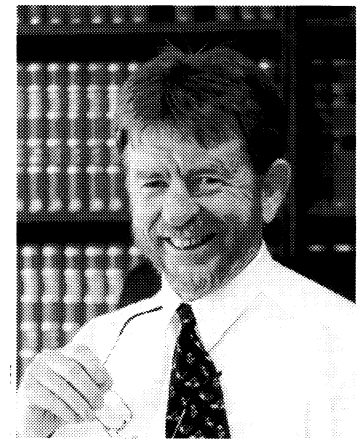
Advocacy – The Aboriginal Witness (Part 1)



Hon Justice Riley

"A client or a witness who is misunderstood through no fault of theirs is ill-served by the legal system."

Frank Brennan SJ

Aboriginal people constitute a significant part of the population of the Northern Territory. Many Aboriginal people have English as a second or third language. Often the English they speak is different from that spoken by other speakers of English in Australia. They are also likely to have ties to, and be affected by, their own cultures and traditions. Special difficulties and special considerations apply to such people when they become involved in litigation. It follows that careful preparation is needed for the presentation of, or challenge to, the evidence of such a person in proceedings before a Court or Tribunal. The advocate needs to be aware of linguistic and cultural differences and accommodate them in the preparation for, and presentation of, the case.

Mildren J of the Supreme Court of the Northern Territory has written on this topic in recent times. I commend to you his paper entitled: 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System'.[1] What follows includes reference to issues addressed in the work of Dr Diana Eades,[2] the Paper of Mildren J and to the sources referred to therein.

There is a wide range of issues that have an impact upon Aboriginal people when they find themselves involved in proceedings before Courts and Tribunals. For present purposes I am concerned only with the narrower field of the presentation of the evidence of Aboriginal witnesses and any challenge that may be made to such evidence.

Obviously there are many matters which are likely to be relevant to your preparation for a case involving Aboriginal witnesses. This will be so whether you are to lead evidence from an Aboriginal witness or cross-examine such a witness or perform both functions in the course of a hearing.

Whilst each witness will be different from the next there are some factors that commonly occur in relation to Aboriginal witnesses. It follows that these are matters of which you will need to be aware and in relation to which appropriate consideration will need to be given to enable you to effectively carry out your function as an advocate.

In the course of your preparation the first matter for consideration will be whether you require the services of an interpreter. Obviously this must be considered at an early time. You should be aware that obtaining an appropriate interpreter may not be an easy task. There are numerous Aboriginal languages in the Northern Territory and the availability of competent interpreters in many of those languages can not be assumed. Even when an appropriately qualified interpreter is available difficulties may arise. The kinship relationship between the interpreter and the witness may inhibit or otherwise impact upon the answers given. The gender of the witness and the interpreter may be significant. A wide variety of other cultural factors may arise.

It is always desirable for an advocate to meet with a witness prior to the hearing to allow the witness to become comfortable with the advocate and also to allow the advocate to fully explain what is to occur. I have discussed this matter in an earlier article in this series. It applies with great force to Aboriginal witnesses who may not be familiar with the Court system and in relation to whom the whole process is likely to be quite alien and alienating. It is not hard to imagine the impact of a Judge and Counsel in wig and gown, in a room dominated by non-Aboriginal faces, upon a person who has not previously been exposed to our system. Add to that the unfamiliar and ritualistic procedures that take place in our Courts and Tribunals along with the use of time honoured, but for most people quite unusual language ("may it please Your Worship"), and the whole experience may be quite overwhelming. The more you are able to assist the witness to feel comfortable with the process and to have an understanding of what is to occur, the greater the prospect of an effective presentation of the evidence.

It is also desirable to spend time with the witness in the process of obtaining instructions. Such witnesses are often shy and lacking in confidence in the unusual circumstances and surroundings which confront them. It may take some time and more than one conference before you can be assured that you have the complete information that the witness is able to provide and that the witness has an understanding of what is to occur.

In leading evidence and in cross-examining you will need to be conscious of the language used by the witness. Ordinary English words may be used by Aboriginal English speakers in a way which is different from what may be described as standard English. Further it is unwise to assume that a particular Aboriginal English speaking pattern will be applicable to any particular witness. The witnesses will come from a wide range of backgrounds; with differing levels of education, skills with the English language, understanding of the processes involved and acceptance of those processes. Clearly each witness must be individually assessed. The

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earlier this assessment takes place and the more thorough it is the greater is the likelihood that you will be able to anticipate difficulties and plan a way around them.

Dr Eades points out that you should not assume that an Aboriginal witness is speaking standard English. The answers: "I don't know" and "I don't remember" may mean what they convey or they may be a statement about the inappropriateness of the question. There are many examples of how the different use of language may lead to confusion and possibly serious error. John Coldrey (now Coldrey J of the Supreme Court of Victoria) gave an example of difficulties that may arise by reference to a record of interview[3]. I set out the passage:

Policeman:	Did you want to kill Lillian?
Kennedy:	Yeah.
Policeman:	You wanted to kill her. Did you want to kill her properly or kill her a little bit?
Kennedy:	Little bit.
Policeman:	A little bit?
Kennedy:	Yeah.
Policeman:	Where did you want to kill her?
Kennedy:	Leg, leg.
Policeman:	In the leg, you wanted to kill her in the leg?
Kennedy:	Yeah.

Here, the expression 'to kill' is used synonymously with the verb 'to hit'. This policeman knowing that to be the case is able to accommodate it and fairly represent the intent of the accused person. Had the policeman asked only the first question the true meaning of the witness would have been lost, possibly with significant adverse consequences for the accused.

When the witness gives evidence it is obviously important to ensure that you pay careful attention to what is being said and that you be alert to prevent misunderstanding from arising or continuing. You should be alive to the prospect that an incorrect meaning or some ambiguity may arise from the choice of words adopted either in your question or in the answer received.

1 Published in Foreign Linguistics; The International Journal of Speech, Language and the Law Vol 6 No.1, 1999. Another version of the paper is to be found in the Criminal Law Journal (1997) Vol 21 at p7. Both copies are available in the Supreme Court Library.

2 Dr Eades: Aboriginal English and the Law (1992) Queensland Law Society Inc.

3 Coldrey J (1987) Aboriginals and the Criminal Courts. In K. Hazelhurst (Ed.): Ivory Scales: Black Australia and the Law; NSW University Press

THE VENUS 49'ERS: 13 YEARS ON

In 1986, realising that none of the existing Darwin soccer clubs were desperate enough to give them a game, a bunch of young lawyers formed the Venus 49'ers, a soccer team that took them on to win more games than they lost.

The team, pictured here in 1987, continued to play until 1994. During that period over 30 members of the legal profession in Darwin had worn "the green and white".

"The story behind the team's name," John Duguid told *Balance*, "is that having decided to field a team in 1986, they were told that the new club must be registered within a couple of weeks — not long enough to become an incorporated association. In haste the team used a Mildrens' shelf company called "Venus no. 49 P/L"!

Eleven of the 14 players in the 1987 photo opposite had something to do with legal practice. An indoor hockey team was even fielded for a couple of wet seasons, fearlessly led by none other than Ian Morris.

Spot the lawyer! Back Row: from second left: Steve Huntingford (then at Waters James McCormack and now of Hunt & Hunt) , Graham Heaton (then articled clerk in the Department of Law and now??), Kelvin Strange (then of Waters James McCormack and now of Hunt & Hunt), John Duguid (then Associate to Muirhead/Kearney and now of NAALAS), Colin Haymon (then police prosecutor and now Professional Responsibility Division), Peter Robinson (then of Mildrens/McCormack & Co and now barrister in Brisbane), Roy Ellis (then Crown Prosecutor now with NSW DPP)
Front Row: from second left: Guy Riley (then of Waters James McCormack and now of Clayton Utz), Peter Thompson (then of Mildrens, McCormack & Co and now running own firm in Sydney), Paul Hatzer (then of Cridlands and now of Holmans in Hong Kong) , Nick Mitaros (then of .. and now of Clayton Utz)
Missing: Johnny Lawrence (signed up in 1988 when Crown Prosecutor, now barrister at James Muirhead Chambers), Steve Williams (then of Cridlands and now of Minter Ellison in Adelaide)