

ASKING ABORIGINAL PEOPLE QUESTIONS

A paper about calling evidence from Aboriginal clients and witnesses and the application of the *Evidence Act 1995 (NSW)*

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Asking Aboriginal People Questions: An Introduction

1. The purpose of this paper is to discuss issues arising from the calling of evidence from Aboriginal people and the application of the *Evidence Act* 1995 (NSW) to such witnesses. It refers to and addresses a number of the matters raised by Professor Diana Eades concerning communicating with Aboriginal clients and witnesses.
2. The focus of this paper is to refer the advocate to the various tools provided by the *Evidence Act* 1995 (NSW), and to the current judicial guidance provided to the Judicial Commission of NSW Bench Books, when evidence is being adduced from an Aboriginal witness in certain circumstances.
3. The paper is written from the perspective of two non-indigenous lawyers, both with predominantly criminal law experience, and both having spent a number of years as solicitors of the Aboriginal Legal Service, living and working in north-western and far-western NSW.
4. We premise this discussion by saying that it is obviously inappropriate when talking on such a subject to present Aboriginal witnesses or clients as fitting into the one mould, just as it would be inappropriate to do so for any other category of people based on race, class, religion or occupation.
5. As we know, Aboriginal and Torres Strait Islander people come from a vast range of socio-economic and cultural backgrounds. Aboriginal communities vary widely in cultural practices and language across Australia. Aboriginal communities have differing histories, before and after colonisation. It is therefore not to be assumed that all Aboriginal persons are at a disadvantage in the courtroom. We have been present in court when Aboriginal witnesses have given evidence that was spine-tingling in its effectiveness: evidence given with clarity, power and command of the space; evidence that was assertive, disarming, raw and ultimately very compelling.
6. It is however important to acknowledge, that on a wide range of socio-economic markers, Aboriginal people in Australia are grossly overrepresented in the sections of our community that experience severe disadvantages and deprivations. It is well documented that Aboriginal Australians are more likely to experience violence both as perpetrators and victims; forced separation of family members; welfare dependency; personal, familial and community substance and alcohol abuse; health problems, particularly in mental health, cognitive disabilities, hearing loss and intergenerational health problems such as foetal alcohol spectrum disorder; self-harm, suicide and early death; poorer education and employment outcomes; overcrowding and homelessness; intergenerational trauma arising from interactions with government agencies, police and courts; incarceration and detention from a young age, and an identity crisis by virtue of loss of connection to traditional culture and language.¹ The role

¹ See eg, Cth, Productivity Commission, *Overcoming Indigenous Disadvantage 2011*, (2011); Julie Stokes (ed), 'Bridges and Barriers – Addressing Indigenous Incarceration and Health' (Revised Edition, 2013, National Indigenous Drug and Alcohol Committee, Australian National Council on Drugs),; and Indig et al, '2009 NSW Young People in Custody Health Survey: Full Report' NSW Government.

of courts and other apparatus of the State in the discrimination of Aboriginal people since colonisation may also give rise to feelings of discomfort, distrust and/or hostility towards the institution of the court and the actors within it.

7. It is important on the one hand, not to succumb to mere stereotype but also on the other hand, to be sensitive to the real possibility that an Aboriginal client or witness is likely to have experienced and/or continue to experience many of these disadvantages and as a corollary, their experience in and response to the courtroom environment may be adversely impacted.
8. Indeed, in the context of a paper dealing with the giving of evidence by Aboriginal witnesses, it is appropriate to acknowledge the history of our courts in New South Wales whereby Aboriginal witnesses were excluded from giving evidence by virtue of being deemed 'incompetent'. In 1830, in the colony of New South Wales, as an exception to the requirement for witnesses to swear a religious oath in order to be competent to give evidence, and for the purpose of criminal proceedings only, the *Aboriginals Competent Witnesses Act 1839* (NSW) was passed. The Act provided for "the more effectual prosecution of crimes and misdemeanours that the evidence of the Aboriginal Natives of the Colony of New South Wales should be receivable in all Courts of Criminal Jurisdiction", stating that:

[W]hereas they have not at present any distinct idea of religion or fixed belief in a future state of rewards and punishments and therefore cannot be admitted as competent witnesses in any Court of Law without the authority of the Legislature of the said Colony Be it enacted by the Governor of said Colony ... [that they] shall be permitted to make an affirmation or declaration to tell the truth the whole truth and nothing but the truth or in such other form as may be approved of by the Court instead of taking an oath in any criminal proceedings that shall be instituted in said Colony and that the evidence so given shall be of so much weight only as corroborating circumstances may entitle it to. (emphasis added)

The conference before giving evidence

9. The quality of evidence adduced in court will undoubtedly be connected to the quality of information obtained from a witness during a conference with them outside of the courtroom.
10. In her Handbook for Lawyers, "Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients", Professor Eades summarised the way that Aboriginal people seek information in their interactions:

"Aboriginal societies in Australia function on the basis of small-scale interaction between people who know each other and are often related to each other. Information or knowledge is often not freely accessible. Certain people have rights to certain knowledge. Direct questions are used in some settings, particularly to find out background details, e.g. "Where's he from?" However, in situations where Aboriginal people want to find out what they consider to be significant or certain personal

information, they do not use direct questions. It is important for Aboriginal people to respect the privacy of others, and not to embarrass someone by putting them “on the spot.” People volunteer some of their own information, hinting about what they are trying to find out about. Information is sought as part of a two-way exchange. Silence, and waiting till people are ready to give information, are also central to Aboriginal ways of seeking any substantial information.

Although we can recognize these ways of seeking information in Standard English, we use them in mainstream society only in sensitive situations. In Aboriginal interactions these are the everyday strategies used to seek substantial information. This is a very significant difference in the way English is used between Aboriginal societies and mainstream societies in Australia. And an awareness of this difference is crucial to understanding why lawyers commonly have so much difficulty in interviewing Aboriginal clients.”²

11. Professor Eades went on to contrast this with everyday ways of seeking information in western societies, which are often based on the assumption that direct questioning is the most effective strategy; and that silences are to be avoided as signaling a breakdown in communication. Professor Eades suggests that conducting an interview in a way that is culturally appropriate to Aboriginal ways of finding out information may involve:
- (a) The interviewer taking time to establish some sort of relationship with the other person before conducting the interview.
 - (b) The interviewer providing the other person an opportunity to give uninterrupted narrative accounts and respecting productive silences.
 - (c) The interviewer being conscious of allowing the other person to say what they want to say and tell their story, whilst also achieving their goal of finding out certain aspects of the person’s story that are determined to be legally relevant and structuring the interview accordingly.³

Plain English legal language

12. Much of what is discussed throughout this paper is apposite to clients and witnesses from a broad range of backgrounds and experience. Clear and effective communication and the use of plain English legal language with any client or witness will greatly enhance the quality of justice achieved in the matter.

13. Earlier this year, in a joint project with Aboriginal Resource and Development Services (ARDS) and the North Australia Aboriginal Justice

² Diana Eades, “Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Lawyers” (1992) at 27-28. Extract quoted in Diana Eades “Lawyer-Client Communication: ‘I don’t think the lawyers were communicating with me’: Misunderstanding cultural differences in communicative style” (2003) at 1117-1118.

³ Diana Eades “Lawyer-Client Communication: ‘I don’t think the lawyers were communicating with me’: Misunderstanding cultural differences in communicative style” (2003).

Agency (NAAJA), the Northern Territory Aboriginal Interpreter Service launched a “Plain English Legal Dictionary”. It defines criminal and general legal terms using a style of English that closely matches the words, grammar, genre and structure of Aboriginal languages. It will be an invaluable resource for judicial officers, Aboriginal interpreters and legal professionals working with speakers of Aboriginal languages.

14. The Dictionary is available online at the Aboriginal Resource and Development Services website at the following link:

<http://www.ards.com.au/dictionary/legaldictionary/categories/index.htm>.

15. The Northern Territory Aboriginal Interpreter Service has also published “A Guide to plain English” available at the following link:

http://dlgcs.nt.gov.au/_data/assets/pdf_file/0018/154080/AIS_fact_PlainEnglishGuide_FINAL_for_GPO.pdf

16. That guide provides a number of useful examples on how to employ the following plain English techniques when taking instructions or asking questions in court:

- (a) Use active voice, avoid passives.
- (b) Avoid abstract nouns.
- (c) Avoid negative questions.
- (d) Define unfamiliar words.
- (e) Put ideas in chronological order.
- (f) Avoid multiple clauses in a sentence (one idea, one sentence).
- (g) Be careful when using words like ‘if’ and ‘or’ to talk about hypothetical events which have not happened yet.
- (h) Place cause before effect.
- (i) Indicate when you change topic.
- (j) Avoid relying heavily on prepositions to talk about time.
- (k) Avoid figurative language.

Factors which may affect an Aboriginal person’s evidence

17. There are a range of circumstances which may affect the quality or style of an Aboriginal person’s evidence. Those circumstances might arise where:

- (a) the witness has limited, or no, standard English skills (use of an interpreter ought to be pursued to alleviate this where appropriate);
- (b) the witness has a physical disability (eg. hearing loss), a mental or intellectual disability that hampers their ability to understand and respond to questions;
- (c) the witness’s cultural background gives rise to discomfort, distrust or hostility or other feelings towards the court and/or the advocates in the case; or
- (d) the witness presents with a particular communication style that is culturally different to mainstream communication styles, and which might be misconstrued by the magistrate, judge and/or jury.

18. Professor Eades exposes the way that Aboriginal cultural assumptions about communication may clash with the norms of the legal system in relation to obtaining information (or adducing evidence) and assessing a person's reliability or credibility. The following table compares and contrasts key cultural assumptions at play:⁴

In western legal institutions	In Aboriginal societies in Australia
Silence in answer to a question indicates ignorance, shyness, or unwillingness to cooperate. Silence in answer to an accusation (possibly masquerading as a question) indicates guilt.	People who use silence should be respected for their thoughtfulness and their recognition of the value of time.
If a person being interviewed can't look the interviewer in the eye, then she is trying to hide something.	It's rude to make direct eye contact with a person you should respect, especially an older person.
Conflicting answers in an interview are a sure clue to a speaker's dishonest and untrustworthy character.	If you want to find out whether a person is honest and trustworthy, you need to take time to get to know her; don't rush her, and don't talk all the time when you are with her.
The most effective way to find something out is to ask a question.	Interrupting a person's story with questions makes it harder for her to be accurate and consistent.
The most effective way to find out many things is to ask many questions.	Asking many questions is rude, and it is a very ineffective way of finding things out.
The best way to test a person's truthfulness is to put conflicting propositions to her and see what she agrees to.	If a white person in authority asks you many questions, especially in a pressured situation, the best thing is to say "yes," to keep them happy. If it's a negative question, say "no."

19. The Equality Before the Law Bench Book, drafted by the Judicial Commission of New South Wales, is a reference work used to assist judicial officers to conduct hearings and trials. It is available online to all judicial officers, practitioners and the public at the following link:

<http://www.judcom.nsw.gov.au/publications/benchbks/equality>

20. Whilst it may have no legal authority, the publication indicates there is judicial recognition of various communication styles that may impact on the effectiveness (and therefore the reliability) of the evidence from some Aboriginal witnesses. It might be accepted that some parts of the Bench Book can be taken into account by a court pursuant to s 144 *Evidence Act 1995* (NSW) as a matter of judicial notice.

21. The following reference appears in the Bench Book:

⁴ This table was created from two lists that appear in Diana Eades "Lawyer-Client Communication: 'I don't think the lawyers were communicating with me': Misunderstanding cultural differences in communicative style" (2003), 1127-1128.

In relation to questioning (including cross-examination):

- Note that Aboriginal people often pursue personal information in a roundabout way gradually getting to a subject by building an overall picture first. Personal questions are only asked when some understanding has been established. So, try to avoid direct questions. Instead, it is usually better to use an indirect approach and then give time for an answer — Instead of the direct question “Were you at that house?” try: a) hinting and waiting — for example, “I need to know whether you were at that house”. Or, b) framing a question as a statement — for example, “You were at that house?” Or, c) making a statement and waiting for confirmation or denial — for example, “It seems as if you were at that house”, or “Maybe you were at that house”.
- Avoid negative questions (“You didn’t do that, did you?”) — they can confuse.
- Avoid “either/or” questions — they can confuse. Rather than “Were you at the house or the park?” ask “Were you at the house?”, “Were you at the park?”, and then wait for the answer.
- Be careful of the person agreeing or saying “yes” when they do not mean to agree — they may be saying yes, in order to show that they are being obliging/amenable, or because they see the situation as hopeless or futile, or rather than admit they do not understand the question.
- Be careful if the person is trying to repeat or is repeating the exact words and grammatical structure of the questioner — they may simply not have the English skills to give a more accurate or precise reply.
- Be careful of silences — for more on this see the box at 2.3.3.3 above. Silences may also mean that it is not possible to answer the question with a certain member of the family present.
- Be careful of “I don’t know” responses — they may not mean evasiveness, they may simply mean that this is not an appropriate way for them to provide the information. There may also be issues of shame or modesty involved. Try a different approach.
- Vagueness about time, numbers or distances may simply be cultural. Aboriginal people may list or describe rather than numbering or quantifying; and may refer to physical, social or climatic events rather than using specific dates or times.⁵

22. Whether it is a function of physical, mental or language limitations, or of intercultural communication and miscommunication, it is important to be alive to the possibility that one or more of these factors above may affect the way the witness is perceived by the tribunal of fact, and that adverse credit findings may be made against the witness (unjustifiably) on that account.

Calling evidence from Aboriginal witnesses

23. Trite as it is to say, effective examination in chief, clearly and persuasively allows a witness, be they client or witness, to tell their story in a way that supports the case of the party on whose behalf the witness is called.

⁵ Judicial Commission of NSW, Equality Before the Law Bench Book (June 2014 –Update 08) [2.3.3.4]

24. A number of provisions in the *Evidence Act 1995* (NSW) provide for the manner of questioning witnesses.

25. Section 26 provides as follows (emphasis added):

Court's control over questioning of witnesses

The court may make such orders as it considers just in relation to:

- (a) the way in which witnesses are to be questioned, and
- (b) the production and use of documents and things in connection with the questioning of witnesses, and
- (c) the order in which parties may question a witness, and
- (d) the presence and behaviour of any person in connection with the questioning of witnesses.

26. Section 29 of the *Evidence Act 1995* (NSW), provides as follows (emphasis added):

Manner and form of questioning witnesses and their responses

- (1) A party may question a witness in any way the party thinks fit, except as provided by this Chapter or as directed by the court.
- (2) A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.
- (3) Such a direction may include directions about the way in which evidence is to be given in that form.
- (4) Evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

27. These provisions should be read in conjunction with ss. 11 and 192 of the *Evidence Act 1995* (NSW) as the general powers of a court. Section 11 provides (emphasis added):

General powers of a court

- (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.
- (2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

28. Section 192 provides as follows (emphasis added):

Leave, permission or direction may be given on terms

- (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:
 - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

- (b) the extent to which to do so would be *unfair to a party or to a witness*, and
- (c) the *importance of the evidence* in relation to which the leave, permission or direction is sought, and
- (d) the nature of the proceeding, and
- (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

29. The operation of these various sections gives significant latitude to the court to make orders concerning the way in which a witness is questioned.

30. The provisions in the *Evidence Act* 1995 (NSW) to allow for witnesses (whether defendants, complainants or other witnesses), to give their evidence in narrative form pursuant to s 29(2) followed from the Australian Law Reform Commission (“ALRC”) recommendations for change to the way in which Aboriginal complainants, defendants and witnesses were treated by the criminal justice system. The ALRC reported that the question/answer method of eliciting evidence may not be suited to some Aboriginal witnesses.⁶

31. ‘Narrative form’ evidence allows a witness to give their evidence as a continuous story in his or her own words,⁷ without being questioned or interrupted.⁸ For some witnesses this is a more effective manner of presenting oral evidence. It is particularly appropriate for evidence given in examination-in-chief. The power to obtain such a direction is limited by the factors listed in s. 192 above, and any application to give evidence in such a manner must address the factors set out in s. 192(2)(a)-(d) of the Act.

32. Additionally, the operation of these provisions, together with the adducing of expert evidence, if necessary, as to the linguistic style or proclivities of a certain category of witness, may be the basis for applying to employ a particular manner of questioning in eliciting evidence from a witness whose use or response to a question with silence, for example, may be misconstrued.⁹

The use of leading questions

37 Leading questions

- (1) A leading question must not be put to a witness in examination in chief or in re-examination unless:
- (a) the court gives leave, or
 - (b) the question relates to a matter introductory to the witness’s evidence, or

⁶ Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, ALRC Discussion Paper 69 (2005).

⁷ Explanatory Memorandum to the *Evidence Amendment Bill* 2008 (Cth) at [29].

⁸ *LMI v Baudlerstone* (2001) 53 NSWLR 31; NSWSC 688 at [7] per Barrett J.

⁹ See reference to the case of Robyn Kina, identified by Professor Eades in her paper “Lawyer-Client communication “I don’t think the Lawyers were communicating with me”: misunderstanding cultural differences in communicative style”

- (c) no objection is made to the question and (leaving aside the party conducting the examination in chief or re-examination) each other party to the proceeding is represented by an Australian legal practitioner, legal counsel or prosecutor, or
 - (d) the question relates to a matter that is not in dispute, or
 - (e) if the witness has specialised knowledge based on the witness's training, study or experience-the question is asked for the purpose of obtaining the witness's opinion about a hypothetical statement of facts, being facts in respect of which evidence has been, or is intended to be, given.
- (2) Unless the court otherwise directs, subsection (1) does not apply in civil proceedings to a question that relates to an investigation, inspection or report that the witness made in the course of carrying out public or official duties.
- (3) Subsection (1) does not prevent a court from exercising power under rules of court to allow a written statement or report to be tendered or treated as evidence in chief of its maker.
33. Leading questions are those which directly or indirectly suggest the answer, or which assume the existence of a fact which is in dispute, and which as not been deposed to by the witness (see the definition in the dictionary of the *Evidence Act 1995* (NSW)).
34. The general rule in s. 37 *Evidence Act 1995* (NSW) is that leading questions are prohibited in examination-in-chief and re-examination. The use of open-ended questioning in chief facilitates evidence-giving in the witness's own words, allowing them to tell their own story the way that they want.
35. However, the general rule in cross-examination is that leading questions are allowed. This usually means that the questioner controls what evidence is adduced and the way the evidence unfolds, by suggesting answers to the witness. Notwithstanding this, the *Evidence Act 1995* (NSW) contemplates that a court may disallow a leading question or direct a witness not to answer a leading question in cross-examination pursuant to s. 42(1).

42 Leading questions

- (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.
- (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
- (a) evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness, and
 - (b) the witness has an interest consistent with an interest of the cross-examiner, and
 - (c) the witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter, and
 - (d) the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

(3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.

(4) This section does not limit the court's power to control leading questions.

36. Section 42(1) provides a broad discretion to the court to disallow leading questions in cross-examination, without limiting the factors that may be taken into account to determine the point. Professor Eades makes reference to a tendency for some Aboriginal witnesses to answer questions affirmatively (where the question is framed positively) or negatively (where the question is framed negatively) out of politeness rather than genuine agreement, what she describes as 'gratuitous concurrence'. This is most apparent in answer to leading questions. Where factors such as 'gratuitous concurrence' are apparent, this provision could be called in aid.

37. Subsection (3) is particularly apposite in the present context, because it allows a court to prevent leading questions where the facts in the case would be better ascertained by more open questioning. This provision appears to operate such that a court must ("is to") disallow leading questions in cross-examination where the court is satisfied of the relevant consequence, without the need for an objection by a party.

38. In the case of *Stack v The State of Western Australia* [2004] WASCA 300 the appeal court considered the right of defence counsel to use leading questions throughout the cross-examination of an Aboriginal Crown witness. During the cross-examination of the witness the trial judge intervened prohibiting leading questions on the basis that it appeared to him that that the answers given by the witness were "prone to the influence of cultural norms" and that the answers were being answered affirmatively out of politeness ('gratuitous concurrence'). During the trial, the trial judge made a lengthy jury direction about persons of "Aboriginal descent as witnesses". While the judges on appeal left open the possibility that a witness being Aboriginal could be a sufficient basis for prohibiting leading questions, at [117] Steytler J expressed a need for great caution in this area:

While I would not doubt that cultural and language issues might play a significant role in the giving of evidence by some Aboriginal persons (in common with persons of many other cultures) and while I accept that it might be appropriate, in a particular case, to alert the jury to the potential significance of those factors in circumstances in which the jury might otherwise not be aware of them, and even to regulate the form which cross-examination takes, in order to take account of those differences or difficulties, there is, in my respectful opinion, a need for great caution in this area. As with any group or culture, what is generally true may not be true in respect of individual members having different experiences or backgrounds (in this case all of the witnesses were suburban dwellers). I do not consider that any generalised assumption should be made in respect of particular witnesses in the absence of evidence that those factors are applicable to that witness. That is to say, it seems to me that the factors must ordinarily be apparent either from the evidence of the witness himself or herself or from the manner in which the evidence is given. Moreover, while the trial Judge has discretion to control the

form which cross-examination takes, in the end it is a matter for the jury to determine whether or not any general characteristics which might apply to one cultural group are applicable to the evidence of the particular witness concerned...

39. Nonetheless, the Court recognised that the use of leading questions for certain Aboriginal witnesses may raise difficulties where particular cultural issues are present, recognising the concept of “gratuitous concurrence”, as referred to in earlier cases: See Mildren J (at 14-16) of *R v Anunga* (1976) 11 ALR 412; Kearney J in *Dumoo v Garner* (1998) 7 NTLR 129 at 142; *Hall v Police* (SA) [1999] SASC 197 at [193]-[195]; and *R v D* (2003) 139 A Crim R 509 at [11]. The Court in *Stack* found that a trial judge ought to exercise his or her discretion to prevent leading questions being put unfairly to Aboriginal witnesses in cross-examination whenever it appears that the particular witness is not likely to be protected from suggestibility. However, no generalized assumption should be made in respect of particular witnesses when those factors are not applicable to that witness.

Improper questioning

40. Circumstances may arise where one’s client or witness is being cross-examined in a way that, because of matters arising from cultural, language, or other matters, is unfair or improper. Other than the usual objections to the questions arising from the *Evidence Act* 1995 (NSW) as to the content of the question, the manner or form of the question or the information that is attempted to be elicited by the question, an objection may be made on the basis that it is otherwise “improper”. Section 41 of the *Evidence Act* 1995 (NSW) provides (emphasis added):

41 Improper questions

(1) The court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the court is of the opinion that the question (referred to as a “disallowable question”):

- (a) is misleading or confusing, or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- (d) has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

(2) Without limiting the matters the court may take into account for the purposes of subsection (1), it is to take into account:

- (a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality, and
- (b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject, and

- (c) the context in which the question is put, including:
 - (i) the nature of the proceeding, and
 - (ii) in a criminal proceeding-the nature of the offence to which the proceeding relates, and
 - (iii) the relationship (if any) between the witness and any other party to the proceeding.

(3) A question is not a disallowable question merely because:

- (a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness, or
- (b) the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness.

(4) A party may object to a question put to a witness on the ground that it is a disallowable question.

(5) However, the duty imposed on the court by this section applies whether or not an objection is raised to a particular question.

(6) A failure by the court to disallow a question under this section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

41. This provision therefore allows, in Commonwealth and NSW courts, for the court to control “inappropriate cross-examination” in the circumstances of the case. The provision imposes a positive obligation (“must”) on the court to intervene where the ‘disallowable’ question is asked in cross-examination, irrespective of whether an objection has been taken.

42. For example, Professor Eades makes reference to a tendency for many Aboriginal people to give specific details in relational rather than quantifiable terms: “*that is, relating the questions to social, geographical or similar situations and events, rather than using numbers. It is therefore problematic to ask Aboriginal people to give specific information using numbers*”.¹⁰ In the examples given by Professor Eades in evidence referred to in the Bowraville Report she referred to the cross-examination of a particular witness as an example of problems arising in evidence where the cultural factor of ‘gratuitous concurrence’ and a tendency to give details in relational terms applied.

The witness was asked questions about distances in metres. A question was posed as to whether something was “5 to 6 metres away?”, to which the witness answered “yes”. After a few such questions the witness then revealed: “*I don’t know my metres*”. Regardless of this answer, the witness continued to be asked further questions requiring assessment of distances in metres, to which the witness answered “yes”.¹¹

¹⁰ Submission of Professor Eades to the Standing Committee on Law and Justice “the response to the murders in Bowraville Report 55 – November 2014, Submission no 14, p 17 referred to at 4.84 of the Report.

¹¹ Submission of Professor Eades to the Standing Committee on Law and Justice “the response to the murders in Bowraville Report 55 – November 2014, Submission no 14, p 17 referred to at 4.85 of the Report.

43. By reference to s. 41 of the *Evidence Act* 1995 (NSW), this example of particular, or persistent questioning in a particularly culturally-inappropriate way might be objected to as being ‘disallowable’ under this provision, as potentially “misleading or confusing” (s 41(1)(a)), “repetitive” (s. 41(1)(b)), and/or “otherwise inappropriate” (s. 41(1)(c)). The NSW provision is arguably stricter in application than the Victorian equivalent where s. 41(1) makes the disallowing of such a question discretionary, except where the “improper question” or improper “questioning” is asked of a “vulnerable witness”, requiring the mandatory rejection of the improper question under s. 42(2) (“vulnerability” including ethnic and cultural background).
44. The role to be played by judicial training in respect of certain cultural traits is highlighted by the view expressed by some members of the High Court in *Libke v R* (2007) 230 CLR 559 at [35] and [85], and Spigelman CJ of the NSW Supreme Court in *R v Ta* (2003) 57 NSWLR 5444 at [8]. The expressed view is that the court has an overriding obligation to intervene in questioning even where counsel does not object to an improper question.¹²
45. In recognition of these issues, the Equality Before the Law Bench Book includes the following direction to judicial officers:
- As prescribed by law, intervene in an appropriate manner if others in the court (for example those conducting cross-examination) say anything that is, or could be understood as, discriminatory, stereotyping or culturally offensive. Note that s. 41 of the *Evidence Act* 1995 (NSW) provides for the statutory control of improper cross-examination in both civil and criminal proceedings. Section 41 imposes an obligation on the court to disallow improper questions and is expressed in terms of a statutory duty whether or not objection is taken to a particular question.¹³
46. By way of comment a court may have no difficulty hearing a submission from the bar table, that a certain witness may have language difficulties that are apparent, particularly where, as the above example indicates, the witness had already responded that they did not “*know metres*”. That appears to be common sense. However, an application based upon an argument that certain questions ought be disallowed because of a cultural predisposition to gratuitous concurrence, is more complex. Section 41(2)(a) appears to open the door to the admissibility of expert evidence on the matter “*of which the court is...made aware*”, however the opportunity of calling such evidence during the course of examination in chief, or cross-examination, is likely to be awkward. Where these issues may be anticipated (based on a witness’ presentation in conference), consideration ought to be given to expert sociolinguistic or other appropriate expert evidence at an early stage. See further on expert evidence below.
47. Finally, it should be noted that the court has the additional discretion to exclude, or limit the use to be made of “misleading or confusing” evidence under ss. 135 and 136 of the *Evidence Act* 1995 (NSW):

¹² Although neither of these cases involved the tempering of cross-examination of an aboriginal witness on cultural grounds.

¹³ Judicial Commission of NSW, *Equality Before the Law Bench Book* (June 2014 –Update 08) 2.3.3.4

135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or
- (b) be misleading or confusing, or
- (c) cause or result in undue waste of time.

136 General discretion to limit use of evidence

The court may limit the use to be made of evidence if there is a danger that a particular use of the evidence might:

- (d) be unfairly prejudicial to a party, or
- (e) be misleading or confusing.

48. Where misleading or confusing evidence has already been adduced by virtue of inappropriate cross-examination, it may be necessary to make a late objection to evidence already given (for example, pursuant to s. 135(b)) and then make an application that any further evidence on the topic be adduced by the asking of more culturally-appropriate questions.

Expert evidence about cultural and language practices

49. Section 79 provides an exception to the opinion rule set out in s. 76 of the *Evidence Act* (NSW):

79 Exception: opinions based on specialised knowledge

- (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

50. In addition, s. 108C provides an exception to the credibility rule in s. 102 of the *Evidence Act* (NSW).

108C Exception: evidence of persons with specialised knowledge

(1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if:

- (a) the person has specialised knowledge based on the person's training, study or experience, and
- (b) the evidence is evidence of an opinion of the person that:
 - (i) is wholly or substantially based on that knowledge, and
 - (ii) could substantially affect the assessment of the credibility of the witness, and
- (c) the court gives leave to adduce the evidence.

51. The calling of expert evidence requires the satisfaction of two limbs: first the identification of "specialised knowledge" based on "training, study or

experience”, and second that the opinion be “wholly or substantially based on that knowledge”. In the context of credibility evidence there are two further requirements: that the expert’s evidence could substantially affect the assessment of the credibility of the witness; and that the court gives leave.

52. Gaudron and Gummow JJ in *Osland v R* (1998) 197 CLR 316 at [53] said:

Expert evidence is admissible to show that a witness’s capacity to observe, to recollect or to express is impaired, because it is relevant to the weight to be given to the witness’s evidence, so long as the evidence as to that capacity depends on expertise.”¹⁴

53. This principle may extend to the evidence of an anthropologist or socio-linguist about language or communication differences bearing on aspects of evidence given by Aboriginal witnesses in general, or arguably specifically, to the witness in question. Murray J at [17], (in dissent) in *Stack v Western Australia*, in commenting on the case of *R v Condren* (1987) 28 A Crim R 261, noted that it “might” be possible for a person to be qualified as a witness to give evidence of primary fact as to the manner of speech and the impact of cultural background on understanding.

54. In *Jango v Northern Territory (No 4)* [2004] FCA 1539; (2004) 214 ALR 608, a case concerning a compensation claim under the *Native Title Act 1993* (Cth), Sackville J stated at [40]:

I think it is at least arguable that an anthropologist with extensive experience in communicating with Aboriginal people on matters of traditional laws and customs can give evidence of language or communications difficulties that might have a bearing on the ability of Aboriginal witnesses to give reliable or complete evidence on important issues....

In so far as [the anthropologist] comments on particular passages of evidence given at hearing, I do not think that his comments should be admitted into evidence. The evaluation of specific evidence is the task of the trier of fact. In discharging that task, the trier of fact will have to take account of many factors, of which the difficulty of cross-cultural communications is but one. I do not think that the relevant expertise of an anthropologist extends to the evaluation of specific evidence given by particular witnesses at the hearing.

55. In *Jango* his Honour, at [42], held that even if the evaluation of the testimony of a particular witness was within the professional’s expertise, being anthropology and linguistics, he would have rejected it pursuant to s. 135(c) on the basis that it could cause or result in undue waste of time by inviting collateral dispute on a matter that ought be determined by the Court.

56. If obtaining expert anthropological or socio-lingual evidence is not feasible, it may be appropriate in some proceedings to call the solicitor on a *voir dire* to give evidence about the different communication style observed during conferences with a client or witness, in order to justify a variation to the

¹⁴ Citing *R v Bonython* (1984) 38 SASR 45 at 46-47 and others.

mode of questioning permitted or to ground an application for directions in relation to that witness' evidence.

57. Furthermore, on the face of excerpts referred to from the Equality Before the Law Bench Book, it appears that there is an acceptance, reflected in judicial training at least, that such "language or communications" do exist in certain cases, rather than necessarily requiring expert evidence be called on the subject. It may be that courts will accept this material and other local circumstances as a matter of judicial notice pursuant to s 144(1)(a) and/or (b) *Evidence Act 1995* (NSW) and that expert evidence will be unnecessary.

Exclusion of admissions: sections 84, 85, 90 and 135-138 Evidence Act (NSW)

58. Whilst it is not the subject of this paper, many of the same concepts that arise in the calling of evidence from, and the cross-examination of, some Aboriginal witnesses may also apply to the police questioning of Aboriginal suspects and the admissibility of the answers given. Applications under sections 84, 85, 90 and 135-138 of the *Evidence Act 1995* (NSW), may be based on similar issues.

59. We do not intend to canvas these provisions here. Instead we refer you to the following papers which deal with these topics:

- (a) Judge Yehia's paper "Admissibility of Admissions – Aboriginal and Torres Strait Islanders" which can be found at:
http://www.publicdefenders.justice.nsw.gov.au/pdo/public_defenders_research/public_defenders_papers_pd.html
- (b) Stephen Lawrence's papers "The Gathering and Adducing of Admissions in NSW and The ACT" and "Admissibility Issues Arising From Detention of Suspects for Investigation Under Part 9 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)" which can be found at:
http://www.criminalcle.net.au/main/page_cle_pages_evidence.html

Directions during and at the conclusion of the evidence

60. In an appropriate case, advocates ought to seek directions from the judicial officer instructing the jury in relation to assessing the evidence of Aboriginal witnesses.

61. Section 192 of the *Evidence Act 1995* (NSW) provides (emphasis added):

192 Leave, permission or direction may be given on terms

- (1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.
- (2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:
 - (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
 - (b) the extent to which to do so would be unfair to a party or to a witness, and

- (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
- (d) the nature of the proceeding, and
- (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

62. The Equality Before the Law Bench Book makes specific references to differences in relation to Aboriginal appearance, behaviour and body language “of which appropriate account may need to be made”. Particular reference is made to certain practices or norms such as the lack of eye contact, use of silence and different views about touching.¹⁵ The Bench Book notes:

- (a) All of these factors may be taken into account whenever you make any assessment based on the demeanour of an Aboriginal person.
- (b) All these factors mean that you may need to alert the jury to the fact that any assessment they make based on an Aboriginal person’s demeanour must, if it is to be fair, take into account any relevant cultural differences in relation to demeanour. This may need to be noted early in the proceedings rather than waiting until you give your final directions – otherwise their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them”¹⁶

63. Further, the Bench book provides:

- (a) **In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.**
- (b) This should be done in line with the *Criminal Trial Courts Bench Book* or *Local Court Bench Book* (as appropriate), and you should raise any such points with the parties’ legal representatives first.
- (c) For example, you may need to provide specific guidance as follows:
- (d) That the jury must try to avoid making stereotyped or false assumptions and what is meant by this. For example, it may be a good idea to give them specific examples of stereotyping and explain that they must treat the particular Aboriginal person as an individual based on what they have heard or seen in court in relation to the specific person, rather than what they know or think they know about all or most Aboriginal people.
- (e) On the other hand, that they also need to assess the particular person’s evidence alongside what they have learned in court about the way in which Aboriginal people tend to behave, speak, and what they tend to value, as opposed to the way in which they themselves might act, or the way in which non-Aboriginal people are expected to act. In doing this, you may also need to provide guidance on any legal limitations that exist in relation to them taking account of any of these matters. You may also need to be

¹⁵ Judicial Commission of NSW, *Equality Before the Law Bench Book* (June 2014 –Update 08) [2.3.3.3].

¹⁶ Judicial Commission of NSW, *Equality Before the Law Bench Book* (June 2014 –Update 08) [2.3.3.3].

more specific about the particular aspects of cultural difference that they need to pay attention to.¹⁷

64. The above ought be considered with reference to the comments made by the Court in *Stack* at [117], cited above.

65. Finally, whilst in the ordinary course directions will be given to a jury, it may be that in the context of civil or criminal matters heard by a judge or magistrate sitting alone, that it is important for advocates to request that the judicial officer direct themselves appropriately in relation to assessing the evidence given by Aboriginal witnesses.

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¹⁷ Judicial Commission of NSW, Equality Before the Law Bench Book (June 2014 –Update 08) [2.3.5].

