences in language and culture, there is a much higher than usual risk of miscommunication. This can have major consequences.

Consultations with Indigenous organisations and the legal profession in the Territory suggest a need for protocols to assist communication between lawyers and their Indigenous clients. Based on the obligations of lawyers under Australian law and the influence of international law, such protocols can set a basic standard of conduct to assist legal practitioners and their Indigenous clients.

This document provides a set of three protocols, some related discussion and tips for a legal practice that is culturally attuned to Indigenous requirements. It is primarily aimed at lawyers who service Indigenous people in the Northern Territory where that Indigenous person's first language is an Australian Indigenous language. By following the Protocols a lawyer should go some way to both protecting the interests of his or her client and fulfilling his or her obligations as an officer of the court.

Indigenous people are culturally and linguistically diverse and live in remote, urban and rural areas of the Northern Territory. It should therefore be kept in mind that some of the information and tips in this document may not be relevant for all Indigenous clients. Much of the information will, however, be relevant for many clients.

This document does not constitute legal advice and should not be relied upon in the place of legal advice.



## The Three Protocols



### Protocol 1

*The lawyer shall complete the interpreter test before deciding whether an interpreter is needed.*

The Aboriginal Interpreter Service has produced Guidelines to determine if you require an Aboriginal language interpreter. These are on pages 7-8.



### Protocol 2

*The lawyer shall explain his or her role to the client.*

*'An institution, having significant dealing 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.'*

E. Johnston et al, 'Royal Commission Into Aboriginal Deaths In Custody', National Report (1991), Vol 2, page 161.



### Protocol 3

*The lawyer shall use plain English wherever possible.*

*'Dealing with whitefella law is like falling into a big, black hole and you can't get out.'*

Resident, Elcho Island.



# Protocol 1

*The lawyer shall complete the interpreter test before deciding whether an interpreter is needed.*

## When to use an interpreter

Very few lawyers speak an Indigenous language. Many of your Indigenous clients may have English as their second, third or fourth language.

Your client may not want to engage an interpreter: they may think that they speak English well enough and they may even want to take the opportunity of practising their English. In this situation you may want to suggest that even if they don't want an interpreter, you do.

If your client speaks some English you may overestimate your client's capacity to understand what you are saying and you may conclude that he or she doesn't need an interpreter. In fact, it is possible that your client is actually a speaker of a Creole, Aboriginal English, Pidgin or Learner's English.

## The role of the interpreter

Interpreters are required to follow a Code of Ethics and various other guidelines and codes. The Australian Institute for Interpreters and Translators Code of Ethics includes eight principles including confidentiality and impartiality.

The interpreter may take some time in the beginning of the session to tell your client what their role as an interpreter is and what some of their obligations as an interpreter are.

Be conscious that some of the words in your client's language will not have precise equivalents in English, just as some English legal concepts may have only very vague equivalents in your client's language.

If you don't have the ability to use the Aboriginal Interpreter Service make sure you choose the right interpreter. In smaller communities, for example, an interpreter may not be able to interpret for a relative because of kinship reasons.

For explanations of Creole, Aboriginal English, Pidgin and Learner's English, refer to page 9 of this document.

*'It's probably hard for non-Aboriginal people to understand how much our own languages enrich our lives as indigenous people. To speak our language...gives us a real connection with our land and our culture. We can never get that from English, no matter how well we speak it.'*

Jeanie Bell, 'Australia's Indigenous languages' from Michele Grossman (ed)

*Blacklines: Contemporary Critical Writing by Indigenous Australians*, (2003) Melbourne University Press, page 169.



## Protocol 2

*The lawyer shall explain his or her role to the client.*

You should explain your role as a lawyer to your client at the first opportunity.

Keep in mind that lawyers are sometimes perceived to be working with the police. If you are not assisting the police, you should make this clear.

If you are involved in a prosecution you are essentially working with the police. You will often be required to use interpreters when interviewing witnesses, family members and victims. You may need to think about what impact this may have on your client and talk to them about it.

### A few words on culture shock

'Culture shock' is a term that describes the anxiety and fear that a person experiences when he or she moves out of their cultural safety zone and into a new one.

'Culture' consists of the ideals, values and assumptions about life that are widely shared and that guide specific behaviour. When we move into another cultural sphere, those values and assumptions about human behaviour differ. Our expectations of others' behaviour towards us may not be met. This causes us to have strong emotional responses such as anger, confusion and fear. In order to cope in the unfamiliar culture we are required to continually monitor and adjust our own behaviour so that it matches up with the accepted 'norms' in the culture we now find ourselves in. This can be a deeply stressful experience.

Remember that your client is susceptible to experiencing 'culture shock' when they meet with you or appear in court.

You may also experience culture shock when you visit a community or other place with which you are not familiar and where the people around you have world views different to your own.



# Protocol 3

*The lawyer shall use Plain English wherever possible.*

Ensuring that you use Plain English when speaking and writing is one of the keys to ease the stress that you and your client may experience. For example, don't use expressions such as 'in any event' or words like 'incidentally'.

You should ask your client how they wish you to communicate with them when you are not able to see each other face to face.

Sometimes it may be easier for you to communicate with your client in written Plain English rather than spoken, as some clients may have someone whom they can ask to help them read your letter or translate it for them. On the other hand, some clients will not have access to such a person, nor may they wish others in the community to know their legal business.

## Let your client tell their story

Much conversation in Indigenous societies does not follow the Western question and answer method. Instead, much of the information needed to function in Indigenous societies is transmitted through participation and interaction with others in addition to through verbal means.<sup>1</sup>

Your client may therefore feel uncomfortable answering direct questions. Let your client tell you the story in his or her own way. For example, start with 'Tell me what happened' and encourage your client to tell their story by saying 'And what happened then?' etc.

Do not nod as this may indicate that you are happy about what you are hearing. Instead, simply listen and provide no physical or verbal signs of encouragement at all.

## Ask non-leading, open-ended questions

Non-leading questions are much more likely to elicit correct information from your client, particularly if there is no interpreter present and their English is not fluent.

Asking leading questions encourages passive answers from your client. Asking non-leading questions means that the information will come from the client rather than from you. There is also less chance of your obtaining contradictory responses. For example, a non-leading, open-ended question might be, 'You told me it was dark. Tell me more about that.'

*'I explained the charges against my client and the evidence to support them. Then I explained the business about pleading guilty or not guilty. I did not hurry my explanation and we went over the matters a few times. Then I told him to go away and think about what he wanted to do. He came back after a few hours and I asked him if he had decided how to plead. He said he had. He wanted to plead 'guilty-not-guilty.'*

Anecdote cited by Helena Blundell (2000), 'A long fight for basic human rights' 25(5) *Alternative Law Journal* 219, page 220.



### Save your specific questions for last

Specific questions asked early in the interview might discourage your client from providing detailed responses.

Allow your client the time and space to tell you what they wish to tell you. When they have finished then it is your turn to ask more specific questions such as a non-leading specific question, *'Tell me what Mark was wearing...'* or a non-leading, closed question, *'What shoes was Mark wearing?'*

### Leading questions

If you do use a leading question, make sure you follow it up with a non-leading one for clarification. It will help you see whether your client understood your leading question. For example, after asking your client whether it was 'X', say, *'Tell me why you think it was X.'*

### Why, what, when

You may need to limit your use of questions starting with *'why'*, *'what'* or *'when'*. Instead of saying *'Why did Mark do X?'* say *'You said that Mark did X. Tell me more about that.'*

### Allow your client extra time to answer questions

Silence is an important and positively valued aspect in some Indigenous cultures.<sup>ii</sup> Your client may therefore take longer to answer your questions. Be conscious of not interrupting your client's response. In some cases 30 seconds is not a long time to wait.

### Speak conditionally

It is easier in difficult and frustrating situations to tell your client what to do than to explain the options to them and allow them to make up their own mind. This may be easier for you but it is ethically wrong. Be conscious that you may resort to this way of interacting with your client when you are feeling frustrated. Your client may also find this irritating. Instead, try speaking conditionally. For example, not *'You have to do X'* but instead, *'It will help you to do or get X. This may be difficult. It is up to you if you do X but your chance of getting Y will be a lot better.'*

### Explaining legal concepts

It is crucial that your client understands the legal concepts involved in their matter. Legal concepts are more difficult to explain in Plain English when your client does not have English as a first language.

You may wish to make up your own definitions of legal concepts and keep them in a handy place so that you can use them over again. This may avoid the frustration of trying to simplify your language on the spot.

For example, you may wish to describe an affidavit as *'Your story on paper. You must sign the paper and say it is true because those things happened to you'* etc.

## Tip 1

Fax a copy of your client's itinerary to their workplace or community council or ring your client the day before an appointment.

Always check that this is OK with your client first.



## Aboriginal Interpreter Service User Guidelines

**These guidelines are to help you determine if an Aboriginal language interpreter is required.**

The following test method is straightforward and should only take a few minutes. It involves asking some questions that are designed to see how far the person can understand English and how well they can respond using English.

It also involves laying a few word traps to uncover the potential for unrecognised miscommunication.

### Instructions for administering the test:

- You should take notes of the interviewee's responses for checking.
- Speak clearly in plain language.
- After you ask each question give adequate time for a response.
- If a response or lack of response indicates that the question may not have been understood, then investigate this further. You could ask, "Do you understand what I asked you just now?" If the interviewee answers "no", repeat the question and then follow this immediately with a check by saying, "I need to find out if you understand my question, so please repeat back what I just asked you now." If they answered "yes", then also immediately follow this response with the same check.

*In either case, if the interviewee is unable to restate the sense of your questions, then an interpreter's assistance is required.*

### STAGE 1

Before we talk about \_\_\_\_\_, I need to be sure that we can communicate effectively in English.

I'm going to ask you some questions and see how you answer them. This will help us work out if you need an interpreter. Let me ask you this question first: Do you have any difficulties with speaking or understanding English?

*NOTE: If the interviewee does not respond or if they answer yes, but can give no clear details, then there is no need to proceed further, an interpreter is warranted.*



## STAGE 2

Now I'm going to ask you a few questions about yourself so that I can check that you are able to give me information in English. Please listen to my questions and answer them as well as you can.

- Can you tell me where you were born and your date of birth?
- What education have you had?
- Do you know how to read and write English? (If the answer is yes then ask them to read a newspaper headline and to write: I know how to read and write in English.)
- I would like to find out if you have enough English to tell me a story. So tell me a little bit about your country where you come from - for example, things like where it is, what it looks like and what bush tucker you can find there.

*NOTE: If the interviewee's responses are inappropriate to the questions OR if answers are only one or two words long OR if the interviewee cannot come up with a few clear sentences for the last question, then there is no need to proceed further as an interpreter is warranted.*

## STAGE 3

Now I'm going to ask you just a few more questions. This time I might try to make some questions a little bit tricky or ask them in another way so I can see if you stay on track.

- When you were born, was that this century or last century?
- When you were growing up in Sydney, was the food good?
- Gough Whitlam comes from your community too! That's right isn't it?
- How long did you go to school in Canberra; was it more than one year?
- Okay, this is the last question: are you satisfied that we can go ahead in English or do you think we need an interpreter?

*NOTE: If the responses do not match the questions - for example, if the interviewee responds to either/or questions with yes or no, or fails to recognise and rectify the false insertions about Sydney and Canberra - then an interpreter is required.*

You can find these guidelines at: [http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/pages/AIS\\_Guidelines](http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/pages/AIS_Guidelines)



## Aboriginal languages in the Territory

There are a great number of Aboriginal languages spoken in the Northern Territory. Even in a relatively small geographic area a number of languages are spoken. In the Alice Springs and Tennant Creek areas, for example, at least 20 languages are spoken. The same applies to Indigenous people living in and around Darwin and the Top End and the Centre.

You can therefore expect your client to speak a number of languages including languages that have evolved since colonisation. Some of those languages are described below.

### Aboriginal English

Aboriginal English is a term used by linguists to denote dialects of English used among Aboriginal people.<sup>iii</sup>

A leader in the field of Aboriginal English and the law is Dr Diana Eades. She argues that Aboriginal English is not a fixed dialect but a range of dialects. Some of those dialects are closer to Standard English while others are closer to Kriol languages.

### Creoles

Creole languages are fully developed languages that develop from pidgin languages. Northern Territory Kriol is now the main language of many Aboriginal communities and has thousands of speakers across the northern half of the NT.<sup>iv</sup>

### Learner's English

Linguists describe Learner's English as an 'interlanguage'. These are the words people speak when they are learning a second language but consistently fail to speak the second language correctly. For example, 'don't have to' is often used by speakers of Learner's English to mean 'must not'.

Speakers of Learner's English may also revert to using their own language for a word that they do not know the English equivalent of.

### Pidgin

Pidgins are rarely used in Australia now. They are 'contact' languages and are in fact not fully-developed languages. Historically they have evolved from intercultural contact in places such as cattle stations and missions.

The Aboriginal Interpreter Service began in April 2000. It offers interpreters in 104 Aboriginal languages and dialects.

It has designed Guidelines to determine whether an interpreter is required. These Interpreter Guidelines appear on pages 7 & 8.



## The Lawyer's Obligations

### Tip 2

As a lawyer, you have common law and legislative obligations towards your client and the court. These obligations originate from Commonwealth and Northern Territory legislation and rules set out later in this document, together with extracts from relevant cases. The three protocols have their bases in these obligations.

Draw a map of the courtroom layout and explain to your client the role of each person who will be in there and where they will be sitting. Include the security staff and orderlies in your explanation.

### Common Law obligations

You have ethical and legal obligations to your client and to the court. You also owe a fiduciary duty to your client. As an officer of the court you have an overriding duty to uphold and ensure the effective administration of justice.

Whether an interpreter is required under the common law is a matter of judicial discretion. The overriding requirement is that all parties must have a fair trial. In a criminal law context, a fair trial involves the accused and the tribunal being able to hear and understand the evidence of each witness: *Johnson* (1986) 25 A Crim R 433.

### Your fiduciary duty to your client

You have an obligation to explain to your client what the processes of law are, what they involve, the options they have and the risks associated with those options.

You have a duty to ensure that they understand what you have told them so that they can make informed decisions about the choices available to them and so that they may provide you with instructions.

You can only act on those instructions. For this reason it is critical that you are certain that your client has made an informed choice in instructing you.

### Your duty to the court

By not ensuring that you are fulfilling your fiduciary obligations to your client, it is possible that you are breaching your duty to the court because you are not upholding nor ensuring the effective administration of justice.

*'Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned with the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests.'*

*Rondel v Worsley* [1969] 1 AC 191, per Lord Reid at 227.



## Obligations under Northern Territory legislation

There are three sources of Northern Territory legislation that place obligations upon legal practitioners who practise in the Northern Territory: the *Legal Practitioners Act*, the *Law Society of the Northern Territory's Rules of Professional Conduct and Practice* and the *Barristers' Conduct Rules*. The relevant parts of those sources of obligations that are relevant when acting for Indigenous clients are provided here. These regulations and laws are regularly amended so you must keep yourself up to date.

In summary, under section 44 of the *Legal Practitioners Act* you must ensure that you act honestly and fairly in the best interests of your client<sup>v</sup> and you must not engage in conduct or assist in conduct that is calculated to defeat the ends of justice.<sup>vi</sup>

You must regularly report to your client on the progress of their matter in which you are acting for them.<sup>vii</sup> Arguably, this implies that you should report regularly to your client in your client's own language.

While a contravention of any of the above provisions of the *Legal Practitioners Act* does not constitute the committing of an offence against section 44, it may amount to 'professional misconduct'.

'Professional misconduct' is defined in section 45 of the *Legal Practitioners Act*. It is broadly defined as 'misconduct in a professional capacity'<sup>viii</sup> and includes a wilful or reckless failure or contravention of the *Legal Practitioners Act* or any of the general principles of professional conduct specified in section 44(1) or the professional conduct rules.

## Obligations under Federal legislation

In Federal Court proceedings, section 30 of the *Evidence Act (Cth) 1995* applies. This states that 'A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.'

The *Crimes Act 1914* (Commonwealth) imposes obligations on investigative officials for infringements under that act. An investigating official who believes on reasonable grounds that a person under arrest or a protected suspect is unable to communicate orally in English with reasonable fluency must arrange for an interpreter to be present before questioning begins and cannot begin questioning or investigation until an interpreter is present.<sup>ix</sup> An investigating official has additional obligations when the suspect is Aboriginal or of Torres Strait Islander origin.

There are no Northern Territory statutory equivalents to these Commonwealth acts. This means that the common law rules outlined above apply.

### Tip 3

Take special care to explain the court's orders and make sure that your client understands his or her obligations that arise from those orders. Use an interpreter for this part of your job too!



## The influence of International Law

Australia has ratified the International Covenant for Civil and Political Rights (ICCPR). While the ICCPR has not been incorporated into Australian domestic law, the document is a powerful influence on Australian common law.

Article 14(3) of the ICCPR states that everyone who is charged with a criminal offence is entitled, as a minimum, to be informed of the nature and cause of the charge in a language in which they can understand;<sup>x</sup> to have adequate time and facilities to prepare a defence and to be able to communicate with counsel of their own choosing;<sup>xi</sup> and to have the free assistance of an interpreter if they cannot understand or speak the language used in court.<sup>xii</sup>

On 25 September 1991, Australia acceded to the First Optional Protocol to the ICCPR. By this act, Australia has recognised the competence of the Human Rights Committee to receive communications from individuals claiming to be victims of violations of any of the rights set out in the ICCPR.

Individual communications must only be made once all available domestic remedies have been exhausted.<sup>xiii</sup>

### Tip 4

A greater number of Aboriginal people suffer from hearing loss than non-Aboriginal people.

When you are in court, make sure that your client can hear what is being said to them.

### Tip 5

It is likely that your client will feel uncomfortable in the courtroom. They may be suffering from culture shock and the surroundings may also stir up feelings of prior experiences with the non-Indigenous legal system.



## Two Cultures Meeting

Advising an Indigenous client often requires a special type of effort on your part. To begin with, it is important that you are aware that you and your client will have a different world-view. It is also important that you show respect for your client's world-view and their customs.

Appreciate the diversity of circumstances of Indigenous people and, most importantly, don't be judgmental about them.

As a lawyer you should, wherever possible, make an effort to become acquainted with some of the protocols that your client finds familiar or which may apply in the community that you are visiting.

While protocols vary from community to community and individual to individual there are many that the communities have in common. Some examples of protocols to respect are listed below.

### Kinship

Within all cultures there are kinship systems. Indigenous kinship systems are ubiquitous across the Territory and they are specific to the group that claims ownership of them.

For many Indigenous people, kinship systems not only imply who is related to whom but also how they must act towards each other in particular circumstances. For example, do not pressure your client to talk about someone if they seem unable to offer you any information about that person. If you do, you may be forcing them to speak about somebody of whom they must not speak.

Rather than viewing kinship as a barrier to communication, be willing to learn about these different systems. If you take the time to learn a little about your client's culture, communication will become easier between you.

*'Our world view embodies the position from which we evaluate and understand the world. It encompasses all the taken-for-granted meanings, assumptions, and ways of evaluating and dealing with things that unconsciously shape the way we experience, conceptualise and interact with the world.'*

P Dudgeon, D Garvey, H Pickett (2000)  
*Working with Indigenous Australians:  
A Handbook for Psychologists*, Gunada  
Press, Perth, page 10.

## Tip 6

Have at least three points of contact for your client where you can leave messages for them. This may include an auntie or uncle, community centre or CDEP office.



## Avoidance relationships

Within Indigenous kinship systems there are avoidance relationships, sometimes referred to as 'poison cousins'. The term 'poison cousin' is not only incorrect but also very misleading. They are rarely cousins and never poison or negative.

## Eye contact

For many Indigenous people sustained eye contact is considered rude and even disrespectful. This may particularly be the case if you are talking to someone of the opposite gender.

## Funerals

When a person has passed away there are certain obligations that family members need to fulfil. These vary from region to region and between communities. It is usually important that people participate in ceremonies. It is often extremely insensitive to mention the name of someone who has passed away, view any photograph or film of that person and sometimes use anything of that person for a reasonable period of time.

## Making decisions

Sometimes your client may not have a right to make decisions about a particular subject. It may be up to other people in the community to make that decision. This means that someone else may be responsible for giving instructions to you in relation to a particular issue.

## Visiting a community

While each community is different, often the cultural protocols will be similar. You should gather as much information as you can about the community before you go there.

## Practicalities

Find out how many people live in the community, how it is governed, where the nearest town is and what languages are spoken. Obtain your permit well in advance and check to see if it is a 'dry' (alcohol-free) community.

## Dress

If you are a woman this generally means wearing a skirt or a dress so that most of your body is covered. If you are a man, trousers and a shirt and boots are adequate. You may find that when you get to the community it is appropriate to dress in a slightly different manner. Take a cue from what others of your age and gender are wearing. In any event, it is best to err on the side of caution.

## Tip 7

Make special categories in your client information forms to include categories such as languages spoken, skin or clan group, community council contact details or relatives' contact details.

*'That Judges, Magistrates, Court officials and other appropriate persons should receive cross cultural training in Aboriginal affairs.'*

Recommendation 1, NT Law Reform Committee's Report of the Committee of Inquiry into Aboriginal Customary Law, 2003.



## Roles in the community

If you are meeting with particular people in a community find out exactly what their roles in the community are. You may find that the answers you want need to come from a range of people in the community who have the authority to speak about those things.

## In the office

Remember that your client may feel uncomfortable talking to you. This might be because they have uncomfortable feelings from negative contact history or misunderstand the nature of the Western legal system. Above all, you should remember that many spaces do not feel neutral for Indigenous people.

Your client may feel awkward coming to your office. Imagine your first court appearance or your first client interview or even visiting the dentist and this may give you some idea of what it must be like for some Indigenous clients.

A more appropriate place to see your client may be somewhere where there are lots of Indigenous faces or even outside at a picnic table in the park near your office. You may even like to see your client at their home or at an Indigenous legal or health service.

Your client may also bring a support person with them when they see you. This is something that you may want to encourage your clients to do.

## Keeping contact with your client

Indigenous communities and homelands have their own peculiar pressures and difficulties for the people who live there. Many people who live there do not have access to a telephone or a computer in their home or enjoy the luxury of home-delivered mail.

### Communicating

Mail is often not a reliable method of keeping contact with your client because the chances of your client receiving his or her mail may be low. Many of your clients may have to collect their mail from a post office many kilometres away or from their community centre.

## Tip 8

Consider getting an 1800 toll-free number for your workplace so that your Indigenous clients may more easily contact you.

The telephone may be the only one to be shared by the whole community. It may only work between certain hours when the generator is switched on. If the generator has broken down there may be no telephone service at all.

### Coming to town

Your client may only be able to come to your town once a year because of the cost of flying or other difficulty. If they travel by car they may have to wait until the end of the wet season to travel. They may not own a car of their own so they will depend on family members or the community itself to hitch a ride.



### Your expectations

Don't get frustrated because your client has not contacted you within a reasonable time after you have sent a letter or left a message for them to contact you or give you instructions.

There are a number of factors that may determine the timing of your client's contacting you. For example, they may not have received your message or correspondence, they may not be used to reading important-looking letters or they may not have someone to help them read it.

They may also have more important matters to attend to such as fulfilling their obligations to members of their community, attending a funeral or looking after family members.

### Unscheduled visits

If your client makes an unscheduled visit to see you in your office, resist the temptation to send them away asking them to come back another day. If they have come in this usually means that their legal matter is their top priority at that moment.

You may not get another chance to obtain that statement, sign those authorities or finalise that affidavit for weeks. Your client may also become offended if they are sent away and may lose any further interest in helping you do your job.

## Tip 9

If you are in court and you don't have the assistance of an interpreter and your client needs one, ask to have the matter stood down:

*'If counsel requires an adjournment for a given purpose surely it is his responsibility to make a firm application in unambiguous terms. If the grounds have merit such an application will seldom be refused. If counsel does not understand his client's instructions then he should not proceed until he does.'*

Muirhead J, in *Putti v Simpson* (1975) 6 ALR 47, at 51.

## Tip 10

Make the extra effort to finalise the paperwork that you need if a client makes an unscheduled visit.

*'Eight years went by, eight long years of waiting  
Till one day a tall stranger appeared in the land  
And he came with lawyers and he came with great ceremony  
And through Vincent's fingers poured a handful of sand.'*

Verse 9, 'From little things, big things grow', words and music by Kev Carmody and Paul Kelly



Excerpts of the relevant legislative obligations and guidelines follow in this section. They are valid as at October 2004.

## Legal Practitioners Act

### Section 44. General principles of professional conduct

- (1) The following general principles apply to the professional conduct of a legal practitioner in the course of practising the profession of the law:
  - (a) in acting for a client, a legal practitioner -
    - (i) must act honestly and fairly in the best interests of the client;
    - (ii) must not engage in or assist conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law;
    - (iii) must act with skill and diligence and as promptly as is practicable in the circumstances;
    - (iv) must report regularly to the client on the progress of the matter in respect of which the legal practitioner is acting;
  - ...

### Section 45. Meaning of professional conduct

...

- (2) Without prejudice to the generality of subsection (1), “professional misconduct” includes in particular -
  - (a) a legal practitioner’s contravention of, or failure to comply with -
    - (i) this Act or any regulations under this Act; or
    - (ii) the general principles of professional conduct specified in section 44(1) or the professional conduct rules, if the contravention or failure was wilful or reckless;
  - ...
  - (b) an act or neglect by a legal practitioner in connection with his or her practise as such which constitutes a gross breach of duty to a client or the Court;



## Rules of Professional Conduct and Practice

Rule 17.1 of the *Rules of Professional Conduct and Practice*<sup>xiv</sup> obliges a practitioner to ‘advance and protect the client’s interests to the best of the practitioner’s skill and diligence...’

Rule 17.2 obliges a practitioner to ‘seek to assist the client to understand the issues in the case and the client’s possible rights and obligations, if the practitioner is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions...’

## Barristers’ Conduct Rules

The *Barrister’s Conduct Rules*<sup>xv</sup> apply to all practitioners, **including solicitors**, who appear as advocates. Rules 16 and 17 of these rules mirror 17.1 and 17.2 of the *Rules of Professional Conduct and Practice* outlined above.

## Best Practice Guidelines for lawyers doing family law work<sup>xvi</sup>

Guideline 4.5 provides that ‘Lawyers should:

- Consider whether a client requires an interpreter or other assistance to communicate effectively with clients. This is especially important where clients:
- Do not speak English, are illiterate or suffer from a disability that would affect communication, such as vision or hearing impairment.
- Maintain a list of approved translators to make appropriate translations, and
- Consider whether an independent interpreter is preferable to a family member.’

## International Covenant on Civil and Political Rights

### Article 14(3):

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- ...
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;



## Case law

His Honour, Justice Muirhead, stressed the importance of receiving adequate instructions before appearing for clients in *Putti* (*Putti v Simpson* (1975) 6 ALR 47, at 50-51) that:

‘...it is absolutely vital that counsel remember their function and obligations, not the least of which is to ensure they are adequately instructed before appearing for clients - especially when the liberty of those clients may be in jeopardy - and that the clients are properly advised. These matters are basic. Half-baked instructions which may come from unreliable sources are, as a rule, just not good enough. The practice of appearing with only hurriedly-gained instructions, especially where language or cultural differences jeopardise understanding, may result in substantial injustice to individuals.

...

If counsel requires an adjournment for a given purpose surely it is his responsibility to make a firm application in unambiguous terms. If the grounds have merit such an application will seldom be refused. If counsel does not understand his client’s instructions then he should not proceed until he does.

...

I am not unaware of the difficulties faced by all involved in the administration of justice in remote areas, of poor communications, of the problems encountered in obtaining instructions, in arranging legal representation, of arranging for interpreters and for the attendance of witnesses. There are many problems such as distance and weather which jeopardise transport arrangements. Yet neither these matters, nor crowded lists to be coped with on hurried court itineraries, should be allowed to jeopardise an individual’s right to the most careful presentation and consideration of his case.’

Sir William Deane spelt out the terms of a domestic remedy in relation to the withholding of essential interpreter services in the case of *Dietrich* (*Dietrich v The Queen* (1992) 177 CLR 292, at 330-331):

‘Inevitably, compliance with the law’s overriding requirement that a criminal trial be fair will involve some appropriation and expenditure of **public funds** ... On occasion, the appropriation and expenditure of such public funds will be directed towards the provision of information and assistance to the accused: for example, ... **the funds necessary to provide interpreter services for an accused and an accused’s witnesses who cannot speak the language**. Putting to one side the special position of this Court under the Constitution, the courts do not, however, assert authority to compel the provision of those funds or facilities. As *Barton v The Queen* [(1980) 147 CLR, at 96, 103, 107, 109] establishes, the effect of the common law’s insistence that a criminal trial be fair is that, if the funds and facilities necessary to enable a fair



trial to take place are withheld, the courts are entitled and obliged to take steps to ensure that their processes are not abused to produce what our system of law regards as a grave miscarriage of justice, namely, the adjudgment and punishment of alleged criminal guilt otherwise than after a fair trial. If, for example, available interpreter facilities, which were essential to enable the fair trial of an unrepresented person who could neither speak nor understand English, were withheld by the government, **a trial judge would be entitled and obliged to postpone or stay the trial and an appellate court would, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial.**' (Emphases added).

In addition, there is also a strong presumption at common law in favour of permitting the defendant to have the assistance of an interpreter to interpret all proceedings in court. President Kirby (as he then was) in *Gradidge* (*Gradidge v. Grace Bros Pty Ltd* (1988) 93 FLR 414 at 417) has described the rationale for the rule as follows:

'Due process includes an entitlement to a fair trial which is normally conducted in the open. It also normally includes an entitlement to be informed, **in a language which the litigant understands**, of the nature of the case. Where the litigant cannot communicate orally in English it also normally includes, in my opinion, **the entitlement to the assistance of an interpreter.** ... The principle of an open trial in public, which is the hallmark of our system of justice, is not shibboleth. It exists for a purpose. That purpose is publicly to demonstrate to all who may be concerned the correctness and the justice of the courts determination according to law. That demonstration must extend to the parties themselves, for they are most affected by the outcome of the case. **Such demonstration, day by day in the courts, reinforces respect for the rule of law in our society.**' (Emphases added).



## Useful References

In addition to the references below the various community and Indigenous legal and health services and research institutions are important sources of information on interpreting and cross-cultural communication and understanding.

**Blundell**, Helena, (2000) 'A long fight for basic human rights' 25(5) *Alternative Law Journal* 219.

**Cooke**, Dr Michael, (2002) 'Indigenous interpreting issues for courts', Australian Institute of Judicial Administration, Level 1, 723 Swanston Street, Carlton, Victoria, 3053, available on-line at [www.aija.org.au](http://www.aija.org.au)

**Eades**, Dr Diana, (1992) *Aboriginal English and the Law*, Queensland Law Society Inc.

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**Goldflam**, Russell, (1997) 'Silence in Court! Problems and Prospects in Aboriginal Legal Interpreting', *Australian Journal of Law and Society* 17.

**McRae**, H, Nettheim, G, Beacroft, L and McNamara, L, (2003) *Indigenous Legal Issues: Commentary and Materials*, 3rd edition.

**Riley**, Trevor J, (2003) 'The Aboriginal Witness (Part 1)', *The Little Red Book of Advocacy*, 43.

**Riley**, Trevor J, (2003) 'The Aboriginal Witness (Part 2)', *The Little Red Book of Advocacy*, 46.

**Weis**, Barbara, (2001) 'Northern Territory Aboriginal Legal Service' 5(8) *Indigenous Law Bulletin* 27.



## End Notes

- <sup>i</sup> Martine B. Powell, undated, Guidelines for conducting investigative interviews with Aboriginal people', Law Society of the Northern Territory, page 9 (Powell). Much of the information in relation to Protocol 3 is taken from this paper.
- <sup>ii</sup> Powell, page 10.
- <sup>iii</sup> Dr Michael Cooke, *Indigenous Interpreting Issues for Courts*, Australian Institute of Judicial Administration, 2002 available at [www.aija.org.au](http://www.aija.org.au)
- <sup>iv</sup> Harris, John *Northern Territory Pidgins and the Origin of Kriol* (1986) Pacific Linguistics, Series C - No. 89. Australian National University, quoted in Cooke (2002), page 6.
- <sup>v</sup> Section 44(1)(a)(i) *Legal Practitioners Act (NT)*.
- <sup>vi</sup> Section 44(1)(a)(ii) *Legal Practitioners Act (NT)*.
- <sup>vii</sup> Section 44(1)(a)(iv) *Legal Practitioners Act (NT)*.
- <sup>viii</sup> Section 45(1) *Legal Practitioners Act (NT)*.
- <sup>ix</sup> Section 23N *Crimes Act 1914* (Commonwealth). These are set out in sections 23H - 23M of the Act.
- <sup>x</sup> Articles 14(3)(a) *International Covenant for Civil and Political Rights (ICCPR)*.
- <sup>xi</sup> Article 14(3)(b) *ICCPR*.
- <sup>xii</sup> Article 14(3)(f) *ICCPR*.
- <sup>xiii</sup> Article 2 First Optional Protocol to *ICCPR*.
- <sup>xiv</sup> Law Society of the Northern Territory *Rules of Professional Conduct and Practice*, January 2002.
- <sup>xv</sup> *Barristers' Conduct Rules* issued 20 March 2003.
- <sup>xvi</sup> The Best practice guidelines for lawyers doing family law work may be accessed at [www.lawcouncil.asn.au](http://www.lawcouncil.asn.au) and are regularly updated. The Guidelines were prepared by the Australian Government Family Law Council and are endorsed by the Federal Attorney-General, Child Support Agency, Chief Magistrate of New South Wales Judge D Price, Legal Ombudsman of Victoria Kate Hamond, Office of the Legal Services Commissioner New South Wales, Law Society of South Australia and The Law Society of the Australian Capital Territory.



