Best practice guidelines **for representing Aboriginal clients**

Legal Services Commission South Australia

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Acknowledgements

We acknowledge the Traditional Owners and Custodians of the land on which we live and work in South Australia. We recognise their continuing connection to the land, waters and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal peoples.

The Legal Services Commission of South Australia (Legal Services) is committed to working in partnership with community and providing culturally competent services to Aboriginal peoples.

This document adapts the Best practice standards for representing Aboriginal clients produced by Legal Aid New South Wales in 2020. Legal Services gratefully acknowledges Legal Aid NSW for originally producing best practice standards and giving us permission to reproduce and adapt them for application to our services in South Australia.

Legal Services acknowledges the authority of Legal Aid NSW's best practice standards and pays respect to every person involved in their production, especially every Aboriginal person who contributed their knowledge, insight, and time. The adaptations that Legal Services has made are aimed at tailoring the document to the South Australian context.

Legal Services also gratefully acknowledges Tasmania Legal Aid for giving us permission to reproduce and adapt content from their Independent Children's Lawyers Practice Standards and Guidelines.

Any reference to Aboriginal peoples in this document is a reference to all First Nations peoples, including Torres Strait Islander peoples.

Our artwork

In 2022, Legal Services commissioned Ngarrindjeri, Narungga, and Kaurna artist Gabriel Stengle to create our artwork depicting Legal Services' commitment to the South Australian community.

Gabriel Stengle is an Aboriginal Contemporary Artist. She is a proud Ngarrindjeri, Narungga and Kaurna Woman from South Australia who sources inspiration for her art from the Dreamtime and stories told to her by her Elders as a young girl.

In the commissioned artwork, Legal Services is represented as the centre meeting place connected to Journey Lines. The journey represents Legal Services' journey, as well as its staff and people who seek and need legal help.

The surrounding waterholes represent the many locations where our legal services are accessed, where people have equal access to justice, wherever they may be.

The symbol (U) represents the people: the people who represent Legal Services as well as the people in the many diverse communities across South Australia.

Throughout the piece there are kangaroo prints that represent the Legal Services mission to always move forward and never backwards, to keep growing and being a voice for the community.

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Opening remarks

In early 2022 Legal Services established a Working Group to further enhance our relationships with and commitment to Aboriginal clients and communities. That Working Group developed our Aboriginal Engagement Strategy 2022–24 and continues to work on initiatives to further enhance and strengthen our commitment and the commitment of all lawyers working on grants of legal aid.

One of the principal objectives of the National Agreement on Closing the Gap 2020 is to ensure government funded services 'are culturally safe and responsive to the needs of Aboriginal and Torres Strait Islander people'. Priority Reform Three on transforming government organisations requires the implementation of several 'transformation elements' including embedding and practising meaningful cultural safety and improving engagement with Aboriginal peoples.

Of Legal Services' clients who received a grant of aid for legal representation, a duty lawyer service or a legal advice appointment in 2023–24, 22% identified as Aboriginal.

Aboriginal peoples are over-represented as clients who receive duty lawyer services, particularly in criminal law and care and protection matters. In 2023-24, 28% of clients who received a criminal law duty service and 37% of clients who received a child protection duty service, identified as Aboriginal. Aboriginal peoples are also over-represented as clients with grants of aid. In 2023-24, 29% of criminal law grants and 25% of child protection grants were made to Aboriginal peoples. In our northern region offices (Port Augusta and Whyalla), 60% of all grants of aid were to Aboriginal clients.

We are committed to providing best practice legal representation to Aboriginal clients across our services and these Guidelines will provide lawyers at Legal Services with practical information and guidance to enhance their knowledge and skills in providing effective services to Aboriginal peoples.

While the percentage of Aboriginal clients assisted by Legal Services is trending upwards, Legal Services acknowledges the primacy of the Aboriginal Legal Rights Movement (ALRM) in providing legal representation to Aboriginal peoples in South Australia and is committed to working closely with ALRM to deliver coordinated services to Aboriginal peoples.

Our continued commitment as an organisation, and as individual lawyers, to understand and develop an awareness of Aboriginal cultures, and the differences unique to Aboriginal clients, is fundamental to properly fulfilling our duty to represent our clients to the best of our ability.

Annmarie Lumsden
CEO
Legal Services

1. General guidance across all practice areas

The information in these Guidelines is general in nature and may apply differently to individual clients in their unique circumstances. These Guidelines are intended to ensure you have the right tools at your disposal when needed, but you will need to assess each client and situation on a case-by-case basis.

Some of the information in this document may not be relevant for all Aboriginal clients, although it is intended that much of it will be relevant for many.

1.1. Participation in Aboriginal cultural awareness training

Ensure you participate in the Cultural Awareness Training workshops regularly coordinated by Human Resources. New staff at Legal Services should start their journey with Aboriginal Cultural Awareness Training and continue to improve their representation of Aboriginal clients by attending Cultural Competency Training at each offering. The diversity of Aboriginal peoples, cultures and communities means that cultural competency is an ongoing process and will help you acquire on-the-job knowledge to better represent your clients. All courses qualify for MCPD points.

Be willing to learn about yourself and your own personal biases, including unconscious biases and privilege. Unconscious bias:

- is bias that we are unaware of, that happens automatically outside of our control, and
- involves quick judgments and assessments of people and situations, using our background, cultural environment, and personal experiences over our lifespan.[1]

Consider taking a test through Project Implicit to learn about your unconscious bias. Regularly self-reflect to avoid biased thinking in your interactions with clients.

A useful tool for staff to better understand privilege is the Privilege Walk which is an online resource that can be completed individually or as part of a group exercise.

Always keep in mind that although you may work with Aboriginal clients in a professional capacity, across a range of service delivery methods and/or years, you may not be proficient in the breadth of Aboriginal cultures and identities. In your professional capacity, an Aboriginal person is presenting you with a limited part of their life during a period of what will quite often be extreme distress. These Guidelines and the ongoing Cultural Awareness Training will provide you with tools to better represent your Aboriginal clients during this period in their lives.

[1] South Australian Department of Premier and Cabinet, 'Diversity and Inclusion Framework 2023–25'.

1.2. Awareness of local Aboriginal community

It is important to acknowledge 'the far reaching, intergeneration impacts of colonisation and dispossession which explicitly excluded Aboriginal peoples and resulted in entrenched, systemic and structural racism and disadvantage. Despite the past and present impacts of colonisation, Aboriginal peoples, families and communities remain strong and resilient and continue to sustain the world's oldest living culture'.[2]

Understand the local Aboriginal community you work with. Find out what Aboriginal country you are working on and the specific cultural and social issues that affect the community. If unsure, consult the Australian Institute for Aboriginal and Torres Strait Islander Studies website at aiatsis.gov.au/whose-country. Knowing this information will help you connect with your client and provide a better service. To gain a better understanding of the local community, connect with Aboriginal community-controlled organisations and Elders within the area.

If you are presenting at a community event, provide an Acknowledgement of Country.

1.3. Trauma-informed practice and vicarious trauma

Many Legal Services' clients have experienced significant trauma in their lives, and this will impact their interactions with the legal system. Many clients, including Aboriginal clients, are profoundly affected by intergenerational trauma. This should be kept in mind when representing Aboriginal clients.

Taking a trauma-informed approach can reduce the impact of trauma on your client's engagement with you. If you do not take a flexible and responsive approach, it:

> can have significant negative impacts on clients with a history of trauma, including re-traumatisation. This can occur when rigid procedures or a lack of understanding inadvertently trigger past traumas, causing distress and potentially leading to a re-experiencing of traumatic events. Clients may also feel misunderstood or not heard, which can lead to a breakdown in the lawyer-client relationship. This could result in clients disengaging from the legal process. Where clients feel unsafe or uncomfortable, they may be reluctant to fully disclose necessary information, which can hinder the legal process and potentially result in less favourable outcomes for the client.[3]

The general guidance within this document is consistent with trauma-informed practice. To see a more complete list of trauma-informed do's and don'ts from the With You Toolkit, see Appendix A. We strongly recommend staff complete the following With You e-learning modules:

- Trauma-Informed Legal Assistance, and

2 South Australian Implementation Plan for the National Agreement on Closing the Gap, 2021, page 5.
3 With You, Trauma Informed Organisational Toolkit, National Legal Aid, 2023 at (https://nationallegalaid.org.au/national-services/withyou/toolkit) on 2 May 2025.

- Working Effectively with Aboriginal and Torres Strait Islander Peoples and Communities.

As a lawyer at Legal Services, you also need to take care of yourself, particularly in relation to vicarious trauma. We encourage you to debrief with your colleagues to support and share experiences and lessons learnt in dealing with clients experiencing trauma and difficult situations. Legal Services provides training around vicarious trauma, and we encourage all staff to seek help and support via our Employee Assistance Program if needed.

1.4. Use of interpreters

Providing services to an Aboriginal person whose first language is an Australian Aboriginal language and who has difficulty understanding English can be challenging. The Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia (Third Edition, 2020) (the Lawyers' Protocols) published by the Law Society of South Australia provide practical guidance to help obtain instructions and give advice. The Lawyers' Protocols also provide general information in relation to protecting the interests of an Aboriginal client and fulfilling obligations as an officer of the court.

Aboriginal peoples in the remote north-west of South Australia may speak in the Western Desert language which has many dialects. Port Augusta has a settled population of Aboriginal peoples and is also a traditional meeting place and crossroads for Aboriginal peoples who travel to and through this area from the north-west of the State and beyond. This means that people from many different Western Desert language groups are in this area at any one time.

For those peoples from the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands), their first language may be Pitjantjatjara or Yankunytjatjara and their second, third or even fourth language may be English. Pitjantjatjara and Yankunytjatjara people identify as separate and distinct groups despite intermarriage between the two groups. Pitjantjatjara can be understood by many Yankunytjatjara, Ngaanyatjarra, and Manjiljarra speakers. Interpreter services are available for both Pitjantjatjara and Yankunytjatjara, as well as several other Aboriginal languages.

The Lawyers' Protocols[4] set out:

- how to assess whether an interpreter is needed before taking instructions
- how to talk to your client about using an interpreter
    - the need to ensure you engage the services of a certified interpreter

[4] The Law Society of South Australia, 'Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia', Third Edition (2020).

    - the role of the interpreter and how they are required to follow the Australian Institute for Interpreters and Translators Code of Ethics which includes impartiality and confidentiality
- the need to use plain English as much as possible
- the importance of explaining your role to your client
- the importance of explaining the legal or court process to your client before taking instructions in such a way that they can tell you their story, being mindful of gratuitous concurrence and different ways of communicating (see further below)
- the need to assess whether your client has a hearing or other impairment that may affect their ability to communicate.

The Lawyers' Protocols set out a 4-step process for assessing the need for an interpreter:

1. Ask your client an open-ended question regarding working with an interpreter, the role of an interpreter and whether they would like to use one.
2. If they decline, continue to assess their speaking ability.
3. If speaking ability is sufficient, continue to assess their comprehension.
4. If their comprehension is sufficient, then assess their overall communication against the table provided for an indication of whether to use an interpreter (see Appendix B). If two or more of the points in the 'Likely to need an interpreter' column apply, it would be best to engage one subject to the client's consent.

1.5. Communication style

Oral communication is a fundamental component of Aboriginal cultures. It is a vital tool in your effective communication with clients and should be used to support all written correspondence.

Be aware of communication and linguistic differences between Aboriginal and non-Aboriginal peoples. Many Aboriginal clients' use and understanding of the English language may not be the same as yours. There are distinctive features of accent, grammar, words, and meanings. This is often referred to as 'Aboriginal English' and retains characteristics of traditional Aboriginal dialects.[5] Be mindful of these differences, but do not adopt language used by Aboriginal peoples when communicating with your client because it can be considered inappropriate. It is important to be authentic, respectful, and polite when communicating with your Aboriginal client.

[5] Eades, D, 'Aboriginal Ways of Using English', Aboriginal Studies Press (2013) page 76.

Ensure that you use plain language, not complicated legal jargon, when communicating with your client. Refer to The Plain English Legal Dictionary: Northern Territory Criminal Law[6] for judicial officers, Aboriginal interpreters and legal professionals working with speakers of Aboriginal languages. Also consider using relevant aspects of Legal Aid WA's Blurred Borders legal communication tools.

Be aware that Aboriginal communication styles are often less direct than those of non-Aboriginal people. We encourage you to use open-ended questions and allow time for your client to respond. During periods of silence try not to feel pressure to rush your client or think they have no opinion or do not have anything to say. They may be considering your advice and taking time to make a decision. Also, do not view this as an indication of unfriendly behaviour or that communication has broken down. While silence in Western societies can often be uncomfortable, in Aboriginal cultures it is a legitimate feature of personal interaction and does not have the same negative connotations. Pause after making each point. This allows clients to digest your advice and ask any questions.[7]

Ensure that your client understands your questions and advice. In some circumstances, a client may just agree because they are too embarrassed to tell you that they do not understand it. This is commonly referred to as gratuitous concurrence.

Always consider having a conversation with your client about any written communication or documents you provide to check your client's understanding and whether they need more information.

1.6. Body language

If unsure of the appropriate greeting, follow the lead of your client. Be aware of your own body language. Avoiding eye contact can be a sign of respect for many Aboriginal peoples. People may also avoid eye contact due to shyness. Do not take this as a sign of disengagement and never force eye contact in these situations.[8]

1.7. Building trust and rapport

Due in part to the detrimental impact of past interactions with those seen as authority figures (government, police, lawyers), you need to allow more time to build rapport and trust with your client.

Explain the lawyer-client relationship and the rules around confidentiality. Explain why you are taking notes. Reassure your client that the information they provide to you will not be used against them and that it is in their best interests to give you all the information you need so you can better represent

6 AARDS, NAAJA and AIS, 'The Plain English Legal Dictionary: Northern Territory Criminal Law' (2015).

7 Above n 4, page 101.

8 Above n 4, page 102.

them. Reassure your client that you are working for them, and when and why you will speak to the other parties involved in their case on their behalf.

Listen to your client's story without interruption. We understand that lawyers often have time constraints that will inhibit their ability to spend this time with the client, but best efforts should be made to allocate meaningful time with an Aboriginal client.

To help build a relationship of trust and respect, consider inviting clients to bring a friend, relative, or support person to the interview, who may assist in this process. Ensure there is no conflict of interest, and that the client is comfortable with that person's presence during the interview. A support person may be a family member, a community member or a liaison officer from other justice and social services agencies. Explain how the confidentiality rules apply to their support person.

Never promise something that you cannot deliver. The 'grapevine' effect works well in Aboriginal communities. Any failure to reply or follow up something promised is likely to be public knowledge in a short period and may jeopardise any credibility you have previously established.[9]

1.8. Dates and times

Rather than specific dates and times, Aboriginal peoples may refer to physical, social or climatic events when recalling something.[10] In this context, do not force a response as it may produce misleading or inaccurate answers.

1.9. Issues of shame

The concept of shame is a powerful social construct with Aboriginal communities. This will be particularly strong around issues such as domestic and family violence, sexual assault and substance abuse and may impact on what a client is prepared to tell you.[11]

Aboriginal clients may prefer to speak to a lawyer of the same gender, especially female clients who have experienced sexual assault or domestic or family violence.[12]

9 Legal Aid NSW, Making our Services Work for Aboriginal People, June 2006, page 10.

10 Above n 4, page 102.

11 Above n 4, page 103.

12 Legal Aid NSW, Making our Services Work for Aboriginal People, June 2006, page 10.

1.10. Gender diversity

LGBTIQA+ Aboriginal peoples can experience greater difficulty in accepting their identity given that gender is built into Aboriginal culture (for example, 'men's business' and 'women's business').

Although terms such as 'brotherboy' and 'sistergirl' may refer to gender diverse peoples, especially those within the Northern Territory and Top End communities, these terms have a broader context in SA as terms of endearment for Aboriginal peoples who may not be gender diverse.

For more information about how to support trans and gender diverse children and their families, refer to Deadly Story LGBTQIA+ and a list of Aboriginal specific services and organisations.

1.11. Aboriginal kinship structures

Your client may use terms of endearment such as brother (or bro), sister (or sis), cousin (or cuz), aunt or uncle for non-blood relatives as well as blood relatives. These may be an acknowledgment of the other person's Aboriginality or used as a sign of respect.[13]

Aboriginal kinship structures and family dynamics are different to those of non-Aboriginal people. Extended family members will often have the same status as immediate family members in an Aboriginal person's support network and may accompany clients to court and client conferences.

Kinship refers to a person who shares a cultural or community connection with an Aboriginal person that is recognised by that person, their family or community. This includes extended family including aunts, uncles, cousins, nieces and nephews. However, the connection is not limited to a biological relationship but refers to a culturally defined relationship reflecting cultural bonds and obligations.

For example, in some communities people are divided into groupings according to a complex lore which has ensured children, women and men know who they are in their own identity and within their family and community, know who they can and cannot marry and who they can communicate with/borrow/go to help and who they cannot. This sets up pathways for lore, obligation, care and community cohesion and ensures each person is valued, cared for and protected. These relationships need to be protected. The kinship structures mean different family members have different responsibilities and so it may be necessary to ask them to bring the person who can support them or who is responsible for that aspect of their life that is in question. This is especially important when working with children and young people.

13 Above n 4, page 62.

1.12. Applying for legal aid

Some Aboriginal clients have issues with literacy and numeracy and may need help applying for legal aid. This should be assessed on a case-by-case basis as not all Aboriginal people will require assistance.

When helping clients complete the Legal Aid application form (where you are required to ask if the client is Aboriginal and/or Torres Strait Islander), do not assume by their appearance that they are not. Always ask this question. Aboriginality is complex and not defined by appearance.

An Aboriginal person is commonly defined and widely accepted by Aboriginal communities and organisations as someone who:

- is of Aboriginal descent, and
- identifies as an Aboriginal person, and
- is accepted by the Aboriginal community as an Aboriginal person.

This definition is widely used by both government and non-government organisations regarding eligibility for services and regarding Aboriginal Identified employment programs.

1.13. Appointments and court appearances

It is well established that clients may present with multiple legal issues that cross over into family law, criminal law and civil law. It is important to adopt a holistic approach to help the client address all legal needs. This may involve providing warm referrals to other sections of Legal Services or externally.

Request your client's consent to connect with any other support workers they have. Introduce yourself to them and the work you are doing for your mutual client.

Contact your client at least 24 hours before an appointment time to remind the client of the appointment. Due to the complexity of obligations Aboriginal peoples may have, they may not prioritise an appointment or court appearance when there are other significant factors affecting their ability to attend and engage in the process, such as the care of an elderly parent or multiple children in their care of various ages. A lack of resources or capacity may also make it difficult to attend appointments. In regional locations this may be exacerbated by the distances that need to be travelled and a lack of public transport options. Socio-economic factors such as literacy and numeracy and the financial costs may mean that in some cases an Aboriginal person may not have a driver's licence or vehicle.

If your client does not attend an appointment or court appearance, or if you have not heard from your client, remember that some clients may not have any capacity to contact you (they may not own a

phone or may not have credit). Contact any support officers they have authorised you to speak with to follow up with the client and see if they still need your help.

Maintain regular contact with clients so they know you are helping them by working on their case. This can help build trust between you and your client.

We encourage staff to implement strategies that make the office more welcoming for Aboriginal clients. Consider introducing Aboriginal artwork, posters or other publications, and flags. It is important to note that should staff consult with Aboriginal communities or consultants to seek their input, a payment may be required.

1.14. Engaging with Aboriginal communities via CLE and outreach

Understand community dynamics and politics but do not become involved in them. You may need to take community legal education (CLE) and outreach to more than one venue to ensure you are providing a service to the whole community and not just one faction or family.

Elders play a major and vital role in Aboriginal communities and will often assume high authority on a variety of matters. Many communities have established Elders networks or groups that can be an important engagement tool for any services undertaken in that community.

Link with existing networks and community groups to conduct sessions so that you are not setting up 'yet another thing' for community members to attend.

Be aware of local issues, trends, events, circumstances and the impacts they will have on your service delivery. Consider the best times of the day and week to conduct events. Other events and circumstances may impact on people's attendance and participation. For example, where a community is dealing with 'Sorry Business' (a death within the community), it is both respectful and practical for staff not to schedule CLE or outreach until advised by the community of an appropriate time.

Allow participation numbers to build over time but be proactive and do not wait for people to come to you. Meet people and service providers to explain how you can assist, meet with stakeholders and Elders each time you are in the community and ensure you develop and maintain trust. Do not abandon outreach that has low numbers at the start, as you may just need to establish a relationship with the community.

Be aware of other legal service providers working in the community or region and consult with Aboriginal community-controlled organisations in the area as the first point of contact, including ALRM, Family Violence Legal Service Aboriginal Corporation (SA), Community Legal Centres, JusticeNet SA and local private lawyers.

2. Criminal Law Guidelines

2.1. Introduction

Legal Services plays a vital role in the representation of Aboriginal peoples within the criminal justice system. The responsibilities of lawyers when assisting Aboriginal peoples in the criminal justice system are no different to those that apply in relation to non-Aboriginal defendants. However, the Royal Commission into Aboriginal Deaths in Custody noted the history of dispossession which are of central importance to the issue of over-representation, 'the deliberate and systematic disempowerment of Aboriginal people starting with dispossession from their land and proceeding to almost every aspect of their lives. They were made dependent upon government or non-Aboriginal pastoralists or other employees for rations, clothing, blankets, education, living place and living condition. Decisions were made about them and for them and imposed upon them'.[14]

The over-representation of Aboriginal peoples in the criminal justice system continues to this day, with higher rates of arrest and imprisonment. An Aboriginal person's experience of the criminal justice system can be traumatic and give rise to distrust even of their own lawyer. It is important for lawyers to be culturally aware and behave in a culturally appropriate manner when assisting Aboriginal defendants. Lawyers should explain confidentiality, and the reason for notetaking and speaking to prosecution, to ensure trust and confidence.

2.2. Detention and arrest

Cross-border justice

Be aware of the potential application of the Cross-border Justice Act 2009 (SA). The Act applies within a defined geographical region at the intersection of the South Australian, Western Australian and Northern Territory borders, as defined in the Cross-border Justice Regulations 2024 (SA), and will especially apply to people located in the remote north-west of South Australia. The Act applies upon suspicion or allegation of an offence committed within the region, or when an accused person is arrested in the region or normally resides in the region. The Act also applies to persons residing in the region at the commencement of court proceedings.

There is some complexity in the application of the Act. In essence, it allows police officers and Magistrates from any of the three participating jurisdictions to exercise powers within any of the other jurisdictions within the region. This may mean that an Aboriginal client in South Australia has been arrested and detained pursuant to powers of investigation and arrest applicable in Western Australia or the Northern Territory.

[14] Royal Commission into Aboriginal Deaths in Custody (Final Report, May 1991) vol 1, 1.4.6.

Mandatory custody notification

ALRM operates the Mandatory Custody Notification Service pursuant to Part 5A of the Summary Offences Regulations 2016 (SA). Under regulation 33C, the police officer responsible for the custodial management of an Aboriginal or Torres Strait Islander person at a police facility must notify ALRM of their detention. This includes a person under 18 years of age, in the youth jurisdiction. An ALRM representative must, on request, be allowed to visit or speak to the detained Aboriginal person, and then to the relevant custodial manager.

Health and medical issues

Consider whether your client may need medical assistance. Take into account the prevalence of chronic illnesses within Aboriginal communities and ensure that your client has access to medical assistance if they appear unwell or under the influence of alcohol or other drugs. For example, people experiencing medical symptoms associated with diabetes can be mistaken as being under the influence of drugs and alcohol. Ensure appropriate mental health support is in place while in custody.

The Royal Commission into Aboriginal Deaths in Custody found that Aboriginal peoples were disproportionately represented in relation to the offences of assault, drunkenness and public order offences. The deaths investigated showed that alcohol withdrawal in particular is life-threatening, and that alcohol intoxication is potentially dangerous because it can mask the effects and symptoms of other life-threatening illnesses and conditions, such as closed head injuries. Do not make assumptions about the condition of your client and keep in mind that they may require medical assistance.

Where it is impossible to take full instructions, you should at least attempt to obtain instructions to have the matter held over until your client can communicate effectively. If possible, instructions should also be obtained to warn corrections staff of your client's condition (given that they have a duty of care in respect of your client).

Aboriginal peoples are disproportionately represented in relation to diagnosed and (often undiagnosed) Foetal Alcohol Spectrum Disorder (FASD). The difficulties and impairments of FASD include impulsivity and hyperactivity, language difficulties, poor memory and learning abilities, problems with time and money, inability to plan, inability to judge cause and effect, sensory difficulties, social difficulties and being easily led and manipulated. These difficulties and impairments can lead to drug and alcohol misuse, poor mental health, unemployment and ultimately increased engagement with the criminal justice system.

The intergenerational trauma resulting from colonisation can have an impact on the mental health of some Aboriginal peoples, resulting in reduced cognitive function and often reactive responses to authority (such as reactions leading to offences of assault police, hinder or resist police). What appears to be defiance of the law may be manifestations of conditions such as FASD or

intergenerational trauma. Consider obtaining a neuropsychological assessment if you notice any of these signs. However, it is important to note that these assessment tools generally are not validated for use with Aboriginal peoples therefore it is important to consider the appropriate use of these assessment tools and the professionals conducting those assessments. A useful resource is the Magnolia Project developed in partnership with ALRM to support mental health professional who act as expert witnesses in court to strengthen the cultural content of their reports.

2.3. Bail applications

Make every effort to ensure bail conditions are appropriate. Check that your client fully understands the bail conditions and is not agreeing to conditions they do not understand or cannot comply with.

Ask your client if they have any family or a support person who can assist with accommodation, surety or any other conditions regarding bail. Aboriginal peoples may have extended family and community support networks who can assist. When applying for bail it may be helpful to speak to members of your client's family to find out what factors may be contributing to the offending, and whether there any other factors at play not mentioned by the client. It is important to ensure that family members will only be contacted with the client's consent.

Aboriginal support organisations such as Aboriginal Drug and Alcohol Council SA New Directions Program can be helpful in bail applications as they offer supported accommodation and/or hostels in most major centres. They can often offer places at short notice where a client has no suitable bail address, although there may be waiting lists for some weeks or months. Aboriginal Justice Officers within the courts and Aboriginal Field Officers employed by the ALRM may also provide support locating client family members and support networks, subject to their capacity.

The Supreme Court of South Australia has been receptive to submissions that 'special circumstances' justifying the release on bail of prescribed applicants in section 10A of the Bail Act 1985 (SA) includes the over-representation of Aboriginal people within the remand population.[15] Consider whether such a submission may be appropriate in your client's case.

Maintain continuity of files and client representation where possible. This reduces the risk of the client having to repeat the process of sharing their story and circumstances to multiple lawyers. Continuity maintains the trust and good faith in the relationship which will need to be re-established by a new lawyer. Clients may also find retelling their story distressing.

[15] R v Hayes [2018] SASC 114 at [10]; R v Webb [2019] SASC 8 at [28] – [30]; Butler v The Queen [2020] SASC 74 at [7].

2.4. Sentencing

All lawyers must be familiar with the Sentencing Act 2017 (SA), and in particular section 22 which relates to the sentencing of Aboriginal defendants. Section 22, known as an Aboriginal Sentencing Conference, allows sentencing in a less formal manner through a sentencing conference and empowers the sentencing court to consider any views expressed at the conference. Any court sentencing an Aboriginal defendant may convene a section 22 conference with the defendant's consent. However, a conference is not required, and the court cannot be compelled to hold one (section 22(2)). Convening a conference is ultimately at the court's discretion.[16]

See also Treatment intervention and community courts below. For a more detailed list of Aboriginal Programs within the Courts Administration Authority, visit the Aboriginal Programs webpage.

Specific sentencing principles

Understand the principles in the New South Wales case of R v Fernando,[17] adopted in the South Australian case of R v Tjami.[18] In Fernando, the Court recognised circumstances of disadvantage that may be associated with Aboriginality in sentencing proceedings. While the circumstances of disadvantage require evidence, the following principles were set out:

- The same sentencing principles are to be applied in every case irrespective of membership of an ethnic group (but that does not mean that a sentencing court should ignore particular facts which exist only by reason of the offender's membership of a particular group).
- The relevance of Aboriginality is not necessarily to mitigate punishment but to put context to the offence and offender's circumstances.
- Problems of alcohol abuse and violence are significant, and their cure requires more nuanced consideration than imposing imprisonment.
- The court must be careful in the pursuit of their sentencing policies to not deprive Aboriginal people of the protection which it is assumed punishment provides.
- Where alcohol abuse reflects the socio-economic circumstances and childhood environment, that can be taken into account as a mitigating factor. The court must recognise the endemic presence of alcohol within some Aboriginal communities, the grave social difficulties faced by those communities where poor self-image and a lack of education and work opportunity reinforce their resort to alcohol and its negative effects.

16 R v Grose [2014] SASFC 42 at [122].

17 (1992) 76 A Crim R 58.

18 [2000] SASC 311.

- In sentencing, the court must avoid racism and realistically assess the objective seriousness of the crime within its local setting by reference to the offender's subjective circumstances.
- In sentencing an Aboriginal person from a deprived or disadvantaged background due to social or economic factors, a long term of imprisonment may be unduly harsh if it is served in an isolating environment with no cultural or relevant social connections.
- Full weight must be given to the competing public interests of rehabilitation of the offender and the avoidance of recidivism, balanced against the objective seriousness of the offending.

The Fernando principles can be applied in the sentencing of Aboriginal offenders in:

- fixing the length of sentences
- finding special circumstances
- understanding the impact of systematic deprivation on Aboriginal peoples as an explanation of offending behaviour
- recognising the legacy of dislocation and dispossession of Aboriginal people as causes of offending behaviour
- explaining the difficulties Aboriginal offenders experience in prison
- explaining the use of drugs in Aboriginal communities.

The principles outlined in Fernando are not restricted to Aboriginal people from remote communities.[19] There is no distinction to be made in applying sentencing principles and authorities to Aboriginal people who live in traditional ways and Aboriginal people who live in urban areas. The 'heritage of Aboriginal people raised in urban settings is relevant in explaining matters personal to the offender'.[20]

For more information about these sentencing principles, refer to Working with Aboriginal Defendants, Sentencing Considerations within our Duty Solicitor Handbook.

Understand the principles in Bugmy v The Queen,[21] where the High Court decided the relevance of an offender's background of profound social deprivation to the application of sentencing principles. The deprived background of an Aboriginal offender may inform the sentence appropriate for an offence, just as the deprived background of a non-Aboriginal offender may inform that offender's sentence.

19 See R v Abdulla [1999] SASC 239; R v Fuller-Cust [2002] VSCA 168 for recognition of the impact of the Stolen Generation and the associated intergenerational trauma.

20 See R v Smith [2003] SASC 263.

21 Bugmy v The Queen [2013] HCA 37.

The majority in Bugmy also held that the impact of a background of significant deprivation does not diminish over time and must be given full weight as a factor for consideration in sentencing. Regardless of race, the analysis a sentencing judge must apply to an offender's subjective case to achieve individualised justice will be the same.

The effect of the decision is that Aboriginal offenders will be able to rely upon evidence of systemic social deprivation as a relevant factor in determining an appropriate sentence on an individual basis. This recognises that the effects of a background of profound social deprivation do not diminish over time or with repeat offending.

The Bugmy Bar Book describes research relating to experiences of disadvantage and deprivation. The purpose of this resource is to help lawyers prepare and apply evidence to establish the application of the Bugmy principles. For more information, see The Bugmy Bar Book on the NSW Public Defenders website.

Keep in mind the Supreme Court of South Australia's application of the Fernando and Bugmy principles in the cases of R v Grose[22] and R v Pennington.[23] Unlike the New South Wales Supreme Court, South Australian courts have not wound back the concessions to urban Aboriginal people.

Be aware that publicly available or accessible anthropological reports and books may help a sentencing court assess the social, historical, cultural, socio-economic, and environmental factors relevant to a particular community with whom an Aboriginal client may identify. Anthropological reports are valuable in providing a sentencing court with evidence 'explaining Aboriginal heritage' and may be considered 'objective evidence in support of those personal matters which are put forward as mitigating factors particular to the person being sentenced'.[24]

Customary beliefs relevant to sentencing must be put before the court. [25] A sentencing court may consider Aboriginal customary law and the likelihood of retribution through customary punishment. To do so 'is not to sanction that retribution; it is to recognise certain facts which exist only by reason of that offender's membership of a particular group'.[26] Physical punishment of the defendant by the community is a relevant consideration at sentencing.[27]

22 R v Grose [2014] SASCFC 42.

23 R v Pennington [2015] SASCFC 98.

24 See R v Smith [2003] SASC 263.

25 See R v Shannon (1991) 57 SASR 14 at 18.

26 See Jadurin v The Queen [1982] FCA 215.

27 See R v Poulson (2001) 122 A Crim R 388 at 392.

Commonwealth offences

Be aware that in relation to Commonwealth offences, the Crimes Amendment (Bail and Sentencing) Act 2006 (Cth) amended the Crimes Act 1914 (Cth) in significant ways by removing cultural background as a relevant consideration for bail and sentencing procedures related to Commonwealth offences.

A court may not consider customary law or cultural practices in certain bail applications where these excuse, justify, authorise, require or lessen the seriousness of the alleged criminal behaviour, or aggravate the seriousness of the alleged criminal behaviour.[28] The bail authority must consider that a person is from a remote community in considering the impact of granting bail on that person.[29]

Similarly, cultural background is no longer a specified sentencing consideration. Relevant considerations are the character, antecedents, age, means and physical or mental condition of the person.[30]

Treatment intervention and community courts

Understand the functions of the Treatment Intervention Court programs, the Aboriginal Community Courts and Nunga Courts as alternative sentencing programs and consider referring eligible clients where appropriate. Eligibility criteria for alternative sentencing programs can be found on the Courts Administration Authority website.

Check the requirements of these programs and ensure that your client can meet all requirements of the proposed program.

Early release on home detention

The Correctional Services Act 1982 (SA) allows for early release on home detention for Aboriginal people serving a sentence of imprisonment who normally reside on traditional lands (including any place specified in the instrument of release as the person's residence).[31] However, prisoners sentenced in respect of certain offences, such as those involving violence, are not eligible for home detention.[32]

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28 See Crimes Act 1914 (Cth) s 15AB(1)(b)(i) and (ii).

29 Crimes Act 1914 (Cth) s 15AB(2).

30 See Crimes Act 1914 (Cth) s 16A(2)(m).

31 See ss 37A(1) and 37A(6).

32 See s 37A(2)(d).

Be aware of Aboriginal-specific and culturally safe and appropriate support services, programs and rehabilitation services available to Aboriginal clients.

2.5. Young offenders

Aboriginal kinship and family dynamics may be different to non-Aboriginal families. This is especially important to keep in mind when having a client conference.

The sentencing principles listed above apply equally to Aboriginal children. There are also additional factors to consider, having regard to their young age and developing brain such as *doli incapax*. The adrenaline rush of committing an offence can overcome the thought of the associated consequences. In addition, Aboriginal children do not exist in one cultural space. They grapple with the intersection between Western and Aboriginal worldviews and practices.

There is a strong link between a child's time spent in out-of-home care and a child's involvement with the criminal justice system. Children are removed from Aboriginal parents at higher rates than children from other communities. In line with the Aboriginal and Torres Strait Islander Child Placement Principle, kinship placements should be prioritised, but many Aboriginal children are placed in non-Aboriginal care, foster care or State-run residential care homes. Refer to 1.11 for further discussion about kinship.

This placement history adversely affects bail applications as such children are considered more likely to be a flight risk, have limited supports in the community, and have a higher chance of breaching bail and being reported (by their care workers) for a breach. Such children often distrust adults and authority. It is therefore important to demonstrate to the child that you, as their lawyer, are on their side. You can do so in the following ways:

- Words and body language matter. Be open, calm and listen. Do not appear too busy or the child will lose attention. Encourage the child to interrupt you if you are wrong and to be engaged in the matter. It is their matter and not yours.
- Stay neutral and do not make assumptions.
- Be reassuring.
- Focus on the child's strengths.

Many Aboriginal children in out-of-home care are disengaged from their culture and communities. It is important for them to learn about culture. The South Australian Youth Court has the discretion to hold section 22 sentencing conferences when sentencing Aboriginal children. A court that includes Aboriginal Elders will achieve greater outcomes and empower individuals. Respect for the law is enhanced when the law is speaking the language of the people.

3. Civil Law Guidelines

3.1. Introduction

Legal Services is a significant provider of civil law services to Aboriginal peoples. Of the clients who attended a legal advice appointment relating to a civil matter in the 2023–24 financial year, 3% identified as Aboriginal. Similarly, of the clients who received a grant of aid for legal representation for a civil matter in the same period, almost 5% identified as Aboriginal.

3.2. Common civil law matters

Our Legal Information and Advice Division provides services across a large range of civil law areas. Aboriginal peoples tend to have a higher prevalence of issues with tenancy and housing, consumer and consumer credit, social security, police mistreatment and harassment, and racial discrimination.

3.3. Civil law representation

Our Civil Law Practice Division provides representation in several areas, including those listed below.

NDIS appeals

The National Disability Insurance Scheme (NDIS) provides funding for people with disability to access services, build independence and have a better quality of life. Aboriginal clients may require support and advice to apply for access to the NDIS, or to request appropriate supports.

Legal Services assists with appeals to the Administrative Review Tribunal to support the dispute resolution process and work with the client to gather appropriate evidence and strengthen their case. Clients may require extra assistance to understand their rights and the language used during proceedings. Be aware of some culturally appropriate supports (such as Deaf Aboriginal Services) that are available specifically for Aboriginal peoples.

Guardianship and administration

Under the Guardianship and Administration Act 1993 (SA), a prescribed relative who has a close and continuing relationship with a person may apply to the South Australian Civil and Administrative Tribunal for guardianship (lifestyle and residential decisions) or administration (financial and legal decisions) orders in respect of that person. For Aboriginal clients, section 3 defines a 'prescribed relative' as 'an adult of Aboriginal or Torres Strait Islander descent who is related to the person according to Aboriginal kinship rules or Torres Strait Islander kinship rules (as the case requires)'.

Lawyers should be aware of the broader kinship rules that may allow more people to make an application (or appeal a decision) and be involved in the tribunal process.

Mental health orders

Under the Mental Health Act 2009 (SA), orders may be made requiring treatment for people with severe mental illness. These orders may allow the person to be treated in the community (Community Treatment Orders) or may require treatment in a secure mental health ward (Inpatient Treatment Orders).

Aboriginal peoples experience higher rates of both social and emotional wellbeing problems and mental health issues as compared with non-Aboriginal people.[33] Social and emotional wellbeing problems can result from:[34]

- grief
- loss
- trauma
- abuse
- violence
- substance misuse
- physical health problems
- child development problems
- gender identity issues
- child removals
- incarceration
- family breakdown
- cultural dislocation
- racism
- social disadvantage
- colonisation.

Legal Services assists with a range of representation for orders under the Mental Health Act (see s 84 of the Act). Section 7(ca)(iv) of the Act provides that mental health services should consider an Aboriginal patient's traditional beliefs and practices when considering whether orders are appropriate. Be aware of any cultural beliefs that medical staff may misconstrue as a hallucination or delusion. Further, when practicable and appropriate, the treating team should involve and collaborate with health workers and traditional healers from the patient's community (s 7). Lawyers should keep this provision in mind, especially when questioning the treating psychiatrist in proceedings.

Kinship rules also apply for the definition of a 'relative' under the Act (s 3). A relative may apply for a Community Treatment Order level 2 (s 16), or to vary or revoke such an order. Similarly, a relative may apply to vary or revoke a Community Treatment Order Level 3 (s 29).

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33 Aboriginal Mental Health Clinical Practice Guidelines and Pathways, CALHN Mental Health Directorate, SA Health, February 2017, page 21.

34 Social and Emotional Wellbeing Framework, A National Strategic Framework for Aboriginal and Torres Strait Islander Peoples' Mental Health and Social and Emotional Wellbeing 2004 – 2009.

4. Family Law Guidelines

4.1. Introduction

Legal Services is a primary provider of family law services to Aboriginal peoples in South Australia, including in care and protection matters. In the 2023–24 financial year, 9% of all grants of aid and 7% of duty lawyer services in family law matters were delivered to Aboriginal people.

Widespread unmet need for legal assistance services in South Australian Aboriginal communities regarding family law matters remains a significant issue.

Be aware of the historical issues around child removal especially regarding the Stolen Generations. This has had and continues to have an impact on Aboriginal families.

Aboriginal people historically have not felt comfortable using the Family Court system to resolve parenting disputes. Many Aboriginal people mistrust those involved in the administration of this system (including lawyers).

Remind your client of the lawyer-client confidentiality rules, how they apply to you as their lawyer and how they apply to support persons and others.

4.2. Access to the Federal Circuit and Family Court of Australia (FCFCOA)

An Indigenous List is provided in some FCFCOA registries to encourage and support Aboriginal people to access family law proceedings. Where at least one party in a matter identifies as Aboriginal, consider formally requesting to join the Indigenous List. Several Aboriginal-specific services also attend the Indigenous List to provide wrap-around support services for Aboriginal clients engaging in the family law system. For more information, contact the Court Registry or the Family Advocacy and Support Service (FASS). FASS regularly provide duty services for the Indigenous List. In South Australia, the Aboriginal Family Law List matters are heard by Judge Kelly. When matters are filed, they will be listed before Judge Kelly or referred to her if heard by a Registrar at the first return.

The FCFCOA employs Indigenous Family Law Liaison Officers. They sit in court during the Indigenous Family Law Lists and provide support to parties attending those lists. The Indigenous Family Law Liaison Officers are notified when a matter comes to court that involves Aboriginal children and families. They also accept referrals from the duty lawyers, private lawyers, and court registry services. For more information about the Specialist Indigenous Lists and the role of Indigenous Family Liaison Officer, visit Indigenous | Federal Circuit and Family Court of Australia.

4.3. Aboriginal families and child-rearing practices

Be aware of family and kinship dynamics and understand that Aboriginal family structures and parenting approaches often differ to Western structures. As forensic psychologist Stephen Ralph explains:

> Traditional Aboriginal family structures are based on a collectivist form of social organisation in which the raising of children is not just the responsibility of the parents. In Aboriginal culture the notion of family is broader and more inclusive of extended family members and kinship ties in which matters of mutual responsibility, obligation and reciprocity are tacitly known and understood. This is often evident in the extent to which grandmothers and aunties also play a role in caring for children, particularly when difficulties arise within the family.[35]

Understand Aboriginal child-rearing practices. Stephen Ralph further explains:

> An understanding of Aboriginal families and child-rearing practices begins with the understanding that parenting and child-rearing practices are culturally determined and are based upon the culture's expectations, beliefs, values and future aspirations. As a colonised society Aboriginal Australians seek to maintain cultural integrity and the values and practices that have been part of Aboriginal cultural for tens of thousands of years. At the same time there are evident pressures exerted by mainstream, non-Aboriginal society for Aboriginal people to more fully adapt to living within non-Aboriginal society, and thereby comply with the expectations of non-Aboriginal people.[36]

The concepts of the best interests of the Aboriginal child and their community can be seen as interrelated and interdependent.[37] A collective approach may nurture an Aboriginal child and provide a clear identity and sense of belonging. A child's connection to culture cannot be achieved by only occasional contact with family and community. It is important to consider the broader community and extended family support available to the child reflecting the important role of extended family members in the raising of Aboriginal children. Be aware of the capacity of the extended family and community network to promote the best interests of the child.

Consider contacting any cultural organisation or support person that may already have a connection with your client's family. They can provide valuable support to your client, as well as provide information to you about the child's needs. If the family agrees, the representative of a children's

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35 Ralphs, S, 'Some considerations for Family Law Practitioners in working with Aboriginal and Torres Strait Islander children and their families', NLA Independent Children's Lawyers Training program, page 14.

36 Ibid.

37 Tasmania Legal Aid, Independent Children's Lawyers Practice Standards and Guidelines p 34 at https://www.legalaid.tas.gov.au/wp-content/uploads/2022/06/TLA-ICL-Standards-Guidelines-FINAL.pdf on 30 August 2024.

cultural organisation and/or a support person can be invited to participate in conferences and other decision-making processes.

Cultural awareness includes, but is not limited to, the following:

- considering and recognising the support from extended family members in the raising of Aboriginal children, and the capacity of this extended family and community network to promote the best interests of the child
- ensuring that any expert report writer is knowledgeable, trained and experienced in working with Aboriginal families and has the capacity to relate to Aboriginal families in a sensitive and appropriate manner
- not asking what cultural activities and events the family has been 'doing' or 'attending' with the child. Aboriginal children learn about and are exposed to their culture in many different ways, day-to-day, beyond formal Aboriginal events and activities
- understanding the history of dispossession, discrimination and disadvantage experienced by Aboriginal people, and the intergenerational impacts of this history on the child and their family.

When making assessments involving Aboriginal people it is imperative to understand the impact of trauma and grief. 'The experience of trauma and grief in all its various forms is common to most Aboriginal families and has a widespread and at times debilitating effect upon family functioning and the wellbeing of family members.'[38]

Many factors need to be considered when determining the best interests of Aboriginal children. As Stephen Ralph explains, these 'risk and protective factors' may include:

Indigenous-specific risk factors

- cultural alienation, identity confusion and racism
- trans-generational transmission of trauma
- distrust of the child welfare system due to past exposure to institutional and systemic racism
- suicide of a family member and collective grief
- welfare dependence

Indigenous-specific protective factors

- cultural affiliation and resilience

[38] Above n 35, page 25.

- extended family, community and kin networks
- living on country and connectedness.[39]

The following resources may further assist you working with Aboriginal families and children:

- Stephen Ralph, 'Some considerations for Family Law Practitioners in working with Aboriginal and Torres Strait Islander children and their families' NLA Independent Children's Lawyers Training program
- Australian Institute of Family Studies, 'Working with Indigenous children, families and communities: Lessons from practice'[40]
- Emerging Minds, 'Working with Aboriginal and Torres Strait Islander families and children toolkit'.[41]
- Tracy Westerman (2021): Culture-bound syndromes in Aboriginal Australian populations, Clinical Psychologist.[42]

4.4. Domestic and family violence

While domestic and family violence can occur across the whole community, Aboriginal people experience domestic and family violence at higher rates than any other section of the community.[43] However, research has indicated that this violence is:[44]

39 Above n 35, page 30.

40 AIFS, Working with Indigenous children, families, and communities: Lessons from practice at https://aifs.gov.au/resources/practice-guides/working-indigenous-children-families-and-communities-lessons-practice on 24 August 2024.

41 Emerging Minds, Working with Aboriginal and Torres Strait Islander families and children toolkit at https://emergingminds.com.au/resources/toolkits/working-with-aboriginal-and-torres-strait-islander-families-and-children/ on 24 August 2024.

42 Tracy Westerman (2021): Culture-bound syndromes in Aboriginal Australian populations, Clinical Psychologist, DOI: 10.1080/13284207.2020.1843967.

43 National Plan to End Violence against Women and Children 2022-2032, Commonwealth Department of Social Services at https://www.dss.gov.au/sites/default/files/documents/10_2023/national-plan-end-violence-against-women-and-children-2022-2032.pdf on 18 October 2024.

44 Understanding the role of Law and Culture in Aboriginal and Torres Strait Islander communities in responding to and preventing family violence: Key findings and future directions (Research to policy and practice, 19/2020). Sydney: ANROWS page 2 at https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2020/06/30074041/ANROWS-Blagg-Law_and_culture-RtPP.pdf on 24 October 2024.

> shaped by the specific context of colonialism, systemic disadvantage, cultural disruption, forced removal of children, and the intergenerational impact of trauma. This understanding recognises that family violence in Aboriginal … communities has specific causes and complexities.

Understand the complex factors at play which may prevent help-seeking and reporting. The National Plan to End Violence against Women and Children 2022–2032 states:[45]

> Aboriginal and Torres Strait Islander women are less likely to seek help or report violence because of past government practices, and mistrust of police and mainstream services arising from previous experiences of reporting violence, misidentification of victims as perpetrators, incarceration and child removal. These structural and social inequalities are now also manifesting in higher rates of technology-facilitated abuse against Aboriginal and Torres Strait Islander peoples.

Be aware that domestic and family violence in all its forms, including coercive control, can manifest differently within Aboriginal communities. The Commonwealth Attorney-General's Department released the National Principles to Address Coercive Control in Family and Domestic Violence in 2023.[46] Since then, the Department has also put together the following factsheet and video resources to raise awareness and identify coercive control within Aboriginal communities:

- Understanding how coercive control can harm First Nations peoples (factsheet)
- Coercive control in First Nations communities (video)

If you become aware that your client is experiencing domestic and family violence, consider referring them to our specialist domestic violence and allied health services whenever possible to allow for risk assessment, safety planning and further social support and referrals.

For court proceedings, be aware of the FCFCOA's Family Violence Best Practice Principles, the Lighthouse risk screening process for parenting matters and relevant case management pathways.

Keep abreast of future developments in this area. In 2024, the South Australia Government established a Royal Commission into Domestic, Family and Sexual Violence, led by Commissioner Natasha Stott Despoja AO. This commenced on 1 July 2024 and the report was released on 19 August 2025. SA Parliament has also passed the Criminal Law Consolidation (Coercive Control) Amendment Act 2025 to criminalise coercive control in South Australia.

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45 Above n 43, page 92.

46 National Principles to Address Coercive Control in Family and Domestic Violence (2023), Commonwealth Attorney-General's Department at https://www.ag.gov.au/system/files/2023-09/national-principles-to-address-coercive-control-family-and-domestic-violence.PDF on 18 October 2024.

4.5. Court proceedings

The Family Law Act 1975 (Cth) includes specific provisions that apply to Aboriginal and Torres Strait Islander children in parenting proceedings.

- Section 60CC of the Family Law Act requires the Court to consider the 'child's best interests' when making parenting orders. If the child is an Aboriginal or Torres Strait Islander child, subsection (3) requires the court to consider:
    - the child's right to enjoy their Aboriginal or Torres Strait Islander culture, by having the support, opportunity and encouragement necessary:
        - to connect with, and maintain their connection with, members of their family and with their community, culture, country and language; and
        - to explore the full extent of that culture, consistent with the child's age, developmental level and views; and
        - to develop a positive appreciation of that culture; and
    - the likely impact any proposed parenting order will have on that right.[47]

- Section 61F of the Act requires the Court to consider any kinship obligations and child-rearing practices of a child's Aboriginal or Torres Strait Islander culture when making parenting orders or identifying people who have or may exercise parental responsibility for the child.

Expert evidence on cultural issues can be provided by an Elder of the community (who might be the child's Aboriginal grandparent) or another person accepted by the community as being authoritative.[48] Ideally the witness will be suitably qualified and independent.[49] In some cases, expert anthropological evidence may also be of assistance to the court.

A leading case in SA is Donnell v Dovey[50] which sets out the following:

- A court considering an Aboriginal and/or Torres Strait Islander child must have regard to the well-known and well available literature – including the Bringing them Home Report, royal Commission reports and reports of Stephen Ralph and others.
- Have evidence about the child's culture and that can be from an Elder or cultural leader within the culture – they are far better placed than an anthropologist.

47 Family Law Act 1975 (Cth) s 60CC(1) and (3).

48 For more information, please see Hort & Verran [2009] FamCAFC 214.

49 Sheldon v Weir [2011] FamCAFC 212.

50 [2010] FamCAFC 15.

- Without this evidence there is an appealable lacuna in the evidence.
- That attachment theory and other theories used with non-Aboriginal families may not apply to Aboriginal children and families.
- Eurocentric notions of family were not to be applied to Aboriginal families.

In addition to the general guidance provided at the outset of this document, take extra time to ensure that your client understands matters at issue in the legal proceedings and the likely requirements and outcomes.

4.6. Family Dispute Resolution conferencing

The Legal Services FDR Unit has an arrangement in place with Community Legal Centres (CLCs) including ALRM and other relevant legal services (such as the Family Violence Legal Service Aboriginal Corporation) in South Australia. If a client using these services would normally qualify for a grant of legal aid, then we will host a conference for them.

The FDR Unit at Legal Services prepares for and hosts culturally appropriate conferences for Aboriginal families by combining traditional modes of discussion with restorative justice principles, as well as applying a culturally sensitive and trauma-informed lens to the entire process.

Conferences can be arranged that will consider, in consultation with the parties and their legal representatives, any one or more of the following factors:

- conducting the Intake and Assessment process in a culturally aware way, such as by allowing clients sufficient time and space to respond to invitations to FDR and complete intake questions
- ensuring clients have the opportunity to obtain legal advice from ALRM or another Aboriginal legal agency where they wish to do so (being careful to avoid conflicts of interest)
- adjusting to clients' needs when conducting Intake and Assessment, such as by allowing clients to complete their Intake and Assessment in person or over the phone, rather than by completing an online form
- consulting extensively with the parties and their lawyers prior to a conference about what resources or supports the family may need before, during and after a conference
- providing access to technology to enable hybrid methods of FDR to include clients who may live in remote communities
- including Elders or other important community members at a Conference
- using a 'round table' or a 'yarning circle' approach to the dispute resolution model
- including kinship relationships or other options during a Conference

- including other service providers such as support workers, case managers, DCP workers or others in a Conference, particularly where they are already involved with the family
- enabling an Acknowledgement of Country or Welcome to Country and the sharing of food at a Conference where required
- conducting Conferences in traditional language or using interpreters where they are required
- ensuring any other culturally relevant customs are observed
- providing options to parties (such as conducting the Conference off site in a culturally appropriate space or on country if possible)
- travelling to clients' locations (such as Port Augusta) to conduct the Conference with parties in person
- setting aside more time for the Conference or possibly hosting several conferences over different sessions, if necessary
- appointing a Chairperson who is trained and has experience in conducting culturally appropriate FDR and takes a trauma-informed approach to the process
- offering additional supports and warm referral pathways such as to social workers or mental health workers for families who may be dealing with multiple social or other lifestyle issues.

Culturally aware Conferences arranged for Aboriginal clients are resource-heavy but have excellent outcomes when families can engage.

4.7. Department for Child Protection (DCP)

Many Aboriginal peoples and families have had long and unhappy interactions with State child protection services. Due to the long historical and continuing interactions, many Aboriginal peoples may still refer to these services as 'welfare'.

While DCP provides vital services regarding family welfare, its relationship with Aboriginal communities is strongly affected by interactions that continue to have a detrimental impact on the lives of individuals, families and communities. These interactions permeate through many communities and individuals. You should be aware of this in your representation of clients. A critical part of your role representing an Aboriginal client is to ensure that DCP has adhered to the Aboriginal-specific provisions of its applicable legislation.

4.8. Care and protection proceedings

Care and protection matters are currently governed by the Children and Young People (Safety) Act 2017 (SA). This Act includes specific provisions regarding Aboriginal people, such as Chapter 2 Part 3 which sets out the Aboriginal and Torres Strait Islander Child Placement Principle.

- Section 12(2)(c) states that the object of the section, as well as attempting to reduce the number of removals of Aboriginal and Torres Strait Islander children and young people, is to encourage 'Aboriginal and Torres Strait Islander people, their children and young people and State authorities to act in partnership when making decisions about the placement of Aboriginal and Torres Strait Islander children and young people' under the Act.
- Section 12(3) details the Aboriginal and Torres Strait and Islander Child Placement Principle. Placement must occur in the following order:
    - a member of the child's family
    - a member of the child's community who has a relationship of responsibility for the child
    - a member of the child's community
    - a person of Aboriginal or Torres Strait Islander cultural background (as the case requires) (determined in accordance with Aboriginal or Torres Strait Islander traditional practice or custom).

If a child is unable to be placed with anyone as above, or it is not in their best interests to do so, the child should be given the opportunity for continuing contact with their family, community and culture (determined in accordance with Aboriginal and Torres Strait Islander practice or custom). Before placing a child, the Chief Executive or the Court must, where reasonably practicable, consult with and have regard to submissions from a recognised Aboriginal or Torres Strait Islander organisation.

Further elements to the Aboriginal and Torres Strait Islander Child Placement Principle (not set out in the current Act) include prevention, partnership, participation, and connection.[51]

For further information regarding the Aboriginal and Torres Strait Islander Child Placement Principle, see report from the Commissioner for Aboriginal Children and Young People, Holding on to Our Future.

The State Government plans to repeal and replace the Children and Young People (Safety) Act 2017 with the Children and Young People (Safety and Support) Act 2025. These Guidelines will be reviewed and updated when the new law commences.

[51] SNAICC, Aboriginal and Torres Strait Islander Child Placement Principle at https://www.snaicc.org.au/our-work/child-and-family-wellbeing/child-placement-principle/ on 30 August 2024.

5. Conclusion

These Guidelines have been designed to assist you in your representation of Aboriginal clients. A document like this can never cover the breadth of Aboriginal cultures or indeed every circumstance or issue that you will encounter within your representation of an Aboriginal client. In this light, these Guidelines can be seen as a starting point on your journey as you navigate through your career of representing Aboriginal peoples. Due to the limitations of these guidelines, please consider engaging with local Aboriginal Community-Controlled Organisations, such as ALRM and FVLSAC, to seek ongoing guidance as to how best to work with Aboriginal clients.

We also acknowledge the passion and dedication that many lawyers demonstrate in providing quality legal representation to Aboriginal clients and the community. We want these Guidelines to assist you in this service, and, indirectly, contribute to the necessary journey of reconciliation for all Australians.

Appendix A

With You, Trauma Informed Organisational Toolkit, 2023

Respectful, trauma-informed lawyering from the With You consultations

According to clients we spoke to as part of the With You consultations, the following factors could help build trust and support decision-making when working with lawyers.

Not helpful or respectful of clients	Helpful, respectful
Processes that indicate that the lawyer's time is more valuable than the client's	Respecting each person's time, without rushing. If you only have a short time available to speak with someone, be open about this from the outset. Slow things down when people want to slow down
Having very long or short meetings, expecting people to share their whole story or make difficult legal decisions in one session	Building trust with the client by building a relationship. For one-off meetings, making sure you can take breaks, reschedule or follow up with your service if necessary. Even small moments of connection establish a trusting relationship that can save time later
Expecting people to understand what it means to have a lawyer, or what to expect from legal processes	Checking in with the person about what they might want more information on. Being open to explaining service eligibility, expectations, lawyer-client relationships and information-sharing in detail
Using legal jargon when talking to someone, and not explaining legal concepts	Checking in with the client about their understanding of what is going on, whether they would like more information
Being rude, dismissive or judgmental, e.g., telling people to 'get over' things or 'tone down' how they share information	Being respectful, and led by each client. Understand that legal processes can be stressful and re-traumatising

Speaking only to someone's support person instead of them	Checking in with the client about how they would like you to speak with their support person. Remember they are your client, and you are working with them
Automatically believing 'official' things that are written or said about clients, and treating these things as fact, e.g., medical records and diagnoses	Being on your client's side, believing and respecting their experiences and identity
Cutting someone off or dismissing information that is not strictly about the legal matter	Letting people tell their stories, and share what they think is relevant
Making promises you can't keep, whether about services or court processes	Keeping promises, and being honest and transparent with your client to support them in making decisions

Flexible and respectful service delivery from the With You consultations

According to clients we spoke to as part of the With You consultations, the following factors could make services feel flexible, appropriate and responsive, when implemented by organisations and legal professionals.

Not flexible or responsive to clients	Flexible, responsive
Formal, stuffy environment, with intimidating barriers between clients and staff	Informal environment, welcoming to clients
Having a call-back only phone system, or very limited hours of the service being available on the phone	Having professionals available to take calls and answer the phones. If this is not possible, there is a delay in returning calls, or expected wait times, make this clear on public materials about the service, answering machine messages and individual communications. Even automated messages can be trauma-informed.
Not explaining service eligibility criteria to someone until they have shared their whole story	Discussing service eligibility on initial phone calls, and explaining what information will be used for so clients can make informed decisions about what information to share
Not allowing clients to bring or work with support people	Understanding the importance of support people, and supporting clients to make informed choices about the potential consequences of having support people in legal meetings or at court
Refusing people services or automatically closing their case if they miss appointments	Understanding that people can have a range of reasons for missing appointments, offering to check in or reschedule

Making cold referrals to services that are inappropriate or do not have capacity to work with people	Making warm referrals, checking in with services about eligibility and waitlists. Having referrals handy for national helplines where local services are unavailable or overwhelmed
Online only communications, primarily through email and online meetings	Discussing how people can access your service with each client, in the understanding that not everyone has a computer or smartphone. Talking about and respecting each person's communication preferences, and providing referrals to services that provide the person's preference mode of engagement
Expecting people to print out documents	Being flexible about how people can sign and engage with paperwork. If you require documents to be printed and signed, offering to print them out and provide them to clients or to send them directly to service providers, e.g. a doctor that you need a support letter from
Physically inaccessible, e.g., does not allow for people to access the service in wheelchairs	Physically accessible, and accessibility information is provided to clients and available on public information about the service

Appendix B

Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia (Third Edition, 2020)

	Likely to need an interpreter	Less likely to need an interpreter
Articulating back	The person has difficulty articulating back what you said to them.	The person is able to meaningfully articulate most of what you said to them using their own words.
Short or long answers	The person only speaks in short sentences (four or five words or fewer) or mainly gives one-word answers.	The person speaks in full sentences of six or seven words or more and elaborates on answers to questions.
Agrees or disagrees	The person consistently agrees with your questions or propositions you put to them.	The person is easily able to disagree and articulate a different point of view.
Inappropriate responses	The person frequently responds inappropriately to your comments or questions (e.g. responding with 'yes' or 'what' or 'where' questions).	The person consistently responds meaningfully and appropriately to questions and comments.
Unsure of meaning	You are sometimes unsure about what your client is telling you, even when the words and grammar they are using are clear to you.	You can process the person's speech clearly and understand what they are telling you.
Contradicts themselves	The person appears to contradict themselves and is unaware of the apparent contradiction.	The person does not contradict themselves, or if they do, they are aware of it and can address the contradiction.

Uses new vocabulary	The person does not add significant amounts of new vocabulary to the conversation. They rely on using the words or phrases you have previously said to them.	The person frequently adds new vocabulary to the conversation.
Good grammar	The person does not use correct grammar. E.g. mixes up pronouns ('he' instead of 'she') or uses the past tense incorrectly ('he look at me').	The person's grammar is mostly correct. It should be noted however that "poor" grammar is often a feature of Aboriginal English and is not a conclusive test.
Repeating and simplifying	You find yourself frequently needing to restate and simplify your messages.	You can talk easily in a normal manner.