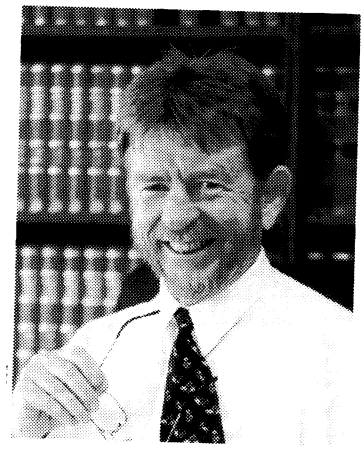
Advocacy – The Aboriginal Witness (Part 2)



Hon Justice Riley

"Many ... Aboriginal people are not biculturally competent and as with many of the non-Aboriginal people involved, they may not be aware of ... important communication difficulties"

Dr Diana Eades

In the last edition of *Balance* I discussed some of the special considerations applicable to dealing with Aboriginal witnesses in our Courts and Tribunals. The topic is a large one and I now wish to offer some further general observations.

Some areas in which problems may arise in relation to language and communication include: the misuse of gender for pronouns; attributing gender to inanimate objects; the omission of plural inflexions from nouns; confusion as to tense; and imprecision inconsistency and inaccuracy as to distances, numbers and time[1]. For example Aboriginal witnesses are unlikely to refer to specific numbers of people. They are more likely to refer to a "mob" or a "big mob" or, alternatively, to list the persons present. They are unlikely to be precise as to distances but rather refer to a "long way" or a "little bit long way" or some other imprecise expression. Similarly with time, the expression a "long time" may mean minutes, months or years. It is necessary to devise mechanisms to deal with these problems. Numbers may be established by having the witness identify the people present. Distances may be obtained by reference to concrete examples in the Court room. Time may be established by reference to some other event, the time of which is known. You may need to be inventive and resourceful in order to obtain reliable information.

In addition it is important to be aware that, on occasions, communication by the witness may be more physical than verbal, eg by use of small movements of the eyes, the lips or the head. These movements may be easy to miss.

Other matters of which you should be aware include the prospect that the witness will avoid direct eye contact – not because he or she is not being frank, as may be the case with some witnesses, but rather because it may be considered rude for eye contact to occur. There may be lengthy periods of silence or a refusal to answer some questions. There may be many reasons for this other than deliberate evasion. It may not be possible to determine why the witness has declined to answer questions and you will need to be in a position, so far as is possible, to anticipate areas which may give rise to this "retreat into silence". You should also have strategies in place to deal with the situation if it should arise. This may involve leaving the topic and returning to it at a later time. If the reason for the silence is a cultural matter you may need to explore this outside the Court room and then, when you are better informed, deal with it in a culturally sensitive way. Dr Diana Eades points out that "silence and waiting till people are ready to give information are also central to Aboriginal ways of seeking any substantial information."[1]

A very important skill to develop, and this particularly applies to cross-examination, is the use of non-leading questions. In advocacy courses and advocacy texts the desirability of asking only leading questions in cross-examination is emphasised. However in my opinion quite different considerations apply with many Aboriginal witnesses. In many instances the seeking of information by the use of direct questions will be regarded by an Aboriginal witness as quite inappropriate. Further, the asking of a leading question is likely to be met with what has been termed "gratuitous concurrence". The Aboriginal witness may respond to the leading question in a way that the witness believes the questioner wants. That generally means giving assent to the proposition put by the questioner. Dr Eades makes the following observations in relation to gratuitous concurrence:

"Aboriginal speakers of English and traditional languages often agree with whatever is being asked, thinking that they will get out of trouble more quickly. The agreement is made regardless of either an understanding of the question or a belief about the truth or falsity of the proposition being questioned. Thus, it does not necessarily mean that the Aboriginal person agreed with the proposition. This pattern of agreement, known as "gratuitous concurrence" is particularly common where a considerable number of *"yes-no"* questions are being asked, the situation with both police and courtroom questioning."

Whatever may be the reason for the response the situation is that gratuitous concurrence is a recurring problem in relation to the evidence of Aboriginal witnesses.

Whilst superficially concurrence may suit your client's case, in the end result it will not. The weight to be attached to such responses will be either nil or negligible. Indeed it is possible that the Court will interfere if questions are put to Aboriginal witnesses in a way which leads to gratuitous concurrence. This is because such evidence will have no probative value and be of no assistance to the Court. If the questions are allowed the advocate may anticipate that the jury will be informed that the answers are unhelpful and why. If there is no jury present the Court or Tribunal may choose to ignore the answers on the same basis.

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A more skilful cross-examination will employ concise non-leading questions, simple in form and containing only one idea. Questions should not be lengthy, convoluted or grammatically complex. For example they should not include double negatives or put a series of alternatives. They should avoid using legal or other formal language. This is not an easy approach for the advocate to master and, of course, will often run counter to the advice contained in text books on advocacy and delivered in advocacy workshops. However in many cases it may be the only effective way to challenge the evidence of an Aboriginal witness.

None of this prevents an Aboriginal witness being challenged and challenged vigorously. What it ensures is that the product of the exercise has value and can be used with force in the final presentation of the case at the time of the closing address.

Whether you are to lead the evidence of an Aboriginal witness or to cross-examine that person there are many factors to consider in your preparation. Difficulties with language abound. Cultural influences may be important. The effective advocate will endeavour to ensure that he or she is as informed as possible in order to identify the problem areas and to create strategies to avoid them.

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

AROUND THE NT BAR

This is the first of what is to become a regular NT Bar Association column in *Balance*. The aim of the column is to provide some background information about the NT Bar, its history and those who are at the Bar. Future columns will include profiles of members of the Bar.

A potted history of the NT Bar and the NT Bar Association.

The NT Bar Association was formed at a meeting held in Darwin on 27 June 1980. However, the NT Bar was actually born about six years earlier, just before the cyclone in 1974. Michael Maurice and Tom Pauling were practicing as in-house counsel at Ward Keller and Rorrison and Cridland and Bauer respectively (as those firms were then known) and they decided go it alone and set themselves up as the independent Bar. Ian Barker QC joined them after the cyclone.

By the time of the inaugural meeting of the NTBA, there were 8 barristers in private practice at the Bar (Bracher, Eames, Harrison, Hiley, Maurice, Mildren, Parsons and Pauling). The other original member, Ian Barker QC became the NT's first Solicitor General with NT Self Government in 1978.

Since then the numbers have grown quite dramatically. By the end of the 1980s, there were 13 barristers at the Bar. Currently there are 27 of whom 24 are members of the NTBA.

John Reeves QC, President of the NT Bar Association

Until 1990, when James Muirhead Chambers was established, there was only one set of chambers — William Forster Chambers, formerly known as Counsels Chambers. It was named William Forster Chambers in 1989, after the first Chief Justice of the NT Supreme Court, Sir William Forster.

Nowadays there are four established chambers — William Forster Chambers (14 barristers), James Muirhead Chambers (4), John Toohey Chambers (3) and Edmund Barton Chambers (4).

Of the current members of the Bar, Colin McDonald QC is the longest serving having joined in 1984. Then followed John Reeves QC (1985), Jon Tippet (1988), Sally Gearin (1990) Steve Southwood (1990) and John Waters QC (1990).

Over the past 20 years there have been 7 presidents of the NTBA. The inaugural president was Michael Maurice QC (formerly a Supreme Court judge and Aboriginal Land Commissioner and currently a contented farmer in northern NSW).

Then followed Tom Pauling QC (currently the NT Solicitor General), Dean Mildren QC (as he then was - currently a Supreme Court judge), Graham Hiley QC (currently practising at the Bar in Brisbane), Trevor Riley QC (as he then was – currently a Supreme Court judge), Colin McDonald QC (the current immediate past president) and John Reeves QC (the current president).

TWO NEW TERRITORY MAGISTRATES APPOINTED

Chief Minister and Attorney General Denis Burke has announced the appointment of two new Territory Magistrates.

Michael Ward and Vince Luppino bring to 11 the number of magistrates employed in the Territory. They were selected from more than a hundred applicants for the positions.

Michael Ward, former Territory, ACT and South Australian magistrate, will take up his magistrate's post in Alice Springs.

Vince Luppino, former senior associate at an Adelaide law firm, will work from Darwin.

October *Balance* will feature profiles of both new appointees.