ODPP Recommendations to the Senate Inquiry into Missing and Murdered First Nations Women and Children

Introduction

1. This submission has been prepared for the Senate Inquiry into Missing and Murdered First Nations Women and Children ('the Senate Inquiry') to offer some general recommendations about how the court experiences of First Nations witnesses could be improved. It should be read in conjunction with the ODPP's report, *Improving the wellbeing and safety of First Nations complainants and witnesses in the criminal justice system* ('the First Nations Report', attached), provided to the Senate Inquiry, as well as Professor Diana Eades' submission to the NSW Government Inquiry into Family Response to the Murders in Bowraville ('the Bowraville Inquiry') ('Eades submission 1', attached), her answers to the questions on notice asked in the Bowraville Inquiry ('Eades QON', attached), and her submission to the Senate Inquiry ('Eades submission 2', attached).

2. The recommendations made in this submission are based on the issues identified across all four documents. Though this submission will briefly outline the specific issue that each recommendation is seeking to address, it will not do so in detail, and will refer to each of the aforementioned documents instead.

Background

3. As outlined in the First Nations Report, the court experiences of First Nations witnesses may be adversely affected by a diverse range of socioeconomic and cultural issues (p 3-8). Although these issues manifest in varying forms and at various stages, including at the time of the disclosure of crime to law enforcement agencies (First Nations Report, p 9-13), the recommendations contained in this submission will focus on the court processes and evidentiary rules that could be modified to promote the cultural safety of First Nations witnesses. Many of these recommendations will have equal relevance to First Nations accused people.

Giving evidence

4. The evidence of First Nations witnesses may be influenced by a number of distinct sociolinguistic tendencies and features. These features may involve differences in "…accent, grammar, meaning, non-verbal communication, silence and language functions" (Eades submission 1, p 2). Common examples of such features include prolonged silence, the avoidance of eye contact, and the phenomenon of 'gratuitous concurrence' (First Nations Report, p 16; Eades submission 2, 12-15). Whilst these features may have a greater prominence in First Nations people from rural or remote communities, as this may reflect a lesser degree of socialisation with non-First Nations people, it is important to note that a First Nations person's place of residence, skin colour, or socioeconomic status will not be determinative of the existence or non-existence of these issues.[1]

5. Where judges, juries and practitioners are unaware of these sociolinguistic features, the evidence of First Nations witnesses may be misconstrued or distorted, particularly during cross-examination (First Nations Report, 16-17). This will impede the capacity of jurors and the court to make informed assessments of the evidence presented, whilst also detracting from the wellbeing of these witnesses. Such outcomes are likely to disincentivise further participation in criminal justice processes.

6. Beyond the distinct sociolinguistic features of First Nations people, there are several other cultural factors that may also affect the evidence of these witnesses. These include cultural norms around men's and women's business (First Nations Report, 17) and customs about the naming of deceased people.

[1] Dr Diana Eades, 'Judicial understandings of Aboriginality and language use' (2016) 12 *The Judicial Review*, 471-490.

Recommendation 1 – judicial training on trauma-informed practice and cultural safety

7. Courts should operate a trauma-informed practice in all proceedings. Trauma-informed approaches recognise the diverse and ongoing ways in which trauma may shape an individual's sense of wellbeing, their conduct and decision-making processes. The legal profession often erroneously assumes that traumatic responses are purely emotional. Rather, these are physiological responses which have a direct impact on brain processing and functioning. By extension, trauma responses may affect the presentation of a witness and their capacity to give clear evidence, or to give evidence at all. When a traumatised individual experiences high levels of distress, their capacity for logic and reason is severely diminished. Accordingly, courts should prioritise the establishment of safe environments that will allow the physiological symptoms of trauma responses to down-regulate, and better evidence to be given.

8. As outlined in the First Nations report (p 3-8), the ongoing effects of colonisation have rendered First Nations people particularly susceptible to trauma. First Nations people are at a heightened risk of being directly exposed to trauma through victimisation, and may also experience its intergenerational aftermaths through disadvantage in their families and communities. The consequences of this trauma are often compounded during court proceedings as within the adversarial system, courts have limited flexibility to accommodate the specific needs of First Nations witnesses and their families. Whilst many of these needs are also experienced by non-First Nations witnesses, there are distinct cultural dimensions that make court environments particularly hostile for First Nations witnesses (see the First Nations Report).

9. To this end, improving cultural safety for First Nations witnesses is central to developing a trauma-informed practice. One way that courts should develop this practice is through mandatory training for judicial officers. The implementation of

mandatory training on First Nations cultural safety and trauma-informed practice is common to many government agencies and legal services, including the ODPP. Given the discretion that judges enjoy over trial process and procedure, they are in the best position to ensure that proceedings are carried out in a culturally safe manner.

10. In NSW, the Ngara Yura program within the Judicial Commission of NSW currently oversees the training of judicial officers in relation to contemporary Aboriginal social and cultural issues, and their effect on Aboriginal people in the justice system. This program was established in 1992 following the Royal Commission into Aboriginal Deaths in Custody. Whilst the Ngara Yura program has been invaluable in contributing to a broader appreciation of First Nations culture within the judiciary, it predominantly has a focus on First Nations offenders. It is submitted that the NSW judiciary would be best served through the development of additional training on First Nations cultural safety during proceedings, which should be situated within a trauma-informed frame of practice.

Proposed Recommendation: that all jurisdictions mandate judicial training on First Nations cultural safety during court proceedings. This training should be developed in consultation with and delivered by local First Nations stakeholders. It should address the heightened risk of trauma within First Nations communities; the likely impacts of trauma on the evidence of First Nations witnesses; the sociolinguistic features of First Nations people that may influence their evidence; and other cultural considerations, such as protocols around death and norms around men's/women's business.

Recommendation 2 - implementation of "Mildren directions"

What are these directions?

11. "Mildren directions" are designed to assist a jury in assessing the evidence of First Nations witnesses, or a First Nations accused person's record of interview, and offer a partial solution to the issues identified above. This is done by informing the jury of particular sociolinguistic features that may have impacted that individual's evidence. By providing this information, Mildren directions are intended to correct any misleading assumptions that jurors may hold about the witness' demeanour and evidence. In this regard, these directions are in some ways analogous to those recently included in in ss 292-292E the *Criminal Procedure Act 1986* (NSW) ('CPA'). These directions were implemented to correct false and misleading assumptions about consent and the so-called "counter-intuitive" behaviours of complainants in sexual offence matters. As provided by s 292(4) of the CPA, these directions may be given at any time in the trial, as the judge sees fit.

Where and when are they currently given?

12. Mildren directions are currently given in the Northern Territory, Queensland and Western Australia.[2] Their use in court proceedings is governed by a number of differing principles, most of which are enumerated in the NSW Judicial Commission's *Criminal Trial Courts Bench Book* [1.910]. In the Northern Territory, Mildren directions may be given at any point in a trial. Former Justice of the Northern Territory Supreme Court, Dean Mildren KC, has argued that these directions should be given before the prosecutor opens their case, as this will enable the trier of fact "…to make a better assessment of the evidence of the witnesses as well as the accused's record of interview".[3]

[2] NSW Judicial Commission, *Criminal Trial Courts Bench Book* [1.910] <Witnesses - cultural and linguistic factors (nsw.gov.au)>.

[3] Dean Mildren KC, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal*, 13.

13. Conversely, the Queensland and Western Australian Courts of Appeal have held that it is inadvisable to give Mildren-style directions in the form of preliminary and general observations before any witnesses are called (*R v Knight* [2010] QCA 372 at [283] and *Stack v Western Australia* (2004) 151 A Crim R 112 at [19] & [144]). Further, these jurisdictions have also held that the directions should specifically address the issues that arise in the case and be framed in terms of the competing submissions of the parties concerning individual witnesses (*Bowles v Western Australia* [2011] WASCA 191 at [69]). These principles are designed to limit generalisation and inadvertent stereotyping of First Nations witnesses, which has the additional potential to confuse practitioners and jurors.[4]

Mildren directions in NSW

14. Whilst Mildren directions are discussed in the NSW Judicial Commission's *Criminal Trial Courts Bench Book* (1.910), such directions have no formal foundation in NSW. In its 2012 report, *Jury Directions,* the NSW Law Reform Commission was reluctant to endorse any position on Mildren-style directions. Instead, it took the position that "…the content of directions that may be required in the NSW context should be the subject of further consideration by the Judicial Commission".[5] In her submission to the Bowraville Inquiry, Dr Eades acknowledged the conclusions of the *Jury Directions* report, but submitted that "…the major obstacle preventing serious consideration in this state is the mistaken view that Aboriginal people here are somehow not sufficiently distinct from other Australians" (p 11-12).

15. As reflected throughout the First Nations report, as well as the evidence given during the Senate Inquiry, the sociolinguistic features of First Nations people have continued to complicate their engagement in court proceedings in NSW. In our submission, Mildren-style directions should be legislated as one solution aimed at addressing this issue. Noting the different approaches between the Northern

[4] *Criminal Trial Courts Bench Book* [1.910].
[5] New South Wales Law Reform Commission, *Jury Directions* (Report 136, 2012), 111 <untitled (nsw.gov.au)>.

Territory and Queensland and Western Australia, in our view the better approach is to permit judges to give them as they see fit and where there is a good reason to give them, or if requested by a party to the proceedings, unless there is a good reason not to give them. This terminology is drawn from the consent directions in s 292 of the CPA, which strike an appropriate balance between establishing a presumption in favour of these directions and maintaining judicial discretion.

Proposed Recommendation: all jurisdictions legislate the use of Mildren directions, with a presumption that the judge must give such a direction if there is a good reason to give the direction, or if requested to give the direction by a party to the proceedings, unless there is a good reason not to give the direction.

Recommendation 3 – expansion of the expert evidence exception to the opinion and credibility rules

16. The ODPP recommends expanding the expert evidence exceptions to the opinion rule and the credibility rule, respectively legislated under Part 3.3 and Part 3.7 of the *Uniform Evidence Act* ('Evidence Act'). This recommendation would be complementary to the implementation of Mildren directions.

17. Section 79(1) of the Evidence Act prescribes an exception to the opinion rule[6] for expert witnesses, providing that "…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". Section 108C is drafted in near-identical terms and provides an exception to the credibility rule[7] for witnesses with specialised knowledge. Sub-section (2) of each provision clarifies that specialised knowledge includes a reference to specialised knowledge of child development and child behaviour, and that a person with such specialised knowledge may provide an opinion about (i) the development and behaviour of children generally, or (ii) the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences. These sub-sections were added to the Evidence Act at the recommendation of the Royal Commission into Institutional Responses to Child Sexual Abuse.[8]

18. As outlined in the First Nations report, substantial barriers exist to adducing expert evidence about the sociolinguistic features of First Nations witnesses (pp 25-28). These issues most frequently arise where the expert has not interviewed the relevant witness personally or is seeking to adduce evidence of a general nature to apply to specific witnesses. They also may arise where the trial judge does not consider that the specific sociolinguistic features of First Nations witnesses are

[6] See s 76 of the *Evidence Act 1995* (NSW).
[7] See ss 101A and 102 of the *Evidence Act 1995* (NSW).
[8] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations*, 111 <Final Report - Recommendations (childabuseroyalcommission.gov.au)>.

beyond the common knowledge of jurors. These barriers to the admission of expert evidence may be further compounded where the judge and opposing counsel misconceive that only First Nations people from remote communities will bear distinct sociolinguistic characteristics. This common misconception was reflected in the obiter dicta remarks of Steytler J in *Stack v the State of Western Australia* (2004) 29 WAR 526, who concluded that whilst Mildren-style directions may be appropriate in certain circumstances, they did not apply to the applicant in that case who was a 'suburban-dweller' (at [117]).

19. In the *Jury Directions* report, the NSW Law Reform Commission acknowledged that expanding the expert evidence exception to include expert evidence on the sociolinguistic features of First Nations witnesses offers one solution to the issues discussed above.[9] The *Jury Directions* report concluded that "…it would be appropriate for this [potential exception] to be the subject of a more specific consultation process and inquiry than we have been able to undertake".[10]

20. Clarifying that these exceptions to the opinion and credibility rules include expert opinions on the sociolinguistic features of First Nations witnesses would operate in a similar manner to sections 79(2) and 108C(2) of the Evidence Act. These exceptions could also be justified on the same basis; that is, because there is a "…demonstrated reluctance of some judicial officers to accept that this is a relevant field of expertise and a matter beyond the 'common knowledge' of the tribunal of fact".[11] As with the existing exceptions on child development and behaviour, the relevant expert will have a specialised knowledge of the sociolinguistic features of First Nations people, and be able to offer general opinions about this school of specialised knowledge. Furthermore, and similarly to the existing exceptions, the expert should not be

[9] *Jury Directions*, 112.
[10] Ibid.
[11] NSW Law Reform Commission, *Uniform Evidence Law*, (Report 112, 2005) [12.132].

required to have interviewed the relevant witnesses before offering a general opinion about their school of expertise.

Proposed Recommendation: that sections 79 and 108C of the Uniform Evidence Act be amended to clarify that "specialised knowledge" includes specialised knowledge of sociolinguistic attributes of First Nations witnesses.

Recommendation 5 – Witness Intermediaries for First Nations witnesses

21. There is a growing practice of using Witness Intermediaries for child witnesses and other vulnerable witnesses throughout Australia. In NSW, Witness Intermediaries are accredited professionals from five primary disciplines (speech pathology, social work, psychology, teaching and occupational therapy) who assist child witnesses to give their best evidence in criminal investigations and court proceedings. Witness Intermediaries identify a witness' communication capacities and provide advice to the parties and the Court on any necessary measures to assist in eliciting clear evidence. This may include, for example, identifying types of questions that may cause confusion in a witness, and advising the court on alternative approaches. During proceedings, Witness Intermediaries sit with the witness and alert the court to any problematic forms of questioning or any concerns about the witness' wellbeing. Importantly, Witness Intermediaries are impartial; they are Officers of the Court and are not expert witnesses, support people or advocates for the witness. Rather, they are another tool to be deployed by the court in ensuring that its practices are trauma informed.

22. Witness Intermediaries have played a key role in NSW's Child Sexual Offence Evidence Program (CSOEP). Owing to the success of the CSOEP, this program is to be expanded throughout NSW later this year. One element of the CSOEP process is the use of a ground rules hearing. The purpose of this hearing is to establish which of the Witness Intermediary's recommendations—prepared in a report in advance—are to be adopted as "ground rules" for the conduct of the trial. During the hearing, each of the parties may ask the Witness Intermediary questions about their recommendations and state their support or opposition to these recommendations. This process is designed to be informal and cooperative.

23. Whilst Witness Intermediaries have been predominantly used for child witnesses and other vulnerable witnesses, such as those with cognitive impairments, we consider that they should also be used for vulnerable First Nations witnesses. They

would be particularly beneficial where either of the parties has identified a potential risk of miscommunication, whether this arises because of the witness' distinct sociolinguistic features or some other subjective factor, such as an increased susceptibility to trauma responses. The existing format of the ground rules hearing offers an appropriate model for the pre-trial assessment of a complainant's communication needs.

Proposed Recommendation: each jurisdiction legislate to provide for the use of Witness Intermediaries for vulnerable First Nations witnesses.

Recommendation 6 – developing court protocols for the naming of deceased people

24. Another issue that regularly arises for the families of deceased First Nations people involves the court naming the deceased where it is culturally insensitive to do so. Many First Nations cultures share the belief that when a person passes away, their spirit leaves the body. The spirit must be sent along its journey; if not, it may stay and disturb the family. In this process, names hold significant power. A deceased person's name may not be used for a long period of time, perhaps for many years. When their name is spoken after death, it may impede the journey of their spirit into the next world.[12]

25. Accordingly, when courts and practitioners use the names of deceased people, it may insult this process and cause significant harm to their surviving kin. This is particularly so where these kin are called as witnesses in a matter. Whilst in many instances it will be acceptable for the name of a deceased person to be used, consent should always be obtained from the next of kin. If consent is not obtained, the court should use an alternative name or consider describing the deceased by reference to their relationship with the relevant witness. It is desirable that the families and kin of the deceased person be consulted when establishing the appropriate course of action. This would be best served through the development of cultural protocols to guide the naming of First Nations deceased people, implemented in a bench book.

Proposed recommendation: that each jurisdiction develop cultural protocols concerning the identification and naming of deceased First Nations people for implementation in judicial proceedings.

[12] Queensland Health, 'Sad news, sorry business: guidelines for caring through Aboriginal and Torres Strait Islander people through death and dying' (Report, 2012), 12 <Sad news, sorry business - Guidelines for caring for Aboriginal and Torres Strait Islander people through death and dying (health.qld.gov.au)>.

ODPP
New South Wales

Case note

Leah's story[1]

In the late 1970s and early 1980s, an Aboriginal teenage girl named Leah was allegedly repeatedly sexually assaulted by two family members. These assaults were alleged to have occurred at several residences in a country NSW town, including Leah's home. The allegations included sexual intercourse without consent. Leah disclosed these assaults to her school counsellor, which led to the preparation of a DOCS complaint and a crime information report. However, no criminal proceedings were initiated against either of the alleged perpetrators.

In the mid-2000s, Leah made a further complaint to the local police. For unknown reasons, an investigation was not commenced, and remained on hold until 2020. In 2021, one of the alleged perpetrators was arrested by the police and charged with two counts of sexual assault. The other alleged perpetrator had since passed away. The matter was referred to the ODPP by the local police. The ODPP legal team included a Crown Prosecutor, Solicitor and Witness Assistance Service (WAS) officer. A First Nations WAS

[1] This is the real account of a complainant who was engaged with the ODPP. For the purposes of de-identifying the complainant, the name 'Leah' has been used, and other details have been edited, including her specific location and the specific dates of the proceedings. Leah and her mother have consented to and encouraged the sharing of their stories.

officer was also allocated to Leah's mother, who was registered with the WAS as a vulnerable witness.

Leah and her mother are cultural leaders within their community. Leah's mum occupies a matriarchal position amongst other local First Nations people, and is considered an Elder. Leah works in and with several government entities and First Nations-led organisations. Both Leah and her mother place considerable value on their cultural safety. They were proactive in informing ODPP staff about their cultural needs during the proceedings. Mechanisms put in place to promote cultural safety included meeting with Leah and her mother in person, engaging in deep listening, allowing Leah to vet the staff allocated to her mother, and ensuring that the legal team was receptive to their cultural needs.

The trial of the accused was scheduled for five days in mid-2023. In the lead-up to the trial, Leah began to voice fears that the proceedings would be detrimental to her cultural safety, as well as her mother's. In particular, Leah noted the following concerns:

(a) Leah stressed that when she, her mum and other First Nations witnesses were giving evidence, there would likely be prolonged silences preceding their answers. She stressed that it was necessary that the parties trust in these silences as periods of reflection.

(b) Leah noted that many of her family members were also survivors of child sexual abuse and acknowledged that being called as witnesses would likely be very traumatic for them. She said while she felt culturally safe within her meetings with the ODPP, she did not expect the court proceedings to be culturally safe in any capacity for herself or her family members. She emphasised that the re-traumatisation of her family and community would further jeopardise her own wellbeing. Leah also accepted that while she was willing to act outside the normative bounds of women's business to give her evidence, this would cause significant stress for her mum.

(c) Leah noted that both she and her mother were storytellers, and that there is significant cultural value and power in storytelling for First Nations people. She articulated her desire to tell her story in a narrative fashion, and anticipated that this desire would be shared by her mother. However, Leah acknowledged that this would be impossible under the evidentiary constraints of court proceedings. She stated that because of these constraints, and particularly because of cross-examination, she did not expect the court proceedings to be healing or give her a sense of closure.

(d) Finally, and because of (b)-(c), Leah expressed a belief that the trial would diminish her capacity to advocate for other First Nations survivors of sexual abuse, particularly if the accused was acquitted, as it would further diminish her faith in the criminal justice system.

In the two weeks prior to the commencement of the trial, Leah resolved that, owing to the above concerns, she no longer wished for the prosecution to go ahead. She was asked by ODPP staff whether there was anything further that they could do to promote her cultural safety during the trial. She concluded that this would not be possible, as the court environment itself was detrimental to her emotional and spiritual wellbeing, which was closely tied to that of her family. While Leah accepted that she would lose the chance of conventional justice if the prosecution was terminated, she affirmed that she would instead seek healing from her ancestors, as well as justice from their cultural lore.

After obtaining the views of the relevant stakeholders in the proceedings, including the officer in charge, the solicitor with carriage and the WAS officer allocated to Leah, the Director concluded that no further proceedings should be taken against the accused. This was communicated to Leah and the Judge on the first day of the scheduled trial.

ODPP
New South Wales

Improving the wellbeing and safety of First Nations complainants and witnesses in the criminal justice system

By Sally Dowling SC, Director of Public Prosecutions (NSW); Damian Beaufils, Crown Prosecutor and Gundungurra man; and Andrew Gay, Associate to the Director

Contents

The artwork on the cover-page is 'Holistic Journey of Life' by Luke Penrith. Luke has ancestral connections to the Wiradjuri, Wotjobaluk, Yuin & Gumbaynggirr people.

Introduction

1. This report has been prepared to canvass the various issues faced by First Nations witnesses and complainants during their interactions with the criminal justice system. In this regard, it is primarily concerned with First Nations 'victims of crime', hereafter referred to as victims. Whilst not all witnesses are victims, the issues discussed below—as well as any lessons discernible from them—are generally applicable to non-victimised witnesses. The dominant use of 'victim/victims' throughout this report is not intended to exclude this class of witnesses.
2. The first section of this introduction will provide a brief overview of First Nations victimisation in Australia. This will include a discussion of the identified gap within the law reform and advocacy sectors relating to the rights and experiences of First Nations victims. The second section will then introduce cultural concepts of safety, wellbeing and trauma, all of which have been adopted from the *Significance of Culture to Wellbeing, Healing and Rehabilitation* report.[1] The third section will provide an overview of the structure of the report.

[1] Vanessa Edwige & Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Report) < Significance of Culture to Wellbeing, Healing and Rehabilitation (nsw.gov.au)> ('*Significance of Culture Report*').

The victimisation of First Nations people

3. The ongoing effects of colonisation, dispossession and the Stolen Generations have inflicted significant disadvantage on First Nations Australians. This disadvantage has manifested in various forms and to varying degrees,[2] though is nowhere more evident than in the criminal justice system. There is a significant relationship between colonisation and First Nations hyper-incarceration, which has been discussed by various governmental inquiries.[3] Proportionately, First Nations people are the most incarcerated ethnic group in the world,[4] and First Nations children are removed from their families at nearly 10 times the rate of non-First Nations children.[5] The dimensions of this crisis were a key pillar of the *Uluru Statement from the Heart*, which called for structural constitutional and social reforms to empower First Nations communities.
4. Some meaningful progress has been made to address the disproportionate rates of First Nations criminalisation. The Walama List in the District Court of NSW and the Youth Koori Court in the Childrens' Court are positive steps forward in breaking cycles of disadvantage, whilst incorporating culturally specific, therapeutic, and holistic approaches. The *Bugmy Bar Book,* published by the NSW Public Defenders, also illustrates how a co-ordinated multi-disciplinary approach is improving the way First Nations offenders are dealt with during sentencing proceedings.

---

[2] See the Australian Government's *Information Repository* on Closing the Gap <Dashboard | Closing the Gap Information Repository - Productivity Commission (pc.gov.au)>.
[3] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, April 1991); *Bringing them home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final Report, 1997); *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017); Steering Committee for the Review of Government Service Provision, *Review of the Overcoming Indigenous Disadvantage: Key Indicators Report* (Report, June 2012).
[4] International Work Group for Indigenous Affairs, "Aboriginal people in Australia: the most imprisoned people on Earth" (Online article, 22 April 2021) < Aboriginal people in Australia: the most imprisoned people on Earth - IWGIA - International Work Group for Indigenous Affairs>.
[5] Lorena Allam, "'Alarming rate': removal of Australia's Indigenous children escalating, report warns", *The Guardian* (Online article, 16 Nov 2020) < 'Alarming rate': removal of Australia's Indigenous children escalating, report warns | Indigenous Australians | The Guardian>.

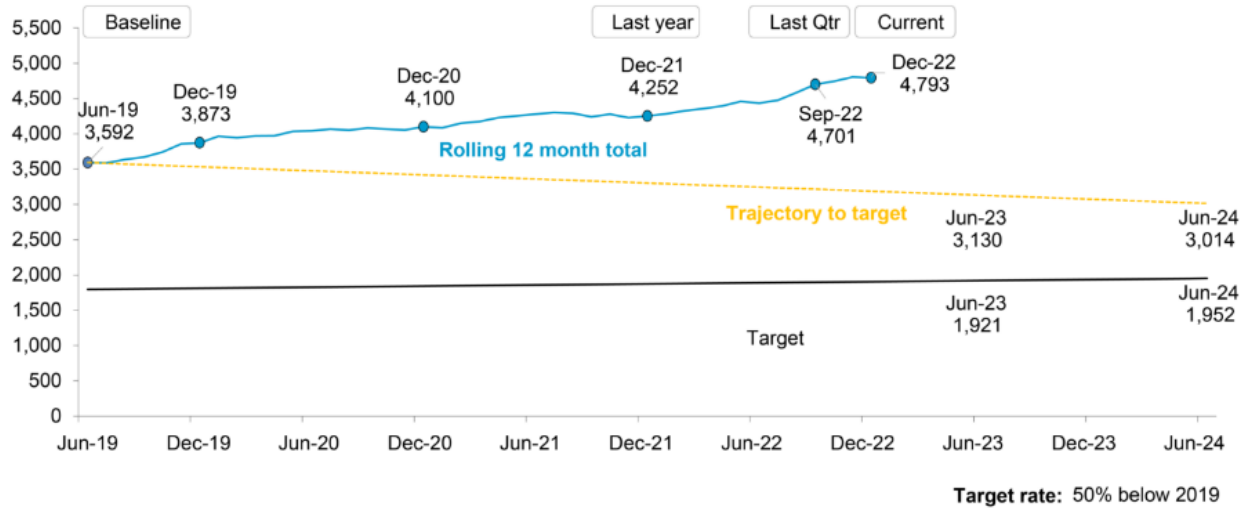
5. Whilst substantial attention has been directed towards the incarceration crisis facing First Nations people, the plight of First Nations victims has received far less attention. This is not because First Nations people are not victims of crime. Indeed, First Nations people are significantly more likely to experience crime than their non-First Nations counterparts.
6. Based on instances of crime reported to NSW Police, the Australian Bureau of Statistics' national Victims Statistics register identified that in NSW in 2022, First Nations people experienced assault at 3.1 times the rate of non-First Nations people, and sexual assault at 2.5 times the rate of non- First Nations people.[6] The Australian Institute of Criminology has identified that between 2005 and 2020, the murder rate for First Nations women ranged from three to 12 times the non-First Nations rate, with an average rate eight times higher than non-First Nations women.[7] Furthermore, the national Closing the Gap strategy has set a target for the 50% reduction of all forms of family violence and abuse against Aboriginal and Torres Strait

[6] Australian Bureau of Statistics, "Recorded Crime – Victims" (Webpage, published 29 June 2023) < Recorded Crime - Victims, 2022 | Australian Bureau of Statistics (abs.gov.au)>.
[7] Evidence to Senate Legal and Constitutional Affairs Reference Committee, Australian Senate, Canberra, 5 October 2022, 16 (Senator Scarr).

Islander women and children by 2031.[8] Currently, Australia is not on track to meet this target, with rates of family violence and abuse having steadily increased each year:

Target 13: Aboriginal female and young victims of violence*

By 2031, the rate of all forms of family violence and abuse against Aboriginal and Torres Strait Islander women and children is reduced at least by 50%, as progress towards zero.



Target rate: 50% below 2019

7. Despite these extreme rates of victimisation, the criminal justice system currently offers very limited (if any) culturally sensitive and trauma-informed approaches which recognise the unique history, culture and needs of First Nations victims. This lacuna speaks to the historical powerlessness of First Nations communities generally, as well as the limited resources available within the law reform and human rights sectors. Whilst many FN-controlled legal (and legal-adjacent) organisations exist in NSW, they are generally dedicated to representing First Nations defendants, rehabilitating First Nations offenders, assisting in civil matters, and promoting connection to culture, rather than advocating for the particular needs of First Nations victims of crime.
8. A further reason for this absence relates to the general historical neglect of victims by the core institutions of the criminal justice system. Modern socio-political developments such as the *Bringing Them Home Report* and *Royal Commission into*

[8] NSW Bureau of Crime Statistics and Research, "Closing the Gap" (Webpage) <Closing the Gap (nsw.gov.au)>.

Institutional Responses to Child Sexual Abuse have gone some way to rectifying this situation, primarily by increasing awareness about the plight of victims and the legal issues associated with victimisation. Recent reforms, including the expansion of the Child Sexual Offence Evidence Program across NSW, have indicated a growing awareness of trauma-informed practice.

9. Given the function that the ODPP serves in relation to all victims of crime, it is uniquely placed to respond to the complexities associated with First Nations victimisation, including by advocating for a greater emphasis on culturally safe judicial practices.

Concepts of trauma, health and wellbeing

10. Attempts to address the needs of First Nations victims must be grounded by an appreciation of the ways in which culture will impact health and wellbeing. Legal understandings of this relationship vary, though have benefited from the recent publication of Vanessa Edwige and Dr Paul Gray's report, *Significance of Culture to Wellbeing, Healing and Rehabilitation* ('the Significance of Culture Report'), commissioned by the Bugmy Bar Book. Whilst the Significance of Culture Report has primarily been used by defence advocates in sentencing hearings, it offers a useful framework for considering the issues experienced by First Nations victims. Much of the literature on First Nations offenders is applicable to First Nations victims, primarily because criminalisation and victimisation are equally the sequelae of structural disadvantage. The commonality of experience between victims and offenders illustrates that advocating for improvement to the experience of First Nations victims should not be viewed as inconsistent with advocating for the improved experiences of offenders. To this extent, adopting the language and concepts used by defence practitioners illustrates the benefits to be reaped when culture is placed at the forefront of all processes within the justice system.

11. The Significance of Culture Report found that wellbeing is intrinsically tied to culture.[9] It summarised that "…[FN] *perspectives of wellbeing and healing reflect holistic worldviews that consider connections between physical, social and emotional wellbeing, individual and collective wellbeing, and the impact of social, political and historical factors*".[10] The Significance of Culture Report further noted that for self-determination to be practised, responses to the justice-related issues experienced by First Nations people must be community designed and led.[11]
12. The Significance of Culture Report's exploration of the various modalities of wellbeing is highly relevant to understanding the issues that may arise for First Nations victims when they encounter the justice system. Specifically, the report notes that promoting the social and emotional wellbeing of First Nations people requires consideration of the ways in which their developmental context and lived experience is affected by broader social, economic, political, and historic circumstances.[12] The transmission of intergenerational trauma is one such circumstance. This has been explored by Wesley-Esquimaux and Smolewski, who argue that the intergenerational transmission of trauma occurs through biological, cultural, social and psychological mechanisms: *"Trauma memories are passed to next generations through different channels, including biological (in hereditary predispositions to post-traumatic stress disorder), cultural (through storytelling, culturally sanctioned behaviours), social (through inadequate parenting, lateral violence, acting out of abuse), and psychological (through memory processes) channels*".[13]

---

[9] *Significance of Culture Report* [12].
[10] Ibid.
[11] Ibid [14]-[15].
[12] Ibid [16].
[13] Cynthia C Wesley-Esquimaux and Magdalena Smolewski, *Historic Trauma and Aboriginal Healing* (Report, Aboriginal Healing Foundation, 2004), 76.

13. The ongoing effects of intergenerational trauma reflect the legacies of colonialism that continue to shape the experiences of First Nations people, particularly during their interactions with the justice system. A clear example of this is provided by the barriers affecting the disclosure of crime by First Nations victims. As outlined below, First Nations victims are significantly less likely to report crime than non-First Nations victims. This difference is owed, among many factors, to a heightened perception amongst First Nations victims that they will not be believed by police, and that responses to their complaints will not be culturally sensitive.[14] Accordingly, recognising the interplay between a First Nations victim's wellbeing and their broader social, historical, political and cultural circumstances must therefore be central to any attempt to enhance the experiences of victims within the criminal justice system.

Report Structure

14. The remainder of this report will address three topics: evidentiary matters; the provision of cultural support; and international experiences. "Evidentiary matters" will explore barriers to disclosure for First Nations victims, the giving of evidence by these victims, and issues and opportunities that arise from the admission of expert evidence. "Cultural support" will focus on the provision of cultural support during proceedings, and how court processes may be improved to increase cultural safety. "International experiences" will consider what lessons can be learnt from overseas jurisdictions.

[14] Matthew Willis, "Non-disclosure of violence in Australian Indigenous communities" *Trends and issues in crime and criminal justice* (2011) no 405, 3-5.

Evidentiary Matters

Barriers to disclosure

15. First Nations victims of crime face a range of barriers to disclosing instances of crime perpetrated against them. It has been estimated that up to 90 percent of incidents of violence perpetrated against First Nations women go unreported.[15] Furthermore, the NSW Aboriginal Child Sexual Assault Taskforce found that *most cases* of child sexual abuse ('CSO') are not disclosed.[16] This is consistent with the findings of government inquiries in Western Australia[17] and the Northern Territory.[18]
16. Whilst there are several specific barriers to disclosure that disproportionately affect First Nations victims, these victims are also impacted by the kinds of barriers that affect the community at large. These include, amongst other barriers, perceptions that the crime was too 'trivial' to report to police, or that the police would not believe them; shame about the crime; and a desire to protect the offender, the victim's relationship with the offender, or their children.[19]

Fear of repercussions

17. A fear of repercussions or lateral violence has been identified as a pervasive barrier to disclosure in First Nations communities.[20] This is particularly significant where these communities are 'small, interconnected and isolated', as anonymity for victims cannot

[15] Australia's National Research Organisation for Women's Safety (ANROWS), "Improving family violence legal and support services for Aboriginal and Torres Strait Islander peoples: Key findings and future directions" (Report, 2020), 2.
[16] Aboriginal Child Sexual Assault Taskforce 2006, "Breaking the silence: Creating the future: Addressing child sexual assault in Aboriginal communities in NSW" (Report, 2006); Willis, "Non-disclosure of violence", 1.
[17] Gordon S, Hallahan K & Henry D, "Putting the picture together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities" (Report, 2002).
[18] Wild R & Anderson P, "Ampe Akeleyername Meke Mekarle 'Little children are sacred' - Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse" (Final report, 2007).
[19] Willis, "Non-disclosure of violence", 2-3.
[20] Ibid, 4-5.

be maintained.[21] A 2010 study by the Australian Institute of Criminology found that a fear of further violence and payback, or culturally related violent retribution, were the most commonly cited reasons for not reporting violent victimisation.[22] First Nations survivors of sexual assault have also identified fears about an escalation of violence as a barrier to disclosure.[23]

18. The fear of repercussions is not limited to a fear of violent retribution. An investigation led by Professor Marcia Langton found that for the First Nations communities of Albury-Wodonga, the primary barriers to disclosure included:
    - a dominant fear of child removal;
    - the real and immediate threat of homelessness, as there was often a reliance on their violent partner to provide financial support to the household; and
    - the fear of isolation from family and community.[24]
19. The conclusions of Langton's investigation—which was facilitated by Australia's National Research Organisation for Women's Safety—mirrored the findings of a 2015 study by the Judicial Council on Cultural Diversity (JCCD).[25] This consultation-based study also found that past experiences of racism and discrimination impacted the decision by First Nations victims not to disclose.[26]

Distrust of the justice system

[21] Ibid, 4.
[22] Matthew Willis, "Community Safety in Australian Indigenous communities: Service Provider's Perceptions" *Research and public policy series* (2010) no 110.
[23] Aboriginal Family Violence Prevention Legal Service Victoria, "Strengthening law and justice outcomes for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault and women and children: National policy issues – a Victorian perspective" (2010, report).
[24] ANROWS, "Improving family violence", 5.
[25] Judicial Council on Cultural Diversity, "The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts" (Report, 2016), 18.
[26] Ibid, 7.

20. An entrenched distrust of the police and the criminal justice system serves as a further barrier to disclosure for First Nations victims. Numerous studies have identified a general perception amongst First Nations women that police responses to their complaints would likely be culturally and sexually insensitive.[27] Memories of the Stolen Generations and other interventionist government policies have led to distrust in other justice institutions, including the courts.[28]
21. Whilst in many communities the practical consequences of having a partner or relative imprisoned may cause a victim not to report, Willis has identified that this "*…takes on extra dimensions in Indigenous communities who experience the impacts of Indigenous over-representation in the justice system*".[29] Alarmingly, he notes that "*…some victims may feel they have to protect the perpetrator from imprisonment and a possible death in custody, while in Cape York communities, a death in custody may be regarded as the victim's fault*".[30] These examples clearly reflect the social and political determinants of wellbeing, demonstrating that for First Nations victims, 'whole-of-system' reforms may be just as important as specific 'victim-tailored' measures. This also suggests that cooperation amongst the core institutions of the justice system will provide the greatest opportunity to meaningfully address these issues.

[27] Willis, "non-disclosure of violence", 5.
[28] Ibid, 5-6.
[29] Ibid, 6.
[30] Ibid.

Cultural issues

22. Disclosures by First Nations victims of crime may also be complicated by specific cultural issues. Whilst the diversity of First Nations in Australia means that cultural issues cannot be generalised,[31] several recurrent themes have emerged.
23. The first issue arises where crimes have been perpetrated by Elders in the community. Elders often occupy positions of leadership, trust and respect in First Nations communities. If a crime is committed by a respected Elder, the perceived costs of disclosure to the victim may be aggravated. This was illustrated in the case of *R v AD (Decision Restricted)* (NSWDC, 2017/00354022, commenced 12 August 2019).

> *R v AD* (NSWDC, 2017/00354022, commenced 12 August 2019)
>
> The matter of *R v AD* was a historical child sexual offence case. The offender was an Elder in the community. He was the uncle of five of the victims and the cousin of three of the victims – males and females all aged between six and 14 years old.
>
> The trial took place in 2019, however the allegations dated back to the late 1970s and 1980s. Many of the witnesses were asked questions regarding the lengthy delay in complaint, and each gave illuminating evidence about the cultural complexities leading to barriers to disclosure.
>
> In the context of a lack of complaint and continued contact with the offender for quite some time, one of the complainants said in evidence, *"…spiritually, in my culture, we, from day dot, we're taught to respect our elders. It's a, you know, they're treated like God to us, and we just, yeah, we just, we've got a, it's just about respect when it comes to elders in our tradition"*.

[31] *The Culture Report* [14].

24. A second issue arises from 'men's/women's business'. The customary delineation of roles and practices by sex has had some bearing on the willingness of victims to make disclosures when sexually assaulted by members of the opposite sex. A female complainant in *R v AD* gave evidence to this effect: *"…talking about stuff like that [referring to the sexual offences] it's not right; it's not right. You don't talk to men about that…My husband doesn't even know the full details. It's shameful."*
25. Feelings of shame are closely related with victimisation. These may also be amplified by cultural factors. A male complainant in *R v AD* gave evidence about his difficulties disclosing due to the senior role he now holds in his community: *"I'm looked upon as a leader and for me to talk about stuff like that, it's, it's hard. I don't want people looking at me differently."* These specific cultural issues complicate the capacity of the ODPP to respond to crime and the needs/interests of victims. They also demonstrate the utmost importance of First Nations victim support officers and educational campaigns within communities about the cultural support available from these officers.

Summary

26. Even before criminal proceedings are commenced, it is clear that there is a range of social, historical, economic and cultural factors that may complicate or prevent disclosures by First Nations victims. These factors are interdependent and prevent the proper operation of the core functions of the criminal justice system. However, many of these issues arise outside the scope of the ODPP's statutory functions, which are generally only engaged upon charges being laid by the NSW Police. Accordingly, this speaks to the need for community education programs designed to promote relationships between First Nations communities, police and other justice services. Correspondingly, the core institutions of the criminal justice system—particularly the ODPP and the police—need to ensure that their practice is worthy of the trust being asked of First Nations communities.

Giving evidence

27. There are a range of cultural considerations that may impact upon the capacity of a First Nations victim to give evidence. As outlined above, customary practices regarding men's/women's business may serve as a barrier to disclosure. These practices may also influence the willingness of First Nations victims, accused people and non-victimised witnesses to give evidence, as doing so could either be in violation of cultural practices, or expose victims to cultural shame and isolation within their communities.
28. Some of the evidentiary complexities associated with these customary practices were described in *Lacey (a pseudonym) v Attorney General for New South Wales* [2021] NSWCA 27.

Lacey (a pseudonym) v Attorney General for New South Wales [2021] NSWCA 27 ('*Lacey*')

Lacey concerned a young Aboriginal female offender who had been charged with four offences of assaulting officers in the execution of their duties. The Crown intended to rely on footage of Lacey being strip searched at the police station.[32] Due to concepts of shame and gendered business, Lacey sought orders, inter alia, that the matter be heard by a female magistrate, and that no men be present for the playing of the footage.[33]

In support of this claim, counsel for Lacey produced affidavits from both her mother and an ALS field officer. These affidavits explained that if the footage of Lacey being

[32] *Lacey (a pseudonym) v Attorney General for New South Wales* [2021] NSWCA 27 [3] ('*Lacey*').
[33] Ibid.

strip-searched was shown in front of males, she would likely experience enduring cultural shame.[34]

McCallum J summarised the cultural complications in the following manner: *"The applicant is naturally distressed at the prospect of the footage being seen by any male person. More significantly for present purposes, there is evidence that, in Aboriginal cultures, the showing of a woman's sensitive parts is considered women's business; that women's business must only be conducted in the presence of women, never to be observed by males; and that the division of men's and women's business is lore to Aboriginal people that has been practised for thousands of years".*[35]

The Court of Appeal rejected Lacey's appeal on several technical grounds, however ruled that the Children's Court has the power, in an appropriate case, to order that a matter be heard by a magistrate of a particular sex.[36] It also ruled that the Children's Court has the power to order that certain evidence not be viewed by persons of a particular sex.[37]

29. Whilst *Lacey* concerned a First Nations accused person, the cultural factors it considered are equally relevant to First Nations victims. Regarding the power of the court to order that a magistrate of a certain sex preside over the matter, McCallum J concluded that, *"…the imposition of a condition of a stay that a matter be heard by a magistrate of a particular sex, provided such a condition is necessary for the effective*

[34] Ibid [59].
[35] Ibid [52].
[36] Ibid [25]-[26], [45], [117]-[119].
[37] Ibid [29], [31], [85].

exercise of the court's statutory powers, does not derogate from the Children's Court's institutional authority".[38] This conclusion—relating to the powers of the court *generally*—leaves open the possibility for the Crown to make similar applications in the future where it would respect cultural norms and promote the wellbeing of a First Nations victim.

Language & directions

30. The language used by First Nations people when giving evidence may present further complexities. Professor Diana Eades has argued that ways of speaking English for First Nations people will depend on their "*…fabric of socialisation, both primary and secondary, and patterns of social networking, interaction and residence*".[39] Eades has distinguished between the structural features of Aboriginal English—such as grammatical patterns, word choice and meaning—and the pragmatic features of language use, 'including patterns of discourse and conversation'.[40] Well known examples of these pragmatic features include silence as a productive form of communication,[41] the avoidance of eye contact,[42] and the phenomenon of 'gratuitous concurrence'; that is, "*… the act of saying yes to a question, regardless of whether the speaker agrees with the proposition being questioned, or even understands it*".[43] In pre-trial interviews and judicial proceedings, these pragmatic and structural features of Aboriginal English may result in miscommunication, particularly where police officers,

---

[38] Ibid [119].
[39] Dr Diana Eades, "Judicial understandings of Aboriginality and language use" (2016) 12 *The Judicial Review*, 475 ('*Judicial understandings*').
[40] Ibid, 476.
[41] Ibid.
[42] Judicial Commission of NSW, "Section 2 – First Nations People", *Equality before the Law Bench Book*, 2.3.3.3 <Section 2 - First Nations people (nsw.gov.au)>.
[43] Eades, *Judicial understandings,* 476.

judges and jurors have not been trained in the cultural nuances of First Nations communication.

31. As explored by Eades, this potential for miscommunication is aggravated during cross-examination. When a First Nations victim or accused person is asked leading questions, gratuitous concurrence may mean that they will agree with the propositions put to them, potentially with dire consequences.[44] Some Australian jurisdictions have responded to the sociolinguistic needs of First Nations witnesses through developing jury directions about their methods of communicating. These have come to be known as 'Mildren Directions', named after the former Justice of the Supreme Court of the Northern Territory, Dean Mildren KC. Mildren Directions have been given formally in courts across the Northern Territory and Western Australia,[45] and informally in Queensland,[46] and are designed to assist juries in appraising First Nations witnesses by directing them to "*…the possibility that sociolinguistic features of an Aboriginal witness's evidence may lead to misunderstandings*".[47] Furthermore, in the Northern Territory and Western Australia, some judges have prohibited leading questions for First Nations witnesses where evidence of their suggestibility is adduced.[48]
32. NSW has not formally adopted Mildren Directions. These directions were considered in *R v Hart*, which concerned the murder of three Aboriginal children in Bowraville.

R v Hart (NSWSC, 2005/857SCRM, commencing 6 February 2006)[49]

[44] Ibid.
[45] Ibid, 482.
[46] Ibid.
[47] Ibid, 481.
[48] Ibid, 483.
[49] Information on this case has primarily been provided by Diana Eades' anecdotal account, detailed in *Judicial Understandings* (n 39).

> In *R v Hart,* the prosecution intended to call 50 Aboriginal witnesses. A sociolinguistic report was requested from Dr Diana Eades. Dr Eades' report identified several ways that the Aboriginal witnesses giving evidence might differ in communication style to non-First Nations witnesses. Furthermore, she recommended that Mildren style directions be given to the jury.
>
> The call for Mildren directions was opposed by the Defence on the ground that they would introduce 'a whole range of assumptions' about the Aboriginal witnesses 'that may or may not be appropriate'. The argument for the directions was not pressed by the Crown, and Hulme J only made a limited direction to the jury that they should *"…bear in mind their apparent level of education or any other attributes"*.

33. Whilst equivalent directions have been discussed in NSW's Equal Treatment Benchbook,[50] evidence of their use in NSW—or of directions like them—is minimal, and strictly anecdotal. This is the product of several different forces, including the lack of a formal foundation for their use (in case-law, legislation, practice note or Judicial bench book); misconceptions that such directions should only apply to Aboriginal witnesses from remote communities; and the adversarial nature of criminal proceedings, which, unfortunately, may militate against cooperation between the Crown and defence on issues such as directions.
34. Another distinction between First Nations and non-First Nations forms of communication revolves around conceptions of time. First Nations people may not conceive of time as linear, nor regard exact appraisals of time with the degree of

[50] Judicial Commission, "Equality before the Law Bench Book – Section 2 – First Nations people" (Webpage, updated 23 June 2023) <Section 2 - First Nations people (nsw.gov.au)>.

importance that it frequently has in criminal proceedings. This was illustrated in *R v AD*. In that case, a First Nations witness gave evidence that the complaint was made to them "*…a few years prior to 2009…*," however the allegations dated back to the late 1970s and early 1980s. In re-examination, the witness explained that the expression 'a few years ago', 'could mean a number of years:' "*…it could be 10, 20 years, two years…It's a cultural thing, like a lot of us do it, we just say you know a couple of years ago, which could mean 20 years ago, it could mean yesterday*."

Narrative evidence

35. A further barrier to culturally safe proceedings arises from the challenges associated with giving evidence in narrative form. The sharing of story, history and customary law via oral narrative is an essential element of many First Nations cultures.[51] This process is epitomised by the passing of Dreaming stories between generations,[52] but also has a truth-telling function in post-colonial Australia.[53] Truth-telling provides an opportunity for First Nations people to record evidence and share stories about their culture, heritage and history with the broader Australian community.[54] On a civic level, this process is designed to increase the non-First Nations community's awareness of colonisation, including its historical and contemporary consequences for First Nations people. Alice Pepper, a member of Victoria's First Peoples' Assembly, has succinctly described the importance of truth-telling for both First Nations and non-First Nations people: "*…In order to know where you're going you must know where you've come*

[51] See, for example, Lynore Geia et al, "Yarning/Aboriginal storytelling: Towards an understanding of an Indigenous perspective and its implications for research practice" (2013, 46:1) *Contemporary Nurse*, 13; Patricia Gwatkin-Higson, "What is the role of oral history and testimony in building our understanding of the past?" (2018) *NEW: Emerging Scholars in Australian Indigenous Studies*, 39-44.
[52] Kingsley Palmer, *Australian Native Title Anthropology* (2018, ANU Press), 110.
[53] See, for example, Gemma Pol, "Truth-Telling" *Common Ground* (web page, May 27 2021) Truth-Telling | Common Ground.
[54] Ibid.

from. Even if it's in your face or hard to swallow, people need to know the true history in order to move forward".[55]

36. As suggested by Pepper, truth-telling—and story-telling more broadly—has a healing function. This was noted in the Significance of Culture Report, which accepted the views of Milroy, Dudgeon and Walker that:

"…[To] *redress the generational and current levels of loss and grief it is necessary to strengthen connections to culture, community, family and spirituality. Importantly, reclaiming the history of the group and creating an ancestral and community story of connection to family and country, will help to restore a sense of cultural continuity*."[56]

37. Opportunities for healing also exist on an individual level. Indeed, for victims of crime, telling one's story—and having others listen to that story—can be therapeutic and vindicating.[57] For First Nations victims, giving one's testimony in court should provide some opportunity for healing. This may be facilitated by s 29(2) of the *Evidence Act 1995* (NSW), which provides that a party may apply to have a particular witness's evidence heard in narrative form. However, healing outcomes rarely eventuate within the demands of the adversarial trial. Under cross-examination, a victim's narrative may be continually interrupted, distorted, and challenged. Their credibility may also be scrutinised, frequently by reference to evidence that is not relevant for any other purpose.[58] For all victims of crime who take the stand, it is common knowledge that this process can be re-victimising, further entrenching the trauma of the initial crime

---

[55] First Peoples Assembly of Victoria, "Report to the Yoo-rrook Justice Commission from the First Peoples' Assembly of Victoria" (Report, June 2021), 3 <Tyerri-Yoo-rrook-Seed-of-truth-Report-2021_Final-1.pdf (yoorrookjusticecommission.org.au)>.

[56] Helen Milroy, Pat Dudgeon and Roz Walker, 'Community Life and Development Programs – Pathways to Healing' in Pat Dudgeon, Helen Milroy and Roz Walker (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 2nd ed, 2014), 426.

[57] Antony Pemberton, Pauline Aarten and Eva Mudler, "Stories as property: narrative ownership as a key concept in victims' experiences with criminal justice" (2019) 19(4) *Criminology and Criminal Justice*, 406.

[58] *Evidence Act 1995* (NSW) Part 3.7.

perpetrated against them.[59] The emotional and psychological costs of giving evidence have in part motivated the developing restorative justice movement.[60]

38. Such adverse outcomes are particularly grievous for First Nations victims, as there is an additional cultural imperative to seek healing through story-telling. As outlined on pp 10-11, the failure of the criminal justice system to promote cultural safety is one barrier to the disclosure of crime. Even if a complaint has been made, ODPP Witness Assistance Service ("WAS") officers have identified that the failure of courts to respect cultural story-telling practices provides a further disincentive to continuing proceedings. Where First Nations complainants have communicated their fears about cultural safety within court proceedings to the allocated WAS officer or prosecutor, this may serve as a basis for the discontinuance of such proceedings. Outcomes of this nature deny First Nations victims the opportunity to seek justice via conventional means.

39. WAS officers have also noted that concerns about culturally unsafe court proceedings are particularly pressing where a First Nations complainant's family, or other First Nations community members, have been called as witnesses. As identified in the Significance of Culture Report, this is because wellbeing may be collective for First Nations people.[61] Accordingly, First Nations complainants may be unwilling to continue court proceedings where they know that this may involve the re-traumatisation of family or community members.

---

[59] Australian Centre for the Study of Sexual Assault, "Supporting victims though the legal process" (Online practice note, 2010) < ACSSA Wrap- Supporting victims through the legal process: The role of sexual assault service providers (aifs.gov.au)>.

[60] See, for example, Australian Law Reform Commission, "Restorative Justice" (Webpage, July 2010) < Restorative justice | ALRC>; Open Circle, "What is restorative justice?" (Webpage) < What is restorative justice? | RMIT Centre for Innovative Justice (cij.org.au)>.

[61] *Significance of Culture Report* [11]-[12].

Summary

40. In sum, complex issues may arise when First Nations people are called to give evidence. These issues may relate to the nature of the evidence to be given, or to the procedural incapacity of the court to accommodate the cultural needs of First Nations victims.
41. Cultural concerns around men's/women's business may mean that certain topics are inappropriate to speak about. Giving evidence in these circumstances may cause substantial harm to the victim, impacting their spiritual, social and emotional wellbeing. However, as demonstrated, there are positive steps courts can take to address these complexities, including by directing that magistrates/judges of a certain sex hear the matter.
42. Furthermore, the language used by First Nations victims may also have a significant bearing on their court experience. If the court is not directed to the sociolinguistic nuances that characterise Aboriginal English, these cultural differences may cause confusion or misunderstanding. At its most extreme, this could result in the evidence being misconstrued by the bench, judge, and jury. Less serious outcomes—such as being repeatedly cross-examined where the victim miscomprehends a question or proposition—are still likely to compound the trauma associated with giving evidence.
43. Finally, the relative inflexibility of the courts to accommodate evidence in narrative form poses a further impediment to culturally safe proceedings. As outlined above, story-telling is a central component of many First Nations cultures, and may have the capacity to help fstheal aggrieved communities and individuals. However, under the strictures of an adversarial trial, there are few opportunities for evidence to be given in such a healing way. For First Nations victims, this disincentivises reporting crime and participating in proceedings. With a view to the welfare of the First Nations victim,

the unavailability of culturally safe proceedings may serve as a legitimate discretionary ground for the ODPP to discontinue prosecutions.

Expert evidence

44. As discussed, the evidentiary demands of court proceedings can be antithetical to the cultural needs of First Nations victims and may lead to an array of adverse consequences. This is particularly clear during cross-examination, where First Nations victim's evidence may not only be continually interrupted and scrutinised in a confrontational manner, but the specific features of their speech and vocabulary may be distorted by opposing counsel. One example of this is provided by the inference that a failure by a First Nations victim to maintain eye contact has a bearing on their credibility.[62] Such damaging and misleading inferences are equally applicable to First Nations accused people. As previously argued, judicial directions offer one partial remedy to this issue.

Expert evidence on First Nations language patterns

45. Another remedy relates to expert evidence. In appropriate cases, expert evidence on First Nations culture may be admitted during proceedings to improve the experience of First Nations victims. For expert evidence to be admissible, it must be relevant per s 55 Evidence Act 1995 (NSW) (EA), and also satisfy the two-part test in s 79(1):

    (1) Does the expert have specialised knowledge based on their training, study or experience, and

    (2) Is their opinion wholly or substantially based on that knowledge?

    Section 79(1) does not apply if the opinion sought is to be given by "*...a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group*".[63]

---

[62] Queensland Health, *Communicating effectively with Aboriginal and Torres Strait Islander people* (Fact sheet), Communicating effectively with Aboriginal and Torres Strait Islander people (health.qld.gov.au).
[63] *Evidence Act 1995* (NSW) s 78A.

46. Experts might educate the court on how a First Nations witness may give their evidence, and why this is given in a particular manner, thereby allowing the court to receive the evidence in a culturally informed way. This is largely analogous to expert evidence given in sexual assault matters.[64] In both circumstances, the purpose of adducing the evidence is to displace any incorrect and damaging assumptions that the judge or jury may have about the witness and the nature of their testimony.
47. Issues most frequently arise in adducing expert evidence on the sociolinguistic tendencies of First Nations witnesses where either the expert has not interviewed the witnesses personally, or is seeking to adduce evidence of a general nature to apply to specific witnesses. As demonstrated in *R v AD*, these issues are frequently related:

R v AD (NSWDC, 2017/00354022, commenced 12 August 2019)

In *R v AD*, the Crown sought to adduce the expert evidence of Dr Diana Eades and Dr Susan Pulman. Dr Eades prepared an expert report on the sociolinguistic tendencies of First Nations witnesses, including:

a. The key differences between Aboriginal English in the Bowraville region and non-Aboriginal English, including in the giving, non-giving and seeking of information;
b. The relevance of Aboriginal English to legal contexts;
c. Factors affecting Aboriginal communication about child sexual abuse within a family and/or to police;
d. Risks of misunderstandings as a result of these communicative differences in police interviews and in a courtroom setting; and

[64] See, for example, Jacqueline Horan and Jane Goodman-Delahunty, "Expert evidence to counteract jury misconceptions about consent in sexual assault cases: failures and lessons learned" (2020) 43(2) *UNSW Law Journal*, 707-737.

e. Recommendations for effectively addressing these communicative differences in a court setting.

Dr Eades' specialised knowledge about the Bowraville region was the result of her involvement in *R v Hart* 13 years earlier, during which she had extensively interviewed Aboriginal witnesses and prepared an expert report for the Crown case. Additionally, Dr Eades has lived in the northern NSW region for over 30 years and has been an eminent scholar of Aboriginal English since the 1980s. In *R v AD,* Dr Eades gave evidence on the voir dire, and recommended that:

a. A Mildren-style direction be given about silence for First Nations witnesses, gratuitous concurrence, and the likelihood of a lack of eye-contact, and;
b. The First Nations witnesses be allowed to give evidence in narrative form.

The Crown pressed for these recommendations, alongside a ruling on the admissibility of Dr Eades' evidence about shame in First Nations communities. Each of these applications was opposed by counsel for the accused, who submitted that:

a. Dr Eades' evidence was general in nature, and was not based on interviews with the specific witnesses;
b. Evidence in narrative form may result in the divulging of prejudicial and/or inadmissible information;
c. An immediate Mildren-style ruling was pre-emptive, and may cause confusion (conceding that, if such a ruling was needed, it would be supported); and
d. Evidence was not adduced to demonstrate the additional cultural elements of shame. A jury would be aware that shame attends to experiences of sexual abuse.

The judge ruled that the shame evidence was inadmissible on relevance grounds, and determined to 'play it by ear' with reference to Dr Eades' other recommendations. Judge Flannery ultimately excluded Dr Eades' evidence.

Dr Pulman was called to give evidence on a variety of issues affecting the disclosure of child sexual abuse, including within Aboriginal communities. These included:

a. Reasons for delays in disclosure, including a sense of shame;
b. The impact of a perpetrator's intrafamilial status on disclosures of abuse;
c. Whether Aboriginality may affect disclosure in cases of intrafamilial child sexual abuse;
d. Whether the behaviour of an adult victim of child sexual abuse towards the perpetrator vary widely and include 'counterintuitive behaviour', such as the victim allowing a perpetrator stay in their home; and
e. Whether Aboriginality, in cases of intrafamilial child sexual abuse, influences the behaviours of victims towards the perpetrator, including counter-intuitive behaviours, either as children or adults.

Following the voir dire, the defence objected to a portion of Dr Pulman's evidence relating to child sexual assault in Aboriginal families, particularly concerning a heightened conception of shame that may inhibit disclosures. It was submitted that some of Dr Pulman's conclusions, as well as certain statistics, related to evidence gathered in remote communities, and were thus 'not directly apposite' to the witnesses from Bowraville. The defence further submitted, and Judge Flannery concurred, that the effect of the evidence about shame and respect for elders gave 'a bit more emphasis than is really warranted', particularly as the various Aboriginal witnesses had explained the concepts of shame and respect in the way that 'we understand elders'. Whilst the Crown submitted that Dr Pulman's evidence of the distinct conception of shame for Aboriginal victims of CSA was relevant and persuasive, this submission was rejected by the judge.

48. The successful objections to Dr Eades' evidence and parts of Dr Pulman's evidence in *R v AD* highlight the challenges involved with calling expert evidence on First Nations cultural matters. Despite the academic acceptance that there are certain common features to Aboriginal English use and patterns of communication, expert opinions based on these common features may be ruled to be inadmissible. This is particularly so where, as in *R v AD*, the expert has only read the First Nations witness's written statements, and/or there is some geographical distinction between the witnesses being called and the subjects of any academic studies referred to by the expert.

ODPP New South Wales

Cultural support

Cultural support during proceedings

49. It is imperative that First Nations victims are provided with adequate cultural support during proceedings. As outlined above, there are a plethora of cultural factors that may impact a First Nations victim's court experience. These could range from past experiences of racism or discrimination within the justice system, to concerns about culturally inappropriate questioning during proceedings. Dedicated First Nations support workers are in the best position to respond to these complexities and offer cultural support.

Witness Assistance Service (WAS)

50. ODPP WAS officers can assist with providing information, identifying special needs of victims and witnesses, referring victims for counselling and support, providing court preparation, and coordinating court support. The ODPP maintains a team of dedicated First Nations WAS officers, who may provide cultural support in addition to the above duties.
51. Prosecution Guideline 5.7 mandates that the solicitor with carriage of a matter refer it to a WAS officer as early as possible in the prosecution process if it involves:
    a. Death;
    b. Sexual assault;
    c. Domestic violence;
    d. A child victim or witness, and;
    e. A victim or witness with special needs.[65]

[65] Office of the Director of Public Prosecutions, *Prosecution Guidelines (March 2021)* <Prosecution Guidelines (March 2021) (nsw.gov.au)>.

52. Failure to adhere to the above guideline may have significant consequences for the matter and the involved parties. This was illustrated in *RC v R* [2022] NSWCCA 281, where a failure by the ODPP to respond to the cultural needs of an incarcerated First Nations complainant had significant legal ramifications.

RC v R [2022] NSWCCA 281
RC was a case involving an Aboriginal complainant in a child sexual assault trial. The complainant was in custody and refused to give evidence about the offences when called. The Crown tendered her statement and relied on s 65 of the Evidence Act (maker unavailable) to avoid the operation of the rule against hearsay. On appeal, the question was whether the complainant was "unavailable" within the meaning of s65 of the Evidence Act. Importantly for present purposes, in relation to whether "all reasonable steps" had been taken to obtain the attendance of the witness, as required by s 65, the Court held at [119]: *"There was no evidence that [the complainant] had been provided with an opportunity to speak to a Witness Assistance Officer from the Office of the Director of Public Prosecutions Witness Assistance Service (WAS). Guideline 5.7 of the Office of the Director of Public Prosecution Guidelines provides that the solicitor with carriage of a matter must ensure it has been referred to the WAS as early as possible in the prosecution process if it involves, amongst other offences, sexual assault. The role of the WAS is to provide support in appropriate cases to victims and witnesses during the criminal justice process. WAS can assist with providing information, identifying special needs of victims and witnesses, referring victims and witnesses for counselling and support, providing court preparation, and coordinating court support."*

The appeal was allowed, and the convictions (involving all three complainants) were quashed, with a new trial being ordered.

53. First Nations WAS officers have historically indicated that problems most frequently eventuate when ODPP lawyers overlook the need for cultural support, and do not refer matters to the WAS when a First Nations victim is involved. These officers have opined that this issue has arisen because of an institutional ignorance of the specific cultural needs of First Nations victims, as well as the cultural support that can be provided by First Nations WAS officers. The ODPP has responded to this issue by mandating cultural awareness training for all staff. We are also currently developing standard operating procedures to govern the referral process to WAS for cultural assessments of First Nations victims.

Court processes

54. A range of court processes that could be used to support First Nations witnesses have already been discussed. These include:
    a. Mildren-style directions regarding the sociolinguistic features of First Nations witnesses;
    b. The listing of matters before a magistrate or judge of a certain sex; and
    c. Orders that particular witnesses be prohibited from inspecting certain exhibits, or from hearing certain evidence.
55. This list is not exhaustive, and other applications may be made within courts to recognise the cultural needs of First Nations communities. One such avenue was illustrated in *R v Knight (No 1)* [2023] NSWSC 195.

R v Knight (No 1) [2023] NSWSC 195

R v Knight concerned a First Nations offender who pleaded guilty to murdering his First Nations partner. The Crown opposed an application that the offender be sentenced via AVL. The reasons for this opposition were summarised by Yehia J at [16]:

"The Crown opposes the application, relying upon the affidavit evidence of Mr Jonathan May, solicitor at the Office of the Director of Public Prosecutions. Importantly, the Crown relies upon representations made to Mr May by the deceased's sisters that the applicant should attend his sentencing proceedings in-person and on country. The Crown emphasised the importance of recognising Indigenous cultural values and principles in the criminal law. In support of that submission, the Crown referenced R v Fernando (1992) 76 A Crim R 58; Bugmy v The Queen (1013) [2013] HCA 37; 249 CLR 571; the Bugmy Bar Book; and the NSW District Court Walama List."

Whilst Justice Yehia acknowledged that the "*importance of recognising Indigenous cultural values and principles is increasingly accepted in the criminal law in New South Wales*", her Honour distinguished between the restorative justice environment of the Walama List and the sentencing hearing under consideration. Furthermore, her Honour noted at [22] that "*…the Crown does not rely upon the Bugmy Bar Book in support of the contention that there is a cultural imperative for the applicant to appear in-person for his sentence*".

Yehia J dismissed the Crown's opposition in the present circumstances at [23]-[24]:
"…I acknowledge the strong view of the deceased's sisters that the applicant should attend his sentence in-person and on country. However, I am not persuaded that it is in the "interests of the administration of justice" that the applicant attends in-person, given that the sentencing proceedings will be conducted in the usual way, rather than pursuant to a restorative justice model. The proceedings will be conducted in the local area where the offence took place and will allow family and community members to attend and observe the proceedings. The applicant will be present, albeit virtually."

However, her Honour commended the Crown's submissions at [27]: "*The Crown is to be commended for highlighting the importance of recognising Indigenous cultural values and principles in the criminal law. In an appropriate case where there is sufficient evidence, it may be wholly appropriate that cultural values and principles would dictate that a direction is made for an offender to appear in-person at sentencing proceedings.*"

56. Yehia J's conclusion at [27] speaks to the increasing willingness of courts to entertain submissions and make orders consistent with cultural considerations. This reinforces the importance of expert evidence being available for the Crown to adduce when the

need arises, as well as the collation of peer-reviewed materials on First Nations culture and language to support the kinds of submissions suggested by Yehia J at [22].

International approaches

Canada

57. Like Australia, Canada experiences a drastic over-representation of Indigenous accused people and victims within its criminal justice system. Whilst Indigenous people constitute only 5% of Canada's population, they account for 31% of its provincial and territorial prison population, and 33% of its federal prison population.[66] Further, Indigenous youth represented 50% of youth admissions to custody in 2020 – 2021.[67] Violence against Indigenous children is three times more likely to be reported to police than violence against non-Indigenous children.[68] Furthermore, 26% of Indigenous women have experienced sexual violence by an adult during their childhood, compared with 9.2% of non-Indigenous women, 5.8% of Indigenous men and 2.8% of non-Indigenous men.[69]

Approaches towards accused people

58. Canada has adopted several strategies to address these issues. Notably, s 718.2(e) of the federal Criminal Code requires sentencing courts to consider "*…all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders*". This provision allowed for the development of "Gladue Reports" within Canadian law, so named after the Supreme Court decision of *R v Gladue* [1999] 1 SCR 688. In *Gladue*,

---

[66] Statistics provided by the Public Prosecution Service of Canada.
[67] Ibid.
[68] Samuel Perreault, "Victimization of First Nations people, Metis and Inuit in Canada" (Webpage, 19 July 2022) *Canadian Centre for Justice and Community Safety Statistics* <Victimization of First Nations people, Métis and Inuit in Canada (statcan.gc.ca)>.
[69] Ibid.

the Supreme Court held that s 718.2(e) applies to 'all aboriginal persons wherever they reside, whether on or off-reserve, in a large city or a rural area'.[70] The Court additionally held that the sentencing judge must consider:

a) The unique systemic or background factors which may have played a part in bringing the particular Indigenous offender before the courts; and
b) The types of sentencing and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection.[71]

59. Subsequently, sentencing courts in Canada began to require the preparation of pre-sentence reports for Indigenous offenders that addressed the requirements of s 718.2(e). In *R v Ipeelee* [2012] SCC 13, the Supreme Court held that there is no requirement to prove a causal connection between an offender's background of disadvantage and their offending, and that Gladue principles should not be discounted in matters involving serious violence.
60. Of interest, in *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571, the High Court of Australia held that disadvantage is a relevant factor in the sentencing exercise for any offender, but rejected the Canadian approach; that is, the default position being to recognise the systemic disadvantage of First Nations people in every sentencing decision. Instead, in Australia, an offender seeking to rely on 'Bugmy factors' must always adduce evidence of their disadvantage;[72] courts will not have regard to it automatically in the way prescribed by *Gladue*.
61. Canadian prosecution services have also attempted to address the systemic disadvantage experienced by Indigenous people. The Public Prosecution Service of

[70] *R v Gladue* [1999] 1 SCR 688 [91].
[71] Ibid [93].
[72] *Bugmy v The Queen* [2013] HCA 37; 249 CLR 571 [36].

Canada (PPSC) recently updated its guidelines regarding the decision to prosecute. The new guidelines require prosecutors to:

a. Challenge their unconscious bias in relation to the accused;
b. Consider the background of the accused, including any systemic factors that may have 'played a role in the commission of the crime;'
c. Familiarise themselves with the concerns and needs of the relevant communities, including information on whether the community is over-policed;
d. Rebut the presumption of non-prosecution where evidence of state-misconduct (including racial profiling) has been identified; and
e. Consult with colleagues, where reasonable, about the decision to prosecute.[73]

Approaches towards victims

62. Relative to the resources directed towards Indigenous accused people, as in Australia, in Canada there appears to be less of a focus on the experiences of Indigenous victims. Whilst Canada promotes mechanisms to represent the voices of victims—such as through victim impact statements, and funding witness assistance officers—these are not specifically tailored to First Nations victims.
63. One difference to the Australian approach is provided within Canada's Criminal Code. The Criminal Code requires sentencing courts to have specific regard to Aboriginal female victims of crime. S 718.04 provides that where an offence involves "*…the abuse of a person who is vulnerable because of personal circumstances—including because the person is Aboriginal and female—the court shall give primary consideration to the objectives of denunciation and deterrence*".[74] Whilst this provides greater recognition

[73] Information provided by the Public Prosecution Service of Canada.
[74] *Criminal Code* (R.S.C., 1985, c. C-46) s 718.04.

of Aboriginal women and girls at sentencing, as discussed above, many of the issues associated with First Nations victimisation arise before this stage in proceedings.

Aotearoa/New Zealand (NZ)

64. NZ experiences a similar over-representation of Māori within its criminal justice system. The Ministry of Justice has found that 38% of Māori were victims of crime within a 12-month period, compared with 30% in the non-Māori population.[75] Further, although Māori constitute 30% of NZ's population, they make up 51% of the prison population.[76] In spite of this, NZ has made significant advances in recognise the cultural complexities that attach to Māori victimisation and criminalisation.

Tikanga Māori & Te Ao Mārama

65. Tikanga Māori encompasses Māori law, but also includes ritual, custom, and spiritual and socio-political elements that go well beyond the legal domain.[77] It has been recognised as one of the elements of the common law in NZ, and has recently been used for a series of innovative legal purposes.[78] The general acceptance of Tikanga Māori within NZ's legal system allows both the Crown and the accused to call upon customary principles to promote cultural safety where needed. This has been identified as one reason for the lack of formal mechanisms within NZ to promote the rights, concerns and experiences of Māori victims and accused people.

---

[75] New Zealand Ministry of Justice, "Māori victimisation in Aotearoa New Zealand" (Report, April 2021) < Maori-victimisation-report-v2.02-20220214-fin.pdf (justice.govt.nz)>.
[76] Jarrod Gilbert, "Maori incarceration rates are an issue for us all" *New Zealand Herald* (Online, 27 April 2016) <Jarrod Gilbert: Maori incarceration rates are an issue for us all - NZ Herald>.
[77] Nā Carwyn Jones, "Tikanga Maori in NZ Common Law" (Online blog post, 15 September 2020) *New Zealand Law Society – Lawtalk* <NZLS | Tikanga Māori in NZ Common Law (lawsociety.org.nz)>.
[78] Pete McKenzie, 'Explosion of ideas': how Maori concepts are being incorporated into New Zealand law" (Online, 17 October 2021) *The Guardian* <'Explosion of ideas': how Māori concepts are being incorporated into New Zealand law | New Zealand | The Guardian>.

66. A further strategy to improve the wellbeing of Māori victims and accused people is the Te Ao Mārama – Enhancing Justice for All initiative. This is being developed in the NZ District Court "*…for the benefit of all people who are affected by the business of the court, including defendants, witnesses, victims, parties to proceedings and whānau (wider families)*".[79] The Te Ao Mārama initiative seeks to emphasise restoration, rehabilitation and healing. It also seeks to implement judicial best practices from the existing Specialist Courts, which include:
    a. Using plain language to improve understanding;
    b. Reducing formalities in court to improve understanding and participation;
    c. Incorporating tikanga Māori processes or other appropriate cultural processes that may be relevant to the parties;
    d. Improving the quality of information available to judicial officers to make well-informed decisions;
    e. Inviting community, iwi and whānau (tribe and family) into the courtroom; and
    f. Identifying and addressing underlying issues and barriers to participation.[80]
67. The whole-of-system approach to recognising Tikanga Māori within NZ should serve as an aspiration for the Australian legal system. However, the relative homogeneity of the Māori ethnic group and the widespread use of te reo Māori language distinguishes the experience of First Nations New Zealanders from First Nations Australians. This distinction suggests that incremental, targeted reforms such as those being pursued in the Te Ao Mārama initiative might better serve Australian jurisdictions.

[79] District Court of New Zealand, "About the Te Ao Mārama – Enhancing Justice for All initiative" (Webpage) <About the Te Ao Mārama – Enhancing Justice for All initiative | The District Court of New Zealand (districtcourts.govt.nz)>.
[80] Ibid.

Submission No 14

INQUIRY INTO FAMILY RESPONSE TO THE MURDERS IN BOWRAVILLE

Name: Professor Diana Eades

Date received: 26/02/2014

SUBMISSION to
Law and Justice Committee
New South Wales Legislative Council

Inquiry: Family response to the murders in Bowraville

Dr Diana Eades, FAHA
Consultant Sociolinguist and Adjunct Professor
University of New England

26 February, 2014

Contents

Summary

Aboriginal people in NSW speak some form of English as their main and first language (and typically their only language). But this English (often referred to as "Aboriginal English") has developed over the past 200 years or so, with influences from traditional Aboriginal languages and cultures, and it is not always the same as English spoken by other Australians.

Subtle differences between Aboriginal and non-Aboriginal ways of speaking English can result in miscommunication, especially where people are unaware of the differences. The report provides examples of such differences in accent, grammar, meaning, non-verbal communication, silence and language functions. Of particular relevance are differences in the way that information is sought: a fundamental assumption about communication in mainstream Australian society is that asking questions is essential for finding out information. But this is a cultural assumption, which is not shared with many Aboriginal societies, where important information is often sought in less direct ways. The submission outlines some of the resulting problems for intercultural communication, particularly in the legal system, and indicates sources of more detailed information.

The three appendices point to the relevance of research on Aboriginal ways of using English to the Bowraville families specifically, in their more than two decades of engagement with the legal system. Appendix A is the expert report I prepared on these matters for the 2006 Supreme Court trial for the murder of one of the children. Appendix B comprises the draft jury directions about Aboriginal ways of speaking English which I recommended for the trial. Appendix C provides some comments about

evidence I observed during that trial which illustrate concerns about the need for jurors to be informed about Aboriginal ways of speaking English.

The submission recommends that committee members be provided with the opportunity to become informed about important aspects of Aboriginal English and communication relevant to its inquiry work with the Bowraville community members. It also recommends that the committee investigate language and communication issues involved in the community's engagement in the legal process since 1991, with a view to making recommendations about improved communication between the law and Aboriginal people in future.

1. Introduction

This submission concerns language and communication issues which I believe are relevant to the inquiry by the Standing Committee on Law and Justice into the family response to the murders in Bowraville. In my view, an understanding of research on Aboriginal ways of speaking English is relevant for two reasons:

(1) it will help the committee to make the most of the opportunities to fully hear what the Bowraville families want to tell the inquiry,

(2) it will shed some light on factors which have led the families to be so frustrated with their attempts to tell their stories within the legal process over more than two decades.

2. Author's expertise relevant to the inquiry

I am a consultant sociolinguist, Adjunct Professor in the School of Behavioural, Cognitive and Social Sciences at the University of New England, and Fellow of the Australian Academy of the Humanities. For more than three decades, I have specialised in Aboriginal ways of speaking English, focusing particularly on the legal process since 1986. I am the sole author of three books about language in the legal process: the lawyers' handbook titled *Aboriginal English and the Law* (1992, Queensland Law Society), the research book titled *Courtroom Talk and Neocolonial Control* (2008, Mouton de Gruyter) and the university textbook titled *Sociolinguistics and the Legal Process* (2010, Multilingual Matters). In addition, I am the the sole author of *Aboriginal Ways of Using English* (2013, Aboriginal Studies Press), the editor of two other linguistics books, and the sole author of more than 65 scholarly book chapters, journal articles and encyclopaedia entries. Since 2006 I have been co-editor of the *International Journal of Speech Language and the Law*. Further information about my expertise can be found on http://www.une.edu.au/staff-profiles/deades

3. Intercultural communication: Aboriginal and non-Aboriginal people in NSW

Aboriginal people in NSW speak some form of English as their main and first language (and typically their only language). But this English (often referred to as "Aboriginal English") has developed over the past 200 years or so with influences from traditional Aboriginal languages and cultures, and it is not always the same as English spoken by other Australians.

Although many of the differences between Aboriginal and non-Aboriginal ways of speaking English are subtle, they can result in miscommunication, especially where people are unaware of the differences. These differences can happen at every level of language, as the following brief examples illustrate:

accent: For example, non-Aboriginal people can get confused when an Aboriginal person says what sounds like "air shairt" – this is "her shirt" with an Aboriginal accent.

grammar: For example, many Aboriginal speakers of English use a grammatical pattern from the traditional languages in which two noun phrases are put together to make a descriptive sentence (such as "She a little girl") or a locational sentence (such as "My Uncle Jim back there"). Other Australian speakers of English use the verb "to be" in such sentences, such as "is" or "was".

semantics: For example, many English words don't have quite the same meaning in Aboriginal societies, because of the way that words are embedded in cultural experiences. Thus, for many Aboriginal speakers of English, the word "mother" can refer to the woman who gave birth to someone, and that woman's sisters.

non-verbal communication: For example, many Aboriginal people communicate direction with head or lip movement rather than words.

silence: There is a fundamental difference between Aboriginal and non-Aboriginal societies in the way that silence is used and interpreted. Research shows that the "standard maximum tolerance for silence" in many western interactions is about one second. After about one second or less, in many conversations or interviews, people feel uncomfortable with silence and someone will say something to fill it in. In an interview, a person who doesn't answer a question within about one second is often taken to be evasive or dishonest. In many Aboriginal societies, on the other hand, people are brought up to feel comfortable with much longer silences in conversations and in more formal situations. Aboriginal people do not use silence in every interaction, but when they do use silence, it is typically seen as positive, indicating that people are taking time to think about important matters, for example.

language use: There are several differences in language function (in addition to structure, word meaning and accent). For many Aboriginal people, information seeking relies less on questions than in western societies. A fundamental assumption about communication in mainstream Australian society is that asking questions is essential for finding out information. But this is a cultural assumption, which is not shared with many Aboriginal societies, where important information is often sought in indirect ways, for example by sharing some knowledge on a topic, and waiting for the other person to contribute their own knowledge. A widespread assumption in Aboriginal societies is that information is shared with people in relationships where there have been opportunities to build up trust. In many situations where Aboriginal people are interviewed by non-Aboriginal people, repeated questions are at the basis of intercultural miscommunication. However, this

miscommunication is often unrecognised by non-Aboriginal people. A particularly problematic aspect of this miscommunication can result from the Aboriginal use of gratuitous concurrence in interviews – that is, the interviewee answering 'yes' to a question (or 'no' to a negative question), regardless of whether or not they actually agree with the question, or even understand it. The interviewer might assume that 'yes' answers indicate the interviewee is agreeing with the question. But such answers might instead reflect the interviewee answering in the way in which the interviewer appears to want them to respond (often in the hope of bringing the interview to an end).

This section has provided a few summary examples of Aboriginal ways of using English which I believe are relevant to the Committee's communication with the Bowraville families, and understanding of their communication with the legal system over more than two decades. More detailed information can be provided, in writing or in person, and I refer the committee to my 2013 book *Aboriginal Ways of Using English* (published by Aboriginal Studies Press), and see also Appendix A.

4. Being bicultural

Many Aboriginal people in NSW have considerable bicultural skills, and can use English in an Aboriginal way when they are in Aboriginal contexts, and switch to using English in a mainstream Anglo way when they are in mainstream contexts (a similar ability to being bilingual).

Learning to become bicultural comes after prolonged and successful interactions in the second culture. This is often achieved through education or employment, as well as participation in groups such as leisure, sporting, and religious groups. Many Aboriginal people in Bowraville, as in other towns, cities and rural areas of the state, have not had opportunities to develop much bicultural ability.

5. Relevance of research on Aboriginal ways of using English to the legal system generally

The legal process relies on interviews: from police investigations, to consultations with lawyers, to testimony in court. Research over more than two decades has highlighted ways in which Aboriginal people's participation in the legal process is impacted by communication differences, such as those briefly outlined in Section 3; see also Appendix A. (For more detailed information, see my 1992 lawyers' handbook *Aboriginal English and the Law* and my 2013 book *Aboriginal Ways of Using English*).

Aboriginal witnesses are often disadvantaged in their participation in the legal process. A person's story and how they tell it and answer questions about it is central to how they are evaluated throughout the legal process. For example, if police officers, lawyers, magistrates, judges or jurors think that waiting for more than a second indicates that a person is not willing or able to answer the question and/or tell the truth, then an Aboriginal person for whom silence has a positive meaning is clearly at a disadvantage.

6. Relevance of research on Aboriginal ways of using English to the Bowraville families specifically

In 2006, the author was asked to prepare an expert report for the court in which a defendant was on trial for the murder of Evelyn Greenup. This report is attached as Appendix A. In brief summary, this report:

- outlines the research methods and theoretical principles and terms used in the research on which the report is based;
- outlines some features of Aboriginal English and culture in Bowraville;

- provides an overview of features of Aboriginal English relevant to legal contexts;
- summarises some key communication features of Aboriginal English which are of particular importance in how people give and seek information;
- provides suggestions about ways in which the communication differences outlined in the report can be addressed in police interviews and courtroom hearings; and
- provides specific information about possible jury directions concerning Aboriginal English speaking witnesses.

In order to avoid an overlong submission, I would like to direct the committee to this report in Appendix A for its explanations of language and communication issues relevant to the Bowraville families, in relation to both the Committee's engagement with them in this Inquiry, and the legal system's various engagements with them over more than two decades.

7. Recommendations about the process of this inquiry

In my respectful submission, it will be important for the committee members to have an understanding of the language and communication issues raised in this document before visiting the community and beginning the process of taking oral submissions with the families. Even with the best intentions, it can be difficult for non-Aboriginal people seeking information to facilitate a communicative environment in which Aboriginal people feel that they can talk freely and that their stories are being properly heard.

A number of practical issues will impact the quality of the evidence provided to the committee, including

- the kinds of questions that are asked,
- the way that questions are asked,
- the way that answers are received,
- the alternative ways that information is sought (ie not through questions)
- arrangements for hearings and informal information gathering

I would be happy to provide more detailed comments about issues such as these.

8. Recommendations about the broader issues relevant to this inquiry

Public statements from the families over a number of years have made it clear that they are disappointed and frustrated with many of their dealings with the legal process. At the same time they have felt listened to and respected in other dealings (particularly with detectives from NSW Homicide). In my view, many Bowraville family members are in a good position to bring to light some very important issues related to what works and what doesn't work when Aboriginal people in NSW participate in the criminal justice process. (Several of these issues were discussed clearly in the public meeting in Bowraville on 11 December 2010).

I suggest that the committee's investigation of the experience of the Bowraville families with the criminal justice process could lead to recommendations in areas such as:

(i) Improvements in communication between investigating police officers and Aboriginal people, including specific training needs

(ii) Compulsory training for lawyers and judicial officers about communication with Aboriginal people

(iii) Attention, and where necessary amendments to, guidelines, regulations and legislation which would enable Aboriginal people to more freely and fully tell what they know in the investigation of crimes. This is particularly relevant to police interviewing practice, and courtroom evidence.

For example, there would be considerable advantages in many Aboriginal witnesses communicating their evidence-in-chief in narrative form. Section 29 (2) of the Evidence Act makes provision for witnesses to do this, but my understanding is that this is rarely used. It would also be useful for the committee to consider whether Section 41 which gives the court the power to disallow "improper questions" is sufficiently understood and used in relation to Aboriginal witnesses.

(iv) Ways in which jurors can be alerted to possible areas of miscommunication with some Aboriginal speakers of English. In Section 6 of my expert report in the 2006 Bowraville murder trial (see Appendix A), I recommended the use of jury directions about Aboriginal ways of speaking English. (I attach to this submission as Appendix B a draft for possible jury directions prepared just before the trial). After brief discussion with the defence and the prosecution, the court decided not to use such directions. Appendix C provides some comments about evidence I observed during that trial which shows why jurors need to be informed about Aboriginal ways of speaking English.

I understand that the legal issues involved in such jury directions are considerable. Nevertheless, in my respectful submission, the fact they are used in Northern Territory and Western Australia suggests that there is scope for considering their use in New South Wales. I believe that the major obstacle preventing serious consideration in this state is the mistaken view that Aboriginal

people here are somehow not sufficiently distinct from other Australians. This view misunderstands the extent to which Aboriginal culture continues in this state, and how it influences communication.

In its 2013 report on jury directions, the NSW Law Reform Commission (NSWLRC) was reluctant to make any decision about directions concerning communication with Aboriginal witnesses. On this issue it took the position that "the content of directions that may be required in the NSW context should be the subject of further consideration by the Judicial Commission, involving consultation with NSW Indigenous and other communities and experts in the fields of culture and linguistics of relevance to those individual communities" (#5.133). I hope that this inquiry will take up this issue, given its relevance to the participation of Bowraville community members and many other Aboriginal people in the legal process.

9. Conclusion

In my view, the families of the murdered Bowraville children can provide the government's Law and Justice Committee with detailed information and examples about ways in which the legal process has failed Aboriginal people in NSW. In order to properly hear this evidence it will be important for the Committee to have an understanding of language and communication issues raised in this report, including the Appendices. I hope the inquiry's investigation of language and communication issues involved in the Bowraville community's engagement with the law since 1990 leads to recommendations which can result in substantially improved communication between the legal system and Aboriginal people.

Family Response to the Murders in Bowraville - Post-hearing response
Diana Eades,
27 May, 2014

Question on notice:
p18: *Please take on notice producing examples of where there is such a jury direction in other jurisdictions and consider whether you think we should recommend to the Attorney General or the Judicial Commission in New South Wales the adoption of a similar jury direction.*

1. The jury direction being referred to:

Sometimes referred to as "Mildren directions" or "Mildren-style directions", these directions are "designed to assist a jury assessing the evidence of Aboriginal witnesses and/or an Aboriginal accused's record of interview. This is achieved by drawing the jury's attention to the possibility that sociolinguistic features of an Aboriginal witness' evidence may lead to misunderstandings" (Fryer-Smith 2008: #7.4.1).

Mildren (1997: 14) points out that the directions "would obviously have to be moulded to the circumstances of the case". And an important feature of the directions is the explicit warning of variation in the ways that Aboriginal people use English, as well as the frequent use of modifying expressions such as "many Aboriginal people", "often", and "may". That is, the directions should be impossible to apply in a categorical manner, and jurors should be explicitly reminded that it is their "function to decide which evidence [they] accept, and which evidence [they] reject" (Mildren 1997: 21; CJC 1996: A9).

2. Background

These jury directions originated with Justice Dean Mildren (Northern Territory Supreme Court), who wrote about it in his 1997 *Criminal Law Journal* paper (Mildren 1997). A version of the directions was also published as an Appendix to that paper (paper including Appendix attached).

In 1995, the Criminal Justice Commission in Queensland asked Mildren J and myself to prepare a pro forma set of directions to be given to juries in Queensland cases involving witnesses who are speakers of Aboriginal English (published in CJC 1996 p A9-11, see also Mildren 1997, 1999).

These directions have also been published in Queensland Supreme Court's 2005 *Equal Treatment Benchbook* (Appendix B in chapter 9) and discussed in the NSW and WA equivalents (Judicial Commission of New South Wales 2009 and Fryer-Smith 2008).

3. Jurisdictions where Mildren-style directions are used

Northern Territory

I have been advised by Justice Mildren (May 2014) that the direction is still used by judges in the NT, in some (but not all) cases involving Aboriginal witnesses.

Western Australia

I understand that the directions are used in some cases involving Aboriginal witnesses, but have been unable to get up-to-date information.

Queensland

Despite the 1996 recommendation of the Queensland Criminal Justice Commission (CJC 1996: and Queensland Supreme Court *Equal Treatment Benchbook*, I understand that the direction is not widely used in Queensland (see Lauchs 2010: 17). However, Justice Mildren (personal communication, May 2014) advised me that it has been used by the resident judge in Cairns.

other jurisdictions:

I am unaware of the use of such directions in other jurisdictions.

4. Judicial consideration of Mildren-style directions

To my knowledge there is one case which deals with Mildren-style directions, but not as binding authority: *Stack v State of WA* (2004) 29 WAR 526. The Aboriginal Benchbook for Western Australia Courts (Fryer-Smith 2008: #7.9) summarised the relevant part of that decision:

[START OF QUOTATION FROM FRYER-SMITH 2008: #7.9]

Case: *Stack v the State of Western Australia* (2004) 29 WAR 526

Facts: the Aboriginal applicant, a resident of Perth, had been charged with wilful murder and unlawful wounding. Five Aboriginal witnesses were to be called. At the commencement of the trial the trial judge had given Mildren directions to the jury. In his final directions, the trial judge had referred again to the Mildren directions given at the commencement of the trial. He stated that whether any of the matters canvassed in those directions was relevant to the evidence of any of the Aboriginal witnesses was solely a matter for the jury to decide. The applicant was convicted and later sought leave to appeal on the ground inter alia that the trial judge had erred in respect of his final directions to the jury.

The appeal succeeded on other grounds (see #7.5.9 [of Benchbook]). However, each member of the Court of Criminal Appeal commented upon the fact that the trial judge had given Mildren directions. Murray J commented that it was "undesirable and unfortunate that his Honour made the preliminary observations he did without any substratum of fact properly proved before the jury in the ordinary way":

> "What was said by the Judge was calculated to cause the jury, in their evaluation of the credibility of such witnesses, to approach a consideration of their evidence sympathetically, making allowances for cultural differences which might or might not have been having an impact on the testimony given by the witnesses. The potential for unfairness to the applicant is manifest, in my respectful opinion." [1]

Murray J observed that the trial judge, in his closing remarks, had done no more than to invite the jury to consider whether the matters referred to in his Mildren directions had to be taken into account in assessing the witnesses' credibility. As the trial judge had "properly" left the matter in the hands of the jury, Murray J dismissed the application for leave to appeal.

Steytler J held that the trial judge had very properly and specifically told the jury that whether or not the issues which he had remarked upon bore

[1] 2004) 29 WAR 526 at [19] per Murray J.

upon the evidence of any particular witness and if so, in what way and to what extent, was for them to assess. His Honour considered that the giving of Mildren directions might be appropriate in certain cases, but noted that in the instant case the applicant was an urban dweller.

Templeman J, having allowed the appeal on other grounds, did not express a concluded view in respect of this particular ground of appeal. However, his Honour considered that it had been inappropriate for the trial judge to have given the Mildren directions. Templeman J expressed the view that a trial judge should not anticipate evidence which might be given, or the manner in which it might be given. In giving the Mildren directions, the trial judge had failed to comply with s 638 *Criminal Code* which provides that judicial comment about the evidence should not be made until after the prosecution and defence have closed their respective cases. The trial judge did not identify the evidence to which his initial observations might have related, and therefore he was not making observations on the evidence, but on Aboriginal witnesses in general. Templeman J expressed doubt that the trial judge's non-compliance with s638 *Criminal Code* had been cured by his directions to the effect that it was for the jury to decide matters of fact, including whether and how his observations bore upon the evidence of any particular witness in the case.

Note: Section 638 *Criminal Code* has been repealed, but s 112 of the *Criminal Procedure Act 2004* (WA) (CPA) is in similar terms. Section 112 CPA provides that a trial judge may make any observations about the evidence that the judge thinks necessary in the interests of justice, after the prosecution and defence have given final addresses to the jury.

[END OF QUOTATION FROM FRYER-SMITH 2008: #7.9]

5. Possible Mildren-style directions for NSW

5.1. Reason for recommendation

In my view, some form of Mildren-style directions, prepared for NSW, should be used in relevant cases in this state. As I explained in my submission to the Inquiry, the experiences of some of the Bowraville Aboriginal witnesses in the 2006 trial (for the murder of Evelyn Greenup) provided examples where it is possible that lack of understanding about differences in communication could unfairly influence assessment of a witness's reliability and/or credibility. For example, during this trial, I observed that Aboriginal use of silence was accommodated by lawyers: witnesses were on several occasions given time to answer questions, and there were silences of more than one second between the question and its answer. However, given the widespread reaction in western Anglo conversations around the world, including Australia, that silence in answer to a question can mean evasion, it would have been important for jurors to be advised that silence does not typically have this meaning in Aboriginal conversations. The silences that were allowed for Aboriginal witnesses in this trial would have served to assist them to give their answers. However, these silences had the real potential of causing the jurors, who were not informed about cultural differences in the use and interpretation of silence, to assess these witnesses as not entirely trustworthy or reliable.

Other features of Aboriginal communication style which also have the potential to impact unfairly on jurors' assessment of a witness's credibility and reliability include gratuitous concurrence (or sociolinguistic reasons why Aboriginal

witnesses may be particularly suggestible), the way in which specific information is given, and eye contact. These issues have been dealt with in my submission to this Inquiry, (see especially Appendix B) and are dealt with in my research over decades (see e.g. Eades 2013).

5.2. NSW *Equality before the Law* benchbook

The NSW *Equality before the Law* Benchbook (p2310) points out the importance of alerting the jury to "relevant cultural differences" in cases involving Indigenous witnesses. In my view, this can be accomplished by a version of the Mildren directions. The NSW Benchbook also says this should happen … "early in the proceedings":

> If appropriate, alert the jury to the fact that any assessment they make based on an Indigenous person's communication style must, if it is to be fair, take into account any relevant cultural differences. This may need to be noted early in the proceedings rather than waiting until you give your final directions to them — 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.

5.3. NSW Law Reform Commission (NSWLRC) 2012 report #136

In its 2012 report on jury directions, the NSW Law Reform Commission (NSWLRC) was reluctant to make any decision about directions concerning communication with Aboriginal witnesses. On this issue it took the position that "the content of directions that may be required in the NSW context should be the subject of further consideration by the Judicial Commission, involving consultation with NSW Indigenous and other communities and experts in the fields of culture and linguistics of relevance to those individual communities" (#5.133).

5.4. My recommendation

I urge this committee to recommend to the Attorney General or the Judicial Commission the adoption of Mildren-style directions.

In my submission to the Inquiry I mentioned the difficulty which could arise in the legal/judicial acceptance of the idea of such directions. This is that I believe that the major obstacle preventing serious consideration in this state is the widespread, but mistaken, view that Aboriginal people here are somehow not sufficiently distinct from other Australians. This view misunderstands the extent to which Aboriginal culture continues in NSW, and how it can influence communication, particularly when it involves Aboriginal people who have not had the chance to develop much bicultural ability. Related to this point, I believe that Steytler J's (obiter dicta) suggestion in the WA *Stack* case that the Mildren-style directions were not relevant to an Aboriginal witness who is "an urban dweller" misunderstand the nature of contemporary Aboriginal cultures, and the reality that Aboriginal ways of communicating are still being used by some people in cities. (But my comment here should not be taken to express a view about this particular witness in the *Stack* case, whose language I have not heard or examined, and about which I have not formed any opinion).

Thus, in NSW, the use of Mildren-style jury directions is likely to be a challenging issue, while ever there is a widepsread lack of understanding about

Aboriginal culture, and about the fact that while many Aboriginal people in NSW are bicultural, there are many who are not. Further, these issues related to bicultural ability should be briefy explained in NSW jury directions, as for example in my suggested directions in the 2006 Bowraville murder trial (submitted to the Inquiry as Appendix B of my written submission).

While I am not legally trained, I am aware that the legal issues can be complex. But in my view, this does not mean they should be ignored: a point highlighted by the experience of Bowraville Aboriginal people over many years in the legal process. I suggest that the Judicial Commission – perhaps with the assistance of the National Judicial College of Australia – could investigate this issue, and should draw on the relevant expertise and long experience of Justice Dean Mildren, Justice of the Northern Territory Supreme Court from 1991-2013, and currently Acting Judge. It would also be relevant to consult with the judiciary in Western Australia, where I understand this issue is also being explored, and where the Aboriginal population includes more diversity than in the Northern Territory. (Thus in some of the southern urban and rural areas of WA, there are Aboriginal people and communities which are quite similar in culture and language usage to many in NSW).

Perhaps a working group comprising legal, sociolinguistic and Aboriginal experts could start with the currently available versions of Mildren-style directions (which overlap to a considerable degree) and consider how they would need to be modified to be suitable for NSW, and what kinds of measures need to be taken to ensure that judicial officers and lawyers understand the directions and the reasons for their use.

Attachment:

Mildren, D 1997. Redressing the imbalance against Aboriginals in the Criminal Justice System. *Criminal Law Journal* 21(1): 7–22. Includes example of directions.

Other versions of Mildren-style directions are found in

(i) CJC (Criminal Justice Commission). 1996. *Aboriginal Witnesses in Queensland's Criminal Courts*. Brisbane: Criminal Justice Commission. pages A9-11.

(ii) the WA *Stack* decision discussed in Section 4 above. The Mildren-style directions given by the trial judge are appended to the decision.

(iii) Queensland Supreme Court. 2005 *Equal Treatment Benchbook*. Chapter 9, Appendix B.

(iv) Appendix B of my submission to the Inquiry (copy of my suggested jury directions in the 2006 trial for the murder of Evelyn Greenup).

Other references

Eades, D. 2013. *Aboriginal Ways of Using English*. Canberra: Aboriginal Studies Press.

Fryer-Smith, S. 2008. *Aboriginal Cultural Awareness Benchbook for Western Australian Courts*. 2nd edition. Perth: Australian Institute of Judicial Administration.

Judicial Commission of New South Wales 2009 *Equality before the Law Benchbook*. Sydney: Judicial Commission of New South Wales.

Lauchs, Mark 2010 Rights Versus Reality: The difficulty of providing "access to English" in Queensland courts. Report published by Faculty of Law, Queensland University of Technology, Brisbane.

Mildren, D. 1999. Redressing the imbalance: Aboriginal people in the criminal justice system. *Forensic Linguistics* 6(1): 137-160.

Submission to ***Missing and Murdered First Nations Women and Children***

Australian Senate Inquiry

From: Diana Eades, PhD, FAHA, Adjunct Professor, University of New England

Date: 11 November 2022

Table of Contents

Diana Eades

1 SUMMARY

1. Despite the criminal law's long experience with First Nations people, there are well documented failures in its engagement with them. While there are many reasons for these failures, it is my opinion that this Inquiry must recognise and address language and cultural issues impacting the law's communication with First Nations people, in relations to Terms of Reference (c), (b) and (d).
2. Cultural and linguistic issues are central to any consideration of the law's engagement with First Nations people. Culture comprises ways of thinking, believing and acting, that include shared background knowledge, shared language/dialect and shared norms, assumptions and expectations.
3. The disjunction between the culture of the law and the culture of Aboriginal societies is at the heart of the communication issues in this submission. Some of the cultural beliefs and practices of the law are shared within the wider western society, but they are not necessarily shared with Aboriginal societies.
4. Many non-Aboriginal people whose work involves responding to Aboriginal people reporting violence are likely to be unaware of differences in language and culture that impact their work.
5. Section 6 of this submission will present some of the cultural and linguistic practices relevant to the participation of Aboriginal people in the law. Some of the practices within legal settings that can impair the law's ability to listen to Aboriginal people include:

   (a) Rushing people, not allowing enough time for conversations and interviews.

   (b) Not taking time to build up rapport before asking questions about substantial, complex and sensitive issues and expecting final answers to such questions

   (c) Limiting the opportunity for people to fully tell their story by
   (i) asking too many questions
   (ii) not making space for Aboriginal silence in interviews or conversations
   (iii) focusing in interview questions on a chronological structure of accounts/stories
   (iv) focusing in interview questions on eliciting specific details through the use of numbers (in contrast to other ways that specific details can be provided)
6. In order to keep within a reasonable length, this submission outlines some of these key issues. Further details can be found in publications such as Eades 1992, 2003, 2008, 2013, 2016, and Malcolm 2018.
7. There are many different ways of being Aboriginal, and this submission, like my research, provides some generalisations based on decades of research and experience. It is important, however, not to go beyond (unavoidable)

generalisations to overgeneralisations. Ignoring individual differences, life experiences and choices can lead to overgeneralisations, such as "she's Aboriginal, so she must speak or think in a certain way …". Thus, my generalisations about Aboriginal ways of communicating generally use qualifications such as "many Aboriginal people" or "often" or "tend to".

2 INTRODUCTION

2.1 Background of person making submission

8. I am a linguist with specialised training and over 50 years' experience in sociolinguistics and anthropological linguistics, with a particular focus on communication between Aboriginal and non-Aboriginal speakers of English, primarily in legal contexts. I have published extensively in this field, with more than 60 book chapters and scholarly journal articles. My books include
    a) the lawyers' handbook *Aboriginal English and the Law* (1992, Queensland Law Society);
    b) the sociolinguistics research book *Courtroom Talk and Neocolonial Control* (2008, Mouton de Gruyter);
    c) the university textbook *Sociolinguistics and the Legal Process* (2010, Multilingual Matters); and
    d) an invited edited selection of some of my papers originally published over a 30-year period, titled *Aboriginal Ways of Using English* (2013, Aboriginal Studies Press).
9. Over more than 35 years I have given expert linguistic evidence in the Federal Court, as well as courts and tribunals in New South Wales, Queensland, Western Australia and the Northern Territory. I have also provided training in several jurisdictions to judicial officers and lawyers about communicating with Aboriginal people in legal settings, over this time period.
10. My work on communication with Aboriginal speakers of English is widely cited in court benchbooks, judicial decisions, and legal scholarship (details can be provided).

2.2 Terms of reference addressed in this submission

11. I make this submission in response to the invitation from the Standing Committee on Legal and Constitutional Affairs (email 16 August 2022), drawing on my expertise and experience summarised above. (A CV can be provided).
12. The focus of my submission is on specific linguistic and sociolinguistic issues impacting the participation of Aboriginal people in the legal process. I advise that

a) I have no expertise in the languages and cultures of Torres Strait Islander people. Thus, my submission is about the law's communication with Aboriginal people specifically, rather than First Nations people generally. However, some of these issues raised in my submission may also be relevant to Torres Strait Islanders.

b) While my research and experience in the last three decades has focused primarily on legal contexts, I understand that many of the issues I raise about communication may not be restricted to legal contexts, but may also be relevant to other institutional contexts, for example in the child protection system.

c) my knowledge about how the law communicates with Aboriginal people is not restricted to women and/or children.

d) I have no expertise on the topic of violence.

13. My submission addresses significant parts of three of the Terms of Reference, namely:

14. TOR (c) *the … policies and practices implemented in response to all forms of violence experience by First Nations women and children*. My submission addresses the communication involved in the various ways in which the law responds to Aboriginal victims of violence and their families, for example in interviews by police, meetings with lawyers, and courtroom hearings.

15. TOR (b) *the current and historical practices, including resources, to investigating the deaths and missing person reports of First Nations women and children …*. There are many reasons why Aboriginal people face obstacles in reporting violence. This submission focuses on one of these reasons, namely assumptions and misunderstandings about language and communication that underlie the policies and practices of the law. This report will show why meaningful communication with Aboriginal people, especially on issues as serious as deaths and missing persons, can require investigators to take more time than may be expected to be necessary. Related to these policies and practices that have been developed within the culture of the law, is the need for more resources to be allocated to investigations into missing and murdered Aboriginal women and children.

16. TOR (d) *underlying … cultural … causes contributing to particular vulnerabilities of First Nations women and children*. An important "underlying … cultural … cause… contributing to particular vulnerabilities of First Nations women and children" is that the practices within the law for hearing and assessing victims of crime is at odds with Aboriginal ways of communicating. Thus, in addition to the vulnerabilities which Aboriginal women and children encounter in terms of violence, they are vulnerable to the (often unrecognised) problem of the disjunction between the culture of the law and Aboriginal cultures. This

submission will show how this impacts the legal system's ability to properly hear and understand what they and their families try to tell police, lawyers and courts.

3 LINGUISTIC ISSUES

3.1 People speaking a traditional language or Kriol as their main language

17. In many areas of the Northern Territory, Western Australia and South Australia, as well as some areas of north Queensland, traditional Aboriginal languages are the main language for some First Nations people. Many of these people require interpreting assistance in talking to police officers or lawyers or when giving evidence in court.

18. This includes many speakers of Kriol, the fastest growing Aboriginal language in the country, widely spoken across the Top End of Australia (excluding Arnhem Land) from western Cape York (Qld) to Broome (WA) and south to Tennant Creek (NT). Kriol is historically related to English, as well as to traditional languages, but it is considered a separate language by linguists. One key reason for this is that Kriol speakers and English speakers cannot properly understand each other (unless one of them knows both languages). However, many people, including many Kriol speakers, call it English. Some superficial similarity of English and Kriol creates intercultural communication problems which are often unnoticed, particularly by English speakers, and which can have far-reaching consequences.

19. It is often unhelpful to ask an Aboriginal person about their English proficiency, as self-assessments of language proficiency are not necessarily accurate. Many Aboriginal people use some English in basic communication with non-Aboriginal people. But this does not mean that they necessarily have sufficient English proficiency to successfully participate without an interpreter in police interviews, lawyer meetings, or to successfully give evidence in court (see *WA v Gibson* 2014 WASC 240).

20. The Judicial Council on Cultural Diversity (JCCD 2022), drawing on work by the Northern Territory Aboriginal Interpreter Service, has provided guidance to be followed in deciding whether an Aboriginal witness needs an interpreter in court (Annexure 4: Four-Part Test for Determining Need for an Interpreter). While this guidance has been prepared for courts, much of it is also relevant to any other contexts where speakers of a language other than English are participating in interviews, especially, but not only, in legal contexts.

21. Contrary to common misconceptions, it is acceptable and professional for someone to communicate with an interpreter some of the time and communicate in English some of the time (for example in court). It is unlikely to be obvious to standard English speakers (and at times Aboriginal language speakers) when the

need arises, so the decision to call on the interpreter is best left to the interpreter and/or (at times) the Aboriginal speaker.

3.2 Aboriginal English speakers

22. Throughout Australia, many Aboriginal people speak English, but often with subtle differences from the English spoken by non-Aboriginal people. Many of these differences reflect continuities from the traditional languages and cultures of the region. The term Aboriginal English refers to the (dialectal) varieties of English spoken by Aboriginal people, which differ, often in subtle ways, from varieties of Australian English.
23. There are some differences between Aboriginal English in various regions of the country, but there is also much that is shared. It is common to use to the term "light" to refer to varieties that differ least from standard Australian English, and "heavy" to refer to varieties that differ most from standard Australian English.
24. Cultural and linguistic differences in how people use English can affect communication between Aboriginal and non-Aboriginal people, and sometimes they can cause non-Aboriginal people to misunderstand what an Aboriginal person has said or not said, and to draw the wrong conclusions about the person.

3.3 Linguistic risks of miscommunication

3.3.1 Ignoring the need for interpreters

25. The importance of interpreters in any legal context for people who do not speak English as their main language has been addressed in Section 3.1 above.

3.3.2 Using legal language

26. Non-legally trained people, whether Aboriginal or not, can often find it hard to understand the talk of legal professionals. This is particularly the case for people with limited success in formal education. Many legal professionals appear unaware of the extent to which they speak in legal language to laypeople, and also in front of laypeople during courtroom hearings. It is also common for lawyers to be unaware of the extent to which they use words or phrases that that are typical of written language, and that could easily be replaced by everyday words or phrases when they are talking to non-legally trained people.
27. A guide for lawyers on avoiding 10 common problems with legal language is available in Annexure 3: Plain English Strategies of the Judicial Council on Cultural Diversity's (JCCD 2022) report.
28. Some of the resources which have been prepared to explain legal terminology to non-native English speakers and/or interpreters can also assist legal professionals

to talk more clearly about the law to other non-legally trained speakers of English, including Aboriginal English speakers, for example:

a) Aboriginal Resource and Development Services (ARDS), North Australian Aboriginal Justice Agency (NAAJA), and Aboriginal Interpreter Service, Northern Territory Government (AIS). (2015). *The Plain English Legal Dictionary: Northern Territory Criminal Law. A Resource for Judicial Officers, Aboriginal Interpreters and Legal Professionals Working with Speakers of Aboriginal Languages.* https://www.ards.com.au/resources-2/p/legal-dictionary-plain-english

b) *The Blurred Borders* Resource kit is a legal communication tool used by frontline service providers working with Aboriginal clients in regional and remote locations of Western Australia and the Northern Territory. Focussing on the key legal concepts around bail and the criminal process, and family violence and child protection, this kit uses visual art, plain language, and storytelling to explain legal concepts and processes. https://blurredborders.legalaid.wa.gov.au/about-blurred-borders

c) The TermFinder™ term bank in family law: https://lawtermfinder.mq.edu.au/

d) A pilot Indigenous term bank in Easy English has also been created for family law, which provides visual support, and is organised by related concepts, rather than alphabetically, partly using resources from the Blurred Borders project (see above). https://lawtermfinder.mq.edu.au/easy-read-home.php

e) Law Society of the Northern Territory (2015). *Indigenous Protocols for Lawyers in the Northern Territory*, 2nd edn, https://lawsocietynt.asn.au/images/stories/publications/indigenous_protocols_for_lawyers.pdf

3.3.3 Lack of awareness of Aboriginal English

29. Some distinctive accents, words and phrases, and sentence structures in Aboriginal English can impact communication with Aboriginal people in police interviews, lawyer meetings and courtrooms.

30. For speakers of light Aboriginal English as their main language, who often live in non-remote areas, much, or most, of what they say does not need interpreting. However, there is a risk that certain expressions are used which do not have the same meaning in Aboriginal English and English.

3.3.4 Lack of awareness of culture in communication

31. Further, there are many ways in which Aboriginal cultures impact communication, regardless of whether a person is a speaker of a traditional language or Kriol or English. Culturally specific assumptions about communication that impact communication within the law are dealt with in Section 6 below.

32. There are many other specific aspects of culture that impact Aboriginal people in the legal system. For example, a widespread Aboriginal cultural assumption is that it is good for children to move between the homes of a number of relatives. This contrasts with a widespread mainstream assumption that such a residential pattern can indicate inadequate parenting and is bad for children. The implications of such a cultural difference can impact the way that the law and child protection services respond to reports of family violence or missing children (see NSWLRC 2014 #4.53-4.54).

4 BICULTURAL ABORIGINAL PEOPLE

33. There are many different ways of being Aboriginal, and the issues addressed in this submission are not likely to be relevant to the increasing number of Aboriginal people who have considerable bicultural abilities in communication. This means that they can communicate in an Aboriginal way in Aboriginal contexts or with other Aboriginal people, and then they can switch to mainstream ways of communicating in other contexts.

34. Bicultural ability is strongest with those Aboriginal people who have spent considerable time in successful mainstream education and mainstream employment with non-Aboriginal people. Aboriginal people are unlikely to have developed strong bicultural ability if they have spent all or most of their life in an Aboriginal community or socialising mainly with Aboriginal people, without extended periods of time living, studying or working in mainstream environments.

35. There is no necessary connection between skin colour and the way that an Aboriginal person communicates: it is related to their life experiences, and their opportunities to learn (often subconsciously) and use Australian English in mainstream communication patterns.

36. The research and experience over many years on which this submission is based have not examined communication of people identifying as Aboriginal who have discovered their Aboriginality as adults and have not grown up being socialised in Aboriginal culture. Thus, this submission cannot address this sub-group of Aboriginal people.

5 LESSONS FROM BOWRAVILLE NSW

37. A powerful lesson about the law's communication with Aboriginal families of missing and murdered children is found in the 2014 New South Wales Legislative Council report into the responses by family of three murdered children from the Bowraville community about their experiences with the legal process. This submission refers to some specific paragraphs of that report as NSWLC 2014.

38. I have some familiarity with the ordeal which the Bowraville families have endured for decades since the three children first went missing in 1990-1, because of my expert report in one of the murder trials (NSWLC 2014 #4.81-4.83), the workshop I presented to the parliamentary committee before they commenced their inquiry (NSWLC 2014 #1.6, #4.74-4.80), and the evidence I presented to the inquiry (NSWLC 2014 #4.81 – 4.101). There is no need to refer in this submission to any of this work, which overlaps considerably with the content of this submission, both being focused on the law's communication with Aboriginal people. However, references to some of the evidence in that inquiry from the police and from some family members will highlight some of the general points being made in this submission.

39. Referring to the many reports to the inquiry of the inadequacies of the original police investigation of the three murders, the inquiry noted specifically that "All three families spoke of being met with indifference or scepticism when they reported their children missing to police following the initial disappearances, and in each case the families undertook the chief burden of searching for the missing children themselves" (NSWLC 2014 #3.1).

40. However, the Sydney-based New South Wales Police Homicide officers who re-investigated the murders of the three children beginning in 1997 developed a relationship of trust and respect with the Bowraville Aboriginal community. I know this from my conversations with Bowraville Aboriginal people, my observations of them interacting with these police officers, the report of the parliamentary inquiry concerning family response to these murders (NSWLC 2014) and media interviews with several community members. In my opinion, this seemingly unusual trust and respect that an Aboriginal community has for police officers has resulted in part because of the police in this task force having a different approach to communication in this community: they realised that they "were required to change their mindset and timeframes" (NSWLC #3.63). See also paragraphs 48 and 56 below.

6 HOW DOES THE LAW LISTEN TO ABORIGINAL PEOPLE

6.1 Introduction

41. In addition to the linguistic issues overviewed in Section 3, cultural issues are central to any consideration of the law's engagement with First Nations people.

42. Culture comprises ways of thinking, believing and acting, that include shared background knowledge, shared language/dialect and shared norms, assumptions and expectations.

43. This section addresses culturally specific ways of thinking about communication, beliefs and (mis)understandings about communication, and ways of communication, which impact the law's interaction with Aboriginal people.

44. Some of the cultural beliefs and practices of the law are shared within the wider western society, but they are not necessarily shared with Aboriginal societies. The disjunction between the culture of the law and the culture of Aboriginal societies is at the heart of the heart of how the law listens to and understands or misunderstands what Aboriginal people say.

6.2 The culture of the law contrasts with Aboriginal cultures

45. Interviews are widespread in western societies, as is the related notion that the question-answer format is the fundamental basis for seeking and giving information in many contexts. But this is not the case in many Aboriginal societies and this difference is central to many of the difficulties that can arise when Aboriginal people participate in the legal process, where interviews are the main linguistic tool for seeking information. A range of interview types is used in the law, with less formality in lawyer meetings with clients, and more formality in courtrooms, where the interviews are particularly rigid in their structure.

46. Many problems arise from the culturally based nature of the interview as a one-sided interaction in which a person requiring information asks questions from a person who is expected to provide the information. The expectation is of a smooth Question-Answer reiterative pattern.

47. However, interviews are not a speech event typically found in Aboriginal societies, where information is often provided in a reciprocal way and less directly. When Aboriginal people want to find out substantial, complex and sensitive information, such as details about an event or a situation, or why someone has done something, they typically talk around a topic, engaging in conversation (or *yarning*) rather than talk structured by direct questions.

48. Aboriginal people do use direct questions in relation to social and geographical and other background details, such as who was present, who they were related to, and where they come from. But as information is given and sought in Aboriginal societies as part of a relationship, trust and connectedness are essential in the sharing of substantial information. [NSWLC 2014 #3.62]

49. Because of the importance of the relationship to the sharing of complex and sensitive information, many Aboriginal people can feel uncomfortable or unable to share information with someone they do not (yet) have an established relationship of trust with. Sometimes people answer *I don't know* or *I don't remember* to indicate that the time or person or situation is not right for the disclosure of information that they do actually know. Many or most non-Aboriginal interviewers are unlikely to be aware of the strong cultural basis for such withholding of information.

50. A fundamental difference between the indirect Aboriginal approach to seeking substantial, complex and sensitive information, and the direct interview approach,

lies in cultural differences in what is believed to be effective communication. Interviews in legal contexts are typically considered effective if time is not wasted on topics not considered relevant. In many Aboriginal contexts, on the other hand, it is often considered very important not to rush people or ask them too many questions. It is often considered to be more effective and polite to give people time to talk about other topics, or simply to be silent, before expecting substantial, complex and sensitive information.

51. Aboriginal people who have not been able to develop considerable bicultural communication skills are typically not comfortable or experienced in the interview format as a way of providing information. Thus, although the law often requires witnesses to give an account (or tell their story) through the interview format, this can be difficult for many Aboriginal witnesses.

52. Problems of misunderstanding that arise from this fundamental cultural difference in information seeking are not one-sided: communication is a two-way process.

53. Problems can arise for Aboriginal people in being able to:

    a) fully tell police officers, lawyers and courts what they know that is relevant,

    b) understand what they are being asked, and

    c) understand what is being expected in terms of their participation

54. Problems can also arise for police officers, lawyers and courts in being able to:

    a) fully hear about the relevant experiences of Aboriginal people,

    b) understand what Aboriginal people are telling them, and

    c) evaluate what Aboriginal people say in terms of such culturally based communication practices as silence (Section 6.2.2), and repeated *yes* answers (to be explained below Section 6.2.1)

55. The following are some of the potential problems, or risks of misunderstandings in legal interviews with Aboriginal people who have not had the chance to develop strong bicultural communication abilities:

    a) Aboriginal people may find it difficult to tell their story through the structure of interview questions.

    b) The frequent focus in police interviews and in court on structuring information and questions about an event in terms of time sequence can disrupt the efforts of Aboriginal people to recount an experience or situation (that is, to tell or retell their story). In contrast, when Aboriginal people tell (and retell) stories, the content of these reports of events are often structured by place and people, rather than time.

    c) The structuring of an Aboriginal person's account or story by lawyer questions can make it harder for many Aboriginal people to be seen as credible and reliable witnesses.

d) Being asked direct questions about substantial, complex or sensitive topics, including reasons or motives, can be an unsuccessful way to elicit what an Aboriginal person knows about an event.

e) The answers "I don't know" and "I don't remember" do not always refer directly to the Aboriginal speaker's knowledge or memory.

56. The NSW Homicide investigation into the missing and murdered Aboriginal children from Bowraville shows that these problems can be mitigated to a considerable extent. These investigators "made the effort to take time with witnesses, as they quickly realised that they would have to discard traditional interview techniques in their contact with community members" (NSWLC 2014 #3.62, see also #3.71). Instead, the police got results when working with Aboriginal assumptions about finding out information, such as "tak[ing] time … simply sitting down and chatting with the witness … in an environment which they did not find threatening" (ibid). Police found that "while this technique often took longer than more formulaic interview techniques, it was found to be a very effective way of obtaining necessary information" (ibid).

6.3 Specific risks for miscommunication

57. In addition to the general risks for miscommunication in legal interviews of Aboriginal people discussed above, the following specific issues create further risks.

6.3.1 Gratuitous concurrence

58. The central role of interviews in the legal process, and particularly the rigid structure of courtroom evidence as answers to questions, can make it hard for some Aboriginal witnesses to avoid or resist the pattern of gratuitous concurrence. This is the term for the communication pattern of answering *yes* (or *yeah* or *mm* or nodding their head) in answer to a question, (or *no, nuh* or shaking their head to a negative question), regardless of whether or not the person agrees with what they are being asked, and sometimes regardless of whether they even understand the question.

59. Gratuitous concurrence different from the *yes* or *uh-huh* that is often used when another person is talking and their interlocutor gives minimal feedback responses such as this. The pattern of gratuitous concurrence refers to a clear answer to a direct question.

60. This way of answering questions is not limited to Aboriginal Australians. Such minimal answers of apparent agreement that do not necessarily mean agreement are common in many societies and countries when people answer direct questions in a language that they do not have good proficiency in. But for many Aboriginal Australians such answers have a wider usage.

61. While some Aboriginal people may give a minimal answer of apparent agreement to a question because they do not understand it, there can be other reasons. Thus, even when an Aboriginal person understands a question, their *yes*-type answer may be gratuitous concurrence, signalling something like:

    a) I want to cooperate with your questioning, and I hope that this answer will help bring the questioning to an end, OR

    b) I'm happy for us to continue for now acting as though I agree with you, but that doesn't imply genuine considered agreement

62. Underlying Aboriginal uses of gratuitous concurrence are strong Aboriginal cultural expectations and practices. Thus, taking time to think about important issues and coming back to matters later or on another occasion are often at odds with the law's reliance on direct questions, and the expectation that all questions should be answered when they are asked, and that the answers given are final.

63. This tendency to give answers of gratuitous concurrence can be particularly misleading in cross-examination, given the prevalence of leading questions. Where the cross-examination is lengthy this danger can be exacerbated.

64. Gratuitous concurrence is also relevant for some Aboriginal people in interviews with lawyers, not only when lawyers are eliciting information, but also when they are giving advice and seeking instructions. It is easy for lawyers to unwittingly elicit minimal answers of apparent agreement to a course of action, when agreement may not be intended.

65. Because of the Aboriginal tendency to use gratuitous concurrence in interviews, it can be problematic to interpret *yes* answers literally. Thus, it is best for interviewers to avoid asking Aboriginal people questions that seek *yes* or *no* answers wherever possible, especially when substantial, complex or sensitive matters are being discussed. This is important in all interview situations, and includes the need to avoid questions such as *Do you understand?*.

66. The implications of this widespread Aboriginal tendency to use gratuitous concurrence can be profound in terms of the role of courtroom questioning in creating inconsistencies in the stories retold by some witnesses. For example, if an Aboriginal person has given *yes* answers of gratuitous concurrence in a police interview or in answers to earlier courtroom questions, later courtroom questions may elicit different evidence which reveals an inconsistency with those earlier answers of gratuitous concurrence.

6.3.2 **Silence**

67. There is an important cultural difference between Aboriginal and mainstream Anglo use and interpretation of silence (or pausing) in conversations, including interviews.

68. In Aboriginal interactions, silences are often used productively and positively. That is, it is not unusual for Aboriginal conversations to sometimes include quite considerable silences. There is no obligation to fill silences, and when serious matters are being discussed, people often like to think for some time before talking. This is quite a contrast to the widespread western norm that silence of more than about one second in a conversation or in answer to a question typically means that something has gone wrong, and that it is good for someone to fill the silence.

69. This cultural difference in the use and interpretation of silences in conversations can mean that Aboriginal interviewees are sometimes unable to answer a question or finish their answer before the non-Aboriginal interviewer asks the next question.

70. Where Aboriginal interviewees are allowed to use silence, there may be a long pause during or before the answer, often, sometimes, or occasionally. This could be wrongly assumed by a non-Aboriginal person, such as a jury member, to indicate ignorance, shyness, or even evasion.

71. Different retellings of a story by an Aboriginal interviewee may appear to be inconsistent if important parts are omitted in one of the versions because of different interviewers' understanding of, and ability to accommodate to Aboriginal patterns of silence in interviews.

6.3.3 **Specific information**

72. Questions in legal contexts seeking specific information are often framed in numeric or quantifiable terms (e.g. "about what year was that?", "how many metres away was he standing?"). This can jeopardise the accuracy of the answer from Aboriginal witnesses, who will often reply with a number to such a question. But, many Aboriginal people are both more familiar with, and more accurate with, giving and seeking this kind of information in relational terms (e.g. "it happened the year this little fella was born", "he was about from where I am now to the back door here"). Thus questions such as "when was that?" or "how far away was he standing?" are preferable to questions with numbers.

73. The use of quantifiable terms in the framing of questions asking specific details can increase the risk of inconsistency between different interviews of an Aboriginal person about the same event or situation. Such inconsistency should not be seen as a personal failing, but can be a product of the way that questions have been asked.

6.3.4 **Shame**

74. *Shame* is an essential cultural notion that can be involved when Aboriginal people interact with non-Aboriginal people. The Aboriginal English word *shame* is

different from standard English "ashamed" and "shy" although it combines some elements of both words. But unlike these two terms, Aboriginal *shame* goes beyond an individual feeling. It is a comment on relatedness to others in one's group, and a sense of failing to conform to the group's norms, especially by being seen to be in isolation from the group. Although this can happen when a person is engaging in non-conformist behaviour, it also happens when an individual is made to stand out from the group, for example for praise, or rebuke, or simply when they are asked for information.

75. Thus, a situation of *shame* (often referred to in Aboriginal English as *shame job*) is often about a social circumstance a person is in, not something they have done. Many Aboriginal people experience *shame* simply from giving evidence in court, or being interviewed in other contexts in isolation from the group. People also experience *shame* from being asked to talk about bodily functions and sexual body parts and actions. This *shame* can be intensified when the person asking about such matters is not of the same gender, and when there are others listening who are not of the same gender.

76. This experience of *shame* can be intensified by being required to state in a formal non-Aboriginal space that they do not understand a powerful non-Aboriginal person. Thus, in addition to gratuitous concurrence, discussed above, *shame* can be a factor involved when an Aboriginal person says *yes* to a question such as "Do you understand?", even if they do not understand.

6.3.5 Eye contact

77. Many Aboriginal people have been raised to avoid direct eye contact, particularly with authority figures of the opposite sex. This is part of respectful communication in many Aboriginal communities, and should not be interpreted as ignorance, evasion or fabrication.

7 CONCLUSION

78. In conclusion, I commend the Senate for undertaking this overdue inquiry into the complex issues involved in one of the most tragic situations which First Nations people face, so often without adequate understanding and support from the institutions which could help families and communities. I hope my submission about how the law communicates with Aboriginal people can shed light on some of the cultural assumptions, policies and practices which comprise part of these complexities.

8 REFERENCES

Eades, D. (1992). *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners*. Brisbane: Queensland Law Society.

—— (2003). 'I don't think the lawyers were communicating with me': Misunderstanding cultural differences in communicative style. *Emory Law Journal*, 52, 1109-34.

—— (2008). Telling and retelling your story in court: Questions, assumptions and intercultural implications. *Current Issues in Criminal Justice*, 20(2), 209-30.

—— (2013). *Aboriginal Ways of Using English*, Canberra: Aboriginal Studies Press.

—— (2016). Judicial understandings of Aboriginality and language use. *The Judicial* Review, 12, 471-90.

JCCD (Judicial Council on Cultural Diversity). (2022). Recommended National Standards for Interpreting in Courts and Tribunals, 2nd edn, https://jccd.org.au/publications

Malcolm, I. (2018). *Australian Aboriginal English: Change and Continuity in an Adopted Language.* Boston/Berlin: Walter de Gruyter.

NSWLC (New South Wales Legislative Council Standing Committee on Law and Justice Inquiry). (2014). *Family Response to the Murders in Bowraville.* Report 55. https://www.parliament.nsw.gov.au/lcdocs/inquiries/2131/Bowraville%20-%20Final%20report.pdf