

# PROTOCOL FOR FIRST NATIONS EVIDENCE IN THE LAND COURT

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The Land Court, on occasion, hears evidence from Aboriginal and Torres Strait Islander peoples. This can occur in different types of matters, including but not limited to matters under the *Aboriginal Cultural Heritage Act 2003*, the *Torres Strait Islander Cultural Heritage Act 2003* and mining objection matters.

The purpose of this protocol is to provide a general framework for hearing First Nations evidence in a culturally appropriate manner. The specific procedures to be undertaken in each case should be decided on a case-by-case basis.

Under this protocol, the Court, parties and legal representatives should consider the unique nature of evidence relating to traditional laws and customs.

The following factors may be relevant considerations:

1. The Court environment

The Court environment may have unwelcome connotations for Aboriginal and Torres Strait Islander peoples. The formality is not conducive to the presentation of evidence which may be personal and/or intimate. The Court and legal representatives should provide a considered and plain English explanation of Court processes and rules to witnesses who have not appeared before the Court previously.

2. The shared nature of cultural knowledge transmission

First Nations evidence may be based on the oral transmission of knowledge with a Traditional Owner group. Some aspects of First Nations evidence may need to be given by a person with a particular level of authority. Other First Nations peoples may defer to a person with authority to speak or be unwilling or uncomfortable when asked to provide evidence themselves without endorsement or participation of the person with authority.

3. Restrictions on information

There may be restrictions on what an individual can speak about with authority concerning traditional laws and customs. This is because knowledge can be 'differently spread' throughout First Nations communities. For example, some knowledge may only be held and communicated by persons of a particular gender. Another example is that younger people may not speak about some types of information which is seen as the responsibility of older, more knowledgeable persons. Younger people may also be reluctant to publicly disagree with what an older person has said.

Asking a person to provide information about which they are not culturally qualified to speak may be embarrassing, offensive and potentially detrimental to the quality of evidence given. The Court and legal representatives should take care to ensure that a particular subject can be discussed openly and that a witness feels it is appropriate to provide information on that subject.



The Court and legal representatives should be careful to note a witness' demeanor when a witness denies knowledge about a particular matter. If a witness denies any significant knowledge about a particular matter or seeks assistance from another, it may not mean that the witness lacks the relevant knowledge but that they have reservations about the appropriateness of disclosing the information themselves. Additionally, the Court should consider whether denial of knowledge is a means to avoid further questions on what the witness regards as a culturally inappropriate topic.

Most evidence to be adduced should be of a non-restricted nature. However, the Court and legal representatives should identify when evidence may need to be given with restrictions, e.g. restrictions on the gender of persons present when the evidence is given and the reproduction and distribution of that evidence.

#### 4. Language

Witnesses should be encouraged to inform counsel and/or the Court when they have difficulty in understanding a question put to them.

Certain phrasing may lead to gratuitous concurrence, whereby a witness will answer affirmatively to questions put to them in order to placate the questioner even where they do not agree or do not understand the question. Courtesy, shyness, fear or a lack of understanding may result in a witness being easily led by a leading question. This may, in particular, occur if the questioner expressly or impliedly asks the witness to agree with a proposition or series of propositions. Counsel should avoid questions that invite witnesses to agree with propositions.

Care should also be taken to clearly tell witnesses when a questioner is changing the topic of questioning.

The Court and legal representatives should also understand that non-verbal expression is a valid form of communication. This may include physical demonstration, sign language and deliberate silences.

#### 5. Speaking on country

Where practicable and relevant, it may be beneficial for evidence about traditional laws and customs to be given on country. This provides an opportunity for family and community members to attend together, satisfying any need for traditional owners to speak about their country together.

**The Land Court of Queensland**

