THE LAW SOCIETY OF SOUTH AUSTRALIA

Lawyers’ Protocols for Dealing with Aboriginal Clients in South Australia

First Edition

Adopted by the Council on 23 August 2010
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Introduction

This document is an adaptation by the Law Society of South Australia of the document entitled 'Indigenous Protocols for Lawyers in the Northern Territory'.

The Law Society of South Australia acknowledges the primacy of the Northern Territory document and states that the adaptations that it has made to that document are an attempt to modify the original text to make it more suitable to South Australian conditions.

Many lawyers in South Australia act for and provide advice to Aboriginal people. For lawyers, communicating with Aboriginal 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 Aboriginal organisations and the legal profession in South Australia suggest a need for protocols to assist communication between lawyers under Australian law and their Aboriginal 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 Aboriginal clients.

This document provides a set of three protocols, some related discussion and tips for a legal practice that is culturally attuned to Aboriginal requirements. It is primarily aimed at lawyers who service Aboriginal people in South Australia where that Aboriginal person's first language is an Australian Aboriginal language where he or she has difficulty understanding Standard English. It is intended as an aid to obtaining instructions and giving advice, not so much for asking questions of an Aboriginal client or witnesses in Court (although it may be of assistance for this purpose). 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.

Aboriginal people are culturally and linguistically diverse and live in remote, urban and rural areas of South Australia. It should therefore be kept in mind that some of the information and tips in this document may not be relevant for all Aboriginal 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. This document also does not purport to provide comprehensive details regarding Aboriginal societies and culture.

Thanks go to Richard Bradshaw, Paul Muscat, Khatija Thomas and Robert Lawton for working on this document. We also express our gratitude to Professor Peter Sutton and Ms Susan Woenn Green for their linguistic and anthropological comments upon the text.

C.J.Charles

Chairperson Aboriginal Issues Committee, Law Society of South Australia, May 2010
The Three Protocols

Protocol 1

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

The NT Interpreter Service has produced Guidelines to determine if you require an Aboriginal language interpreter. The Guidelines on pages 9-11 are based on these.

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'.


Protocol 3

The lawyer shall use plain English wherever possible.

'Dealing with whitefella law is like playing football when the other team and the umpire are applying basketball rules. Not only have the goal posts been moved but there is not even a goal post anymore'.

(Observation by Anangu̱ about the Australian legal system)
Protocol 1

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

1. When to use an interpreter

Very few lawyers speak an Aboriginal language. Many of your Aboriginal clients may have English as their second 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 need one. 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 Aboriginal English or Learner's English.

1.1 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 an Aboriginal interpreter from the State Government’s Interpreter Translating Centre (or a private interpreter service called Multi Lingua), 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.

1.2 Interpreting Aboriginal Languages

Interpreting Aboriginal languages is not like translating from French into English. French and English have a common vocabulary because we live in a common culture with French people. This is not the case with Aboriginal languages, so an interpreter’s task is much harder. In a real sense an interpreter is interpreting between cultures as well as languages. For example, Western Desert languages do not have a numbering system that goes past six, and many concepts you will want to use like “remand”, “bail agreement”, “mortgage”, “occupier’s liability”, “negligence” and so on, have no equivalent in Aboriginal languages. You need to bear these things in mind. You should try to make the interpreter’s task as easy as you can, by discussing with them, the interpretation of legal concepts before you speak with the client.
For explanations of Aboriginal English and Learner's English refer to pages 11-12 of this document.

*It's probably hard for non-Aboriginal people to understand how much our own languages enrich our lives as Aboriginal people. To speak our own 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.'*


**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.

If you are acting for a party involved in a prosecution you may be seen as working with the police. You need to define your role in relation to the prosecution. as being a prosecutor working with police in court or as a defence lawyer working for the accused, but who, in the course of acting for the accused, must talk to the police and prosecution. Or you might be acting, for example, for an alleged victim, in relation to a police prosecution, and speak to all parties. You should make it clear who you are working for and what you can and cannot do.

Explain your role in terms of your functions and the relationship of lawyer and client.

This may be done by

- defining who your client is and who your client is not,
- defining what the matter is, and what the matter is not, over which you have, or are able to take instructions to act.

**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 worldviews different from your own.

In addition your interpreter may well be sensitive to many cultural cues that you do not know about. Examples as ‘avoidance relationships’ between people you may have in the room with you. Avoidance relationships are discussed below on page 21. Also, there may be reticence to talk about topics that induce shame.

Shame in Aboriginal societies has much more intense meaning than in Western society. It has been described by the eminent anthropologist Fred Meyers,\(^2\) in his book “Pintupi Country, Pintupi Self”\(^2\), as being like a combination of acute embarrassment coupled with a situation which creates massive personal insecurity. In addition Professor Peter Sutton reports that the Western Desert language noun, kurnta, usually translated as ‘shame’ also includes the notion of anger or resentment towards the person who exposes one to criticism, ostracism and social isolation.

You need to be open to learning from the interpreters you work with as much as you can.

### 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.

*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'.*


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**Let your client tell their story**

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

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.' If this question were to be put in a leading manner such as 'I suggest to you that you told me it was dark; it was dark, wasn’t it?' this would lead to a number of problems.

First, the Aboriginal person may regard your question as confrontational and your questioning as an aggressive act. Secondly, the use of the question ‘it was dark, wasn’t it?’ will produce confusion and likely result in you getting the answer the Aboriginal person thinks you want to hear. In the case of ‘it was dark, wasn’t it?’ this could be taken either way and lead firstly to great difficulty for the interpreter, secondly, to no clear response at all.

**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', or, 'Tell me why you think it was X.' Instead or as well you might ask the person to tell you the story about X and what happened. It is important that to get the full story from their perspective and this may take some time. You are more likely to get the details that you need by asking about the story. You might also want to find out who else knows about it and what they have been told and what they can tell about the story.

**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?'

**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 Aboriginal cultures. 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 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.'

Either or Questions

As far as possible avoid putting questions or propositions in the alternative (in the same sentence).

The example above is helpful because it discloses the need to explain options in simple language. Remember that it is very difficult for interpreters to translate alternatives 'either this or that' into an Aboriginal language such as Pitjantjatjara. It is frequently better to put your two propositions clearly, and make it clear to the client via the interpreter what consideration they need to give to the two different alternatives.

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. If an interpreter is to be used to explain complex legal concepts, then even more care is needed.

The lawyer might need to spend a session with the interpreter in order to be satisfied that the interpreter will be able to assist the client’s understanding. The lawyer should explain the legal concepts in issue and be certain that the interpreter is comfortable with their ability to translate them to the client. This, obviously, is not to be done in front of the client.

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 and 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 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.
- Avoid putting questions or propositions in the alternative (in the same sentence).
- 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 talk together properly in English.

I need to be sure that I can understand your English, and you need to be sure that you can understand my English, so that I can check I will understand what you tell me.

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 talk to me properly and tell me what I ask about in English. Please listen to my questions and answer them as well as you can.

- Where were you born?
- When were you born?
- Did you go to school? Where
- Do you know how to read English 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 want 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: Where is your country? What does it look like? What bush tucker can you 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 am going to ask you some more questions. This time I might try to make some of the questions a little bit tricky or ask them in another way so I can tell if you stay on track.

- When were you born? Were you born this Century? Were you born last Century?
- When you were growing up in Sydney, was the food good?
- Kevin Rudd comes from your Community too. Is that right,?
- How long did you go to school in Canberra; was it more than 1 year?
- Okay, this is the last question. Are you happy that we can go ahead in English? 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 a yes or no answer, or if the interviewee fails to recognise the false assertions about Sydney and Canberra, or the home community of the Prime Minister – then an interpreter is required.

These Guidelines can be found at:

The following is from an article by Caroline Heske “Interpreting Aboriginal Justice in the Territory”. It is from a transcript of an interrogation. It is provided as an example of interaction between a Police Officer and an Aboriginal person who was suspect. The transcript discloses that an interpreter was certainly needed.

**OFFICER:** “You do not have answer my questions. Do you understand that?”

**SUSPECT:** (no audible response)

**OFFICER:** “No, you have to answer for the tape”.

SUSPECT: “Yeah.”
OFFICER: “Do you have to speak to me?”
SUSPECT: “Yeah.”
OFFICER: “No you don’t. You don’t have to say anything if you do not want to, now tell me what that means in your own words.”

As the learned author says, “there is something deeply troubling about a procedure that forces a person to answer questions in order to prove that they understand they don’t have to.”

**Working with the interpreter and the client**

Aspects of kinship, avoidance relationships and gender need to be taken into account when a lawyer is considering, with their client, the appropriateness of using a particular interpreter.

For example, the traditional status of a male interpreter will be crucial if material to be talked about in court by the client is related to gender specific and initiation status.

It is always important to ask the interpreter and the client (together) whether they are appropriately paired in terms of the court event coming up and the likely subject matter to be spoken about.

When the court is supplying an interpreter for a particular witness, similar considerations will need to be applied to the interpreter and the witnesses.

**Aboriginal languages in South Australia**

There are two main Aboriginal languages spoken in South Australia, where the speaker would be likely to regard English as a second language. These languages are Pitjantjtjara and Yankunytjatjara (or Antakirinja). These two languages are very similar and it is reported that there are only about 30 to 50 words that differ between them. So they may be described linguistically as closely related dialects. Interpreters report that there are significant differences between the dialect used at Yalata community on the West coast of South Australia and those used in the northern regions of the state. This has caused problems in the past.

Of course there are other Aboriginal languages spoken in South Australia, and obviously speakers of those Aboriginal languages regard them as being a very important part of their heritage and life. Nevertheless most (although not all) speakers of other Aboriginal languages in South Australia, such as Adnyamathanha, are able to speak non-Standard or Aboriginal English fluently, (even if some of them may regard English as their second language). Speakers of Ngarrindjeri, Narungga and other Aboriginal languages spoken in South Australia are usually fluent in standard English.

For practical purposes, in the work of lawyers in South Australia, the languages of which they need to be particularly aware are those referred to above, ie Pitjantjatjara and Yankunytjatjara (or Antakirinja). Those languages are spoken in the far north-west of the State, eg on the Anangu-Pitjantjatjara (APY) Lands, Cooper Pedy Oodnadatta, and on the far west coast in such communities as Yalata and Oak Valley. In recent years, Aboriginal people have been travelling down from Alice Springs/Central Australia and staying for some time in Cooper Pedy, Port Augusta and Adelaide. As a result, there are some Arrernte and
Warlpiri speakers living in South Australia who will require interpreters for those languages as well.

For the purpose of these protocols, there is no significant difference between Pitjantjatjara and Yankunytjatjara. The differences are known to the speakers, but are of relatively minor importance to a lawyer, unless the interpreter raises concerns.

Your client may speak a number of languages, including languages that have evolved since colonisation. Some of these languages are described below. Be mindful, in particular, that your client’s English may not be the same as Standard English, eg:

**Aboriginal English**

Aboriginal English is a term used by linguists to refer to forms of spoken English used by many Aboriginal people. 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; others are less so.

Aboriginal English is the first language of many Aboriginal and Torres Strait Islander people. The form and structure of this language contain some speech patterns of Standard English as well as speech characteristics and words originating from Aboriginal or Torres Strait Islander languages. It is a form of English that has developed to reflect the needs of its speakers therefore this form of English will vary according to the people, their culture and community to express ideas not often expressed in Standard English. Aboriginal English has its own sense and grammar, which appears to be “wrong” for standard English.

This does not mean that the speaker does not understand the speaker of standard English. There may be partial comprehension of standard English or the speaker simply chooses to speak Aboriginal English. A lawyer will often be told not to use such big words and to break down their sentences and use simpler ideas. The lawyer will need to judge how effective this is and again, whether an interpreter is really needed.

Examples of Aboriginal English, used in South Australia vary with location. Where Narungga and Ngarrindjeri are spoken, Men will be kornis and women miminis but further north, police may be referred to as Waltjas, men as watis and women as kungkas.

You may find that your client who speaks Aboriginal English will bring a support person to appointments. That will help facilitate cross cultural communication.

**Learner's English and Station 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.
There are often found solecisms in English grammar and syntax, which are now fixed but where the actual meaning is quite clear: “I been telling them fellas all the time but wia,[no] them not listening to us fellas all the time”

Another example: ‘I been sittin down that place, long time’ for ‘I went and lived there for along time’ You will note also that ‘long time’ is a very elastic concept and may not become more specific unless the questioning lawyer is able to tie it down to specific past events.

It is highly unlikely that a speaker of Learners English will have a clear concept of clock time or of calendar dates, rather they will refer to parts of the day, sunrise, sunset, middle of the day and night time. Correspondingly the recent past will be discussed in terms of phases of the moon or changes of the seasons.

In addition to Learner’s English, there is “Station English” which is used widely by people, particularly men, who have worked in the pastoral industry. In some areas of speech it is very specific and very limited in depth. In other areas of speech, spoken English is virtually non-existent.

The Lawyer's Obligations

As a lawyer, you have common law and legislative obligations to your client and the courts. These obligations originate from Commonwealth and South Australian legislation and the Rules of Professional Conduct and Practice 2003. In addition, this document includes extracts from relevant cases. The three protocols have their bases in these obligations.

**Tip 2**

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, as well as the positions of your client and yourself in the courtroom. Discuss with your client how you will be able to communicate when you are in the court room.

**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.

‘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.’
Your duty to the court

A lawyer should remember that by not ensuring that they are fulfilling their fiduciary obligations to their client, it is possible that they are also breaching their duty to the court. That is because they may not be upholding nor ensuring the effective administration of justice.

Obligations on lawyers under South Australian legislation

There are three sources of South Australian legislation that place obligations upon legal practitioners who practise in South Australia: the Legal Practitioners Act 1981 and Regulations 2009, the Law Society of South Australia Rules of Professional Conduct and Practice 2003 (all available from the Law Society of South Australia website) and the Bar Association Rules.

The Rules of Professional Conduct and Practice agreed to by the Council of the Law Society of South Australia must be read in the context of the general ethical preamble, which is as follows:

Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients and always deal with them fairly, free of any interest which may conflict with a client’s best interests. Practitioners should maintain the confidentiality of their clients’ affairs, but give their clients the benefit of all information relevant to their clients’ affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

In the community, legal practitioners have an important and unique role:

• to uphold the public interest and promote confidence in the administration of justice;
• to advise fully and to act competently without regard to self-interest and having regard to the legitimate interests of clients;
• to uphold the client's right of access to justice, to avoid inefficient or unnecessary practices, to ensure that legal work properly carried out and to present the client's case persuasively; and
• to ensure the relationship between themselves and their clients is one of trust and confidence.

In all dealings with the court, members of the legal profession are expected to have a commitment:

• to provide effective and competent assistance to the courts;
• to use the court's processes efficiently and fairly; and
• to act honestly and promptly.
This general statement of responsibility to the public interest in the administration of justice and the obligation to the lawyer's client, obviously implies an obligation to be able to communicate effectively with a client whose first language is not English.

Similarly, the obligation to report to a client implies that the lawyer should do so within the client's own language. This again implies the obligation to use an interpreter when necessary to further the aim of effective communication.

Rule 12 of the SA Rules of Professional Conduct and Practice provides as follows:

12. **Duty to Client**

A practitioner must seek to advance and protect the client’s interests to the best of the practitioner’s skill and diligence, uninfluenced by the practitioner’s personal view of the client or the client’s activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law including these Rules.

12.1 A practitioner must 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, particularly in connection with any compromise of the case.

12.2 A practitioner must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the practitioner believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the litigation.

12.3 A practitioner must (unless circumstances warrant otherwise in the practitioner’s considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty) if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.”

**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!

**Obligations under Federal and State legislation for provision of an interpreter.**

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 investigating officials to obtain an interpreter for the purpose of investigating breaches of Commonwealth law.
23N Right to interpreter

Where an investigating official believes on reasonable grounds that a person who is under arrest or a protected suspect is unable, because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in that language, the official must, before starting to question the person, arrange for the presence of an interpreter and defer the questioning or investigation until the interpreter is present.

An investigating official has additional obligations when the suspect is Aboriginal or of Torres Strait Islander origin.5

Section 79A(1)(b)(ii) Summary Offences Act 1953 (SA) provides as follows:

“…where a person is apprehended by a police officer (whether with or without a warrant) …where the person is apprehended on suspicion of having committed an offence…if English is not the person’s native language – the person is entitled, if he or she so requires, to be assisted at an interrogation by an interpreter…”

See also Section 14 Evidence Act 1929 (SA) (which refers to the entitlement of a witness to be assisted by an interpreter).

14—Entitlement of a witness to be assisted by an interpreter

(1) Where—

(a) the native language of a witness who is to give oral evidence in any proceedings is not English; and

(b) the witness is not reasonably fluent in English,

the witness is entitled to give that evidence through an interpreter.

(1a) A person may only act as an interpreter—

(a) if the person takes an oath or makes an affirmation to interpret accurately; and

(b) in a case where a party to the proceeding disputes the person's ability or impartiality as an interpreter, if the judge is satisfied as to the person's ability and impartiality.

(2) An affidavit or other written deposition in a language other than English shall be received in evidence in the same circumstances as an affidavit or other written deposition in English if it has annexed to it—

(a) a translation of its contents into English; and

(b) an affidavit by the translator to the effect that the translation accurately reproduces in English the contents of the original.
Section 14(1a)(b) Evidence Act will assume critical importance in cases where a witness or a party to proceedings are concerned about an interpreter’s ability to work, having regard to kinship obligations or the subject matter of the evidence to be interpreted. In some cases the interpreter’s gender or status will render them unable to interpret. See notes on Working with an interpreter page12 and the discussion, below at page21 of avoidance relationships.

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.

Frank v Police [2007] SASC 288 (paras 68-70):

68. The correct course was for the Magistrate to stay the proceedings until an interpreter could be present. The Court has an inherent power to stay criminal proceedings which will result in an unfair trial. A right to a fair trial, or a fair hearing in the case of sentencing, is a central pillar of our criminal justice system.

69. In Dietrich’s case, the High Court recognised that the Court has power to prevent an abuse of process of the prosecution of a criminal proceeding which will result in a trial which is unfair. Deane J observed that if the funds and facilities necessary to enable a fair trial to take place are withheld, then Courts are obliged to take steps to ensure that their processes are not abused to produce a miscarriage of justice. He said:

“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, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial. Again, if the Government failed to provide the ordinary facilities necessary to enable an accused held in custody to attend his trial, the trial Judge would be entitled and obliged to postpone or stay the trial and, in the absence of such a stay or postponement, an appellate court would be entitled and obliged to quash any conviction.”

70. The Magistrate should have ordered a stay of proceedings until he could be assured that a Pitjantjatjara interpreter would be present. The Magistrate should have released the appellant on bail.

The influence of International Law

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1 See Dietrich v The Queen (1992) 177 CLR 292, 298 per Mason CJ and McHugh J.
2 Dietrich v The Queen (1992) 177 CLR 292,301.
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; to have adequate time and facilities to prepare a defence and to be able to communicate with counsel of their own choosing; and to have the free assistance of an interpreter if they cannot understand or speak the language used in court.

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.

### 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 European legal system.

Remember Tip 2 and the idea of drawing a map of the courtroom layout and explaining to your client the role of the people who will be there, including and especially their own role in the courtroom and yours, as their lawyer.

### Tip 6

Remember, with a client whose command of English is limited, that it is important to speak slowly in English. It is important to use the simplest language that you can which will express clearly the concepts and ideas that you want to convey. Allow time for your client to respond to the questions that you ask. It is important that the client not feel rushed by you in the process of taking statements and communicating.

**Two Cultures Meeting**

Advising an Aboriginal 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 Aboriginal 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.

"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 Aboriginal Australians: A Handbook for Psychologists, Gunada Press, Perth, page 10.

Tip 7

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 office or health clinic.

Kinship

Within all cultures there are kinship systems. Aboriginal kinship systems are important in South Australia and where they are observed they are specific to the group that claims ownership of them. In Western desert cultures in South Australia, the name of a person who has died is changed into Kunmanara. Effectively that means that the name of a person who has recently deceased is not be used in relation to any other person and that other person becomes Kunmanara or in the shortened form Kunmana. John Doe becomes Kunmanara Doe. It is important to remember to use the Kunmana expression for a given name when you have been told to, and sometimes it applies to surnames as well. To use the name of a recently dead person will tend to close down communications with the community that you are concerned with and to make it difficult for people to relate to you. Another point about Kunmanara is that other names and other words that sound like the name of the deceased may also be altered. It is important that the client is not suspected of inadvertently giving incorrect information. This may also include a client saying “I don’t know” about someone’s identity because we expect a name, and he or she can’t give it in public.

Rules vary from situation to situation and from cultural group to group. In some remote communities the pictures of deceased ancestors have been displayed as a mark of respect and pride, even although the primary cultural taboo still exists against the use of any images, or names of deceased persons. Amongst some Aboriginal people, even in sensitive situations like inquests upon deaths in custody, they will insist that the full name of the deceased be used, yet other people will be much more reticent about using the name of the deceased person. It is always important to ask and to listen carefully to what you are told about the use or not, of the names and images of deceased people.
For many Aboriginal 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.

In addition there are classificatory kinship relationships as opposed to blood relationships that apply in traditional Aboriginal societies. This will vary from culture to culture. For example in Western desert cultures my father’s brother’s son is my brother, not my cousin and my father’s brother is also my father and my mother’s sister is my mother and her daughter is also my sister, again, not my cousin.

In addition to the classificatory kinship system, some people are called uncle or aunty but as a note of respect for the position that they hold in the community. These things need to be clarified in your discussions with your client. Again, the use of simple questions to clarify the position or to clarify the relationship of a particular individual should be sufficient and if there is confusion, it would be advisable to get your client’s relatives in to help.

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.

**Tip 8**

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.

**Avoidance relationships**

There are some persons of whom, for example, a male client may have an avoidance relationship, which prevents them from talking to or addressing that person, or even being in the same room as that person. Obviously an avoidance relationship of this sort will have a significant impact on the person's ability to communicate with you, regarding the person with whom the avoidance relationship applies. It may be best to make yourself aware of the avoidance relationship, and find out from your client who is an appropriate person from whom to seek information or to take a statement etc. Obviously avoidance relationships are crucial for interpreters also. It is always important to ensure that your client does not have an avoidance relationship with the interpreter proposed to be used in court.

Similarly it will be for the court or the party intending to employ the interpreter in court to ensure that avoidance relationships do not apply between the interpreter and the witnesses to be called and for whom the interpreter will be called upon to interpret.

**Eye contact**

For many Aboriginal 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 funerary ceremonies called sorry camps. These obligations are the stronger, depending upon the proximity of the relationship of the client to the deceased.

**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.

“The Royal Commission into Aboriginal Deaths in Custody Final Report included Recommendation No 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 appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non Aboriginal communities today. 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’. Volume 3 paragraph79.

**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. For example it may often be useful to speak to Aboriginal people you know who live at or visit that community to find out what the community is like. If it is a dry community you must be sure to strictly respect rules against Alcohol consumption and possession. Often remote communities have Community Development Managers or Municipal Service Officers. It is useful to speak to these persons about local conditions and the identities of the community chairpersons and the people in authority with whom you should speak. It is always considered a matter of respect to communicate with the community well before you arrive to arrange the date of your arrival, to explain in advance your business, and to ensure that your business is able to be dealt with by the community on the day you propose to attend. Aboriginal people become tired of endless consultation that leads to no significant change; they become cynical about visitors who come with their own agenda and do not want to listen to what Aboriginal people want to talk about. If ceremonies are happening, if a sorry camp is happening, if many of the community members have gone away for other purposes, it may be necessary to postpone your meeting. It is always advisable to make arrangements well in advance of a visit to an Aboriginal community.

**Practicalities- Permits**

A lawyer wanting to visit a community should first find out how many people live in the community, how it is governed, where the nearest town is and what languages are spoken. You should obtain your permit well in advance and check to see if it is a 'dry' (alcohol-free) community. The Anangu Pitjantjatjara Yankunytjatjara (APY) Lands and the Maralinga Tjarutja Lands are dry and it is an offence against the bylaws under the *APY Lands Rights Act 1981* to possess or consume liquor on the APY Lands.
Any visitor to the APY Lands will require a permit before they enter and travelling on the lands without a permit is an offence. Similarly with the Maralinga Tjarutja Lands, which includes Oak Valley Community

**APY Land Rights Act 1981 Section 19**

**Maralinga Tjarutja Land Rights Act 1984** Part 3 Division 3, sections 17 to 20

Aboriginal Communities which are lease holders under the *Aboriginal Lands Trust 1966* are frequently set up as incorporated Associations. Those communities prefer it if visitors make proper arrangements before entering the lease hold land, and protocols require that visitors first go to the community office to state their business and be referred to the relevant persons and residents. It is a matter of common courtesy to follow such requirements. Like any other land holder, these communities are able to expel trespassers.

**Dress**

If you are a woman this generally means dressing 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.

**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 Aboriginal 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 Aboriginal clients.

A more appropriate place to see your client may be somewhere where there are lots of Aboriginal 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 Aboriginal Legal or Health Service.

Be very careful about this and make proper enquiries before you go to see an Aboriginal person at their home. Such things should not be attempted without the assistance of an Aboriginal Field Officer or similar person to assist you in making the arrangement. It may be a matter of respect, it may be a matter of convenience. It is often preferable to see them on neutral territory such as at a Health Service or Legal Service premises. Quite properly, the Legal Services Commission of South Australia has specific policies preventing its lawyers from visiting clients at their home address.
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**

Aboriginal 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 in 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.

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.

If a community has video-conferencing facilities, you may choose to use them to communicate with your client and others.

**Tip 9**

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

**Coming to town**

Your client may only be able to come to your town once a year because of the cost of travelling. 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 the may not have someone to help them read it.

They may also have other 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 10**

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.'


See also *Frank v Police* above

**Tip 11**

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

**Useful Reading**


Dr Bill Edwards An Introduction to Aboriginal Societies, This book has a lot of material on Anangu societies. (It is usually available through University bookshops at Adelaide and Uni SA).

**End Notes**

1 Anangu is the personal or collective noun which Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara people use to describe themselves. The same word denotes either the singular or the plural.


3 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.

5 Section 23N CrimesAct1914 (Commonwealth) The obligations are set out in sections 23H to M of the Act, in particular section 23H sets out the obligations of investigating officers in relation to Aboriginal or Torres Strait Islander people. These include the obligation to inform the person that an Aboriginal Legal Service will be notified of the arrest and to arrange a prisoner’s friend.

x Articles 14(3) (a) *International Covenant for Civil and Political Rights (ICCPR).*

xi Article 14(3) (b) ICCPR.

xii Article 14(3) (f) ICCPR.

xiii Article 2 First Optional Protocol to ICCPR.