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NATIONAL INDIGENOUS ADULT
EDUCATION & TRAINING

SINCE 1957

10861NAT Diploma of Aboriginal and Torres Strait Islander Legal Advocacy

LEARNER MANUAL

Block 1 Advocacy and Support

**NAT10861007 Utilise ethical standards when dealing
with clients**

COMMONWEALTH OF AUSTRALIA

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Introduction *NAT10861007 Utilise ethical standards when dealing with clients*

This unit covers the skills and knowledge required to apply accepted codes of ethics and professional standards to daily work requirements. Ethical codes and practices are an integral part of work and life. An understanding of the basic principles and standards to abide by are necessary to maintain an effective relationship with clients and/or colleagues.

Professional and ethical standards in legal representation

Lawyers and legal services have obligations to practice law according to certain standards with respect to their clients. Standards vary across states and territories of Australia, however there are a number of notable similarities.

The major standards and points of legal professional responsibility to clients are:

1. Competence and promptness
2. Duty to account
3. Fiduciary duties
4. Confidentiality
5. Conflicts of interests
6. Duty to the Court

Competence and promptness

Competence: The general standard of care for those practising law is to exercise the care, skill or diligence which would be expected of a reasonably competent legal practitioner under similar circumstances.

Promptness: Unreasonable delay can amount to professional misconduct. The reason it can lead to misconduct is because it causes unnecessary expenses for the other side, which is unfair and against the public's interest.

Duty to account

A major source of complaints against lawyers by clients is a failure of **communication**. In many circumstances this involves lawyers not being courteous and failing to communicate or follow instructions.

A lack of communication can sometimes be a breach of a lawyer's professional duties. In *R v Szabo* [2000]¹, the client discovered that his defence counsel had been in a relationship with the Crown Prosecutor. This information was not given to the client and the Court of Appeal ordered a new trial.

Fiduciary duties

The relationship between a client and a solicitor is said to be a fiduciary relationship. A fiduciary is an individual in whom another (the client) has placed their trust and confidence to manage and protect property or money. The fiduciary has an obligation to act for the client's benefit.

Lawyers may breach their fiduciary duty to clients, which can result in professional negligence or professional misconduct.

Confidentiality

In *Spincode Pty Ltd v Look Software Pty Ltd* [2001]², it was held that *"the relationship between lawyer and client is one of confidence that obliges a solicitor not to disclose information obtained during the course of the relationship without the express or implied approval and consent of the client"*.

In order to uphold and maintain the trust of your client it is vital that all communication between the solicitor and the client remains within that relationship.

A breach of this confidence is not only unethical and contrary to the nature of the profession but more importantly will affect the solicitor's relationship with current and future clients.

Conflicts of interest

Legal practitioners must make all attempts to avoid the situation where their duty to a client conflicts with their duty to another client (e.g. avoiding misuse of information obtained in confidence during dealing with a previous client), their duty to the court (ultimately prevails over duty to client) or a personal interest the practitioner may have in the proceedings (e.g. drawing up a will in which the practitioner is a beneficiary). A couple of common law examples of the latter kind of conflict of interest are where a solicitor guarantees a loan made to their client (*Maguire and Tansey v Makaronis* (1997)³) and where the solicitor has business dealings with their client (*Law Society of NSW v Harvey* [1976]⁴)

Before beginning to act for a new client, it is important that a legal practitioner determine the following questions:

¹ *R v Szabo* [2000] QCA 194 (26 May 2000)

² [*Spincode Pty Ltd v Look Software Pty Ltd* \[2001\] VSC 287](#)

³ *Maguire and Tansey v Makaronis* (1997) HCA 23

⁴ *Law Society of NSW v Harvey* [1976] 2 NSWLR 154

- Have all interested parties to the proceedings been identified?
- Have all members of the representing law firm registered any personal interest held outside the office (e.g. any relation to the client, any financial interest in the client's affairs, any prior knowledge of the client that may adversely affect your firm's representation?)
- Is the firm, by whatever means, in possession of confidential information regarding any of the interested parties to the proceedings?

Duty to the Court

The various codes of legal ethics and professional responsibilities across Australia make it clear that a legal practitioner's duty to the court and to the administration of justice is paramount. What this means in practice, is that a legal practitioner's duty to the court must prevail to the extent of any inconsistency with any other duty the practitioner may owe⁵.

In *Incorporated Law Institute of NSW v R D Meagher*, Isaacs J made the following statement which is important in reflecting on the role of the lawyer in society:

*"...There is therefore a serious responsibility on the Court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential"*⁶

Identifying and Interpreting relevant codes, policies and procedures for client representation and communication

There are a number of documents that determine the roles and responsibilities of legal professionals when providing services to clients. Some of the more prominent documents are as follows:

1. Organisational codes of conduct
2. Statutory codes
3. Non-statutory professional standards
4. Workplace policies

⁵ For example, see New South Wales Professional Conduct and Practice Rules 2013 (Solicitor's Rules), Rule 3

⁶ *Incorporated Law Institute of NSW v R D Meagher* (1909) 9 CLR 655 at 681

Organisational codes of conduct

A code of conduct is intended to be a central guide and reference for users in support of day-to-day decision making. It is meant to clarify an organisation's mission, values, and principles, linking them with standards of professional conduct. As a reference, it can be used to locate relevant documents, services and other resources related to ethics within the organisation.⁷

A well-written and thoughtful code also serves as an important communication vehicle that *"reflects the covenant that an organisation has made to uphold its most important values, dealing with such matters as its commitment to employees, its standards for doing business and its relationship with the community."*⁸

A code is also a tool to encourage discussions of ethics and to improve how employees/members deal with the ethical dilemmas, prejudices and grey areas that are encountered in everyday employment. A code is NOT a substitute for relevant rules, standards, policies but a complement.

Codes of conduct offer an invaluable opportunity for responsible organisations to create a positive public identity for themselves which can lead to a more supportive political and regulatory environment and an increased level of public confidence and trust among important constituencies and stakeholders.⁹

Aboriginal Legal Service (ALS) 'Code of Conduct'

Excerpt from the ALS NSW/ACT Ltd website....

ALS has a responsibility to its stakeholders to ensure the professional and ethical conduct of its employees. As such it is important that prospective applicants understand the core values of our Code of Conduct policy as the standard of conduct required. These core values are:

- Treat all the people that we come in to contact with respect and dignity
- Uphold the law, respect community standards, and act accordingly
- Use ALS property responsibly and in the best interests of ALS and its reputation, and
- Accept that we are responsible for our actions and accountable for the consequences.¹⁰

⁷ Ethics Resource Centre. (2014). *Why Have a Code of Conduct*. [online] Available at <http://www.ethics.org/resource/why-have-code-conduct>. [Accessed 6/10/14].

⁸ Driscoll, Dawn-Marie and W. Michael Hoffman, *Ethics Matters: How to Implement Values-Driven Management*, 2000, p. 77 as cited in Ethics Resource Centre, *ibid*.

⁹ *Principles of Stakeholder Management*, The Clarkson Centre for Business Ethics, 1999, p. 12.

¹⁰ See Aboriginal Legal Service, (2014). *Field Officer roles are Aboriginal and Torres Strait Islander identified*. [online] Available at:

http://www.alsnswact.org.au/media/BAhbBlsHOgZmSSlhMjAxMy8wMS8yMy8yMl8zOV8xMF8xMThfZmlsZQY6BkVU/22_39_10_118_file [Accessed 26 Sep. 2014].

Statutory codes of conduct

Created and amended by the Government, statutory codes of ethics set forth the legislative obligations of legal practitioners across Australia when engaging in the provision of legal services. In New South Wales, the two core pieces of statutory code regulating the legal profession are the *Legal Profession Act 2004* (NSW) and the *Legal Profession Regulation 2005* (NSW). In short, these documents seek to 'serve the administration of justice and protect clients of law practices and the public generally. [They] also seek to facilitate the regulation of legal practice on a national basis across State and Territory borders.'¹¹

Currently, each state in Australia has its own version of legal statutory codes of ethics. Importantly though, in 2015 the **Legal Profession Uniform Law** was introduced, creating a common legal services market across NSW and Victoria, encompassing almost three quarters of Australia's lawyers. The *Legal Profession Uniform Law Act 2015* came into effect on 1 July 2015. This legislative scheme aims to harmonise regulatory obligations while retaining local performance of regulatory functions.

Privacy and *The Privacy Act 1988* (Cth)

Section 2A:

The objects of this Act are:

- (a) to promote the protection of the privacy of individuals; and
- (b) to recognise that the protection of the privacy of individuals is balanced with the interests of entities in carrying out their functions or activities; and
- (c) to provide the basis for nationally consistent regulation of privacy and the handling of personal information; and
- (d) to promote responsible and transparent handling of personal information by entities; and
- (e) to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected; and
- (f) to facilitate the free flow of information across national borders while ensuring that the privacy of individuals is respected; and
- (g) to provide a means for individuals to complain about an alleged interference with their privacy; and
- (h) to implement Australia's international obligation in relation to privacy.

The *Privacy Act 1988* (Cth) sets down the law in relation to confidentiality and privacy in Australia. Australians have the right to know why information is required of them and how that information is going to be used. ¹² The Act is comprised of 13 Australian Privacy Principles¹³ that

¹¹ The Law Society of New South Wales. (n.d.). *Legislation and Rules*. [online] Available at <https://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ruleslegislation/index.htm>, [Accessed 8/10/14]

¹² Privacy and Confidentiality Acts. (2014). 1st ed. [ebook] UWS. Available at: <http://pubsites.uws.edu.au/ndco/disclosure/pdfs/leg/privacy.pdf> [Accessed 14 Oct. 2014].

have been developed to govern the collection, storage, use, and disclosure of personal information by Federal and ACT government Agencies. Among other things, the Act addresses the management of personal information in an open and transparent way, the use and disclosure of personal information, the integrity of personal information (including the quality and security of personal information) and how to deal with requests for access to and/or correction of personal information.¹⁴

Non-statutory Professional standards

Though not legislation and unenforceable before a court of law, all Australian states through their respective Law Societies, have implemented a binding code of professional standards¹⁵. In an attempt to create a single, uniform set of rules governing the practice of law and the Australian legal profession, the Law Council of Australia has developed the Australian Solicitors Conduct Rules 2011 ('the ASCR'). It is hoped that adoption of the ASCR by all Australian states will ensure that all of Australia's solicitors are bound by a common set of professional obligations and ethical principles when dealing with their clients, the courts, their fellow legal practitioners and other persons.

The ASCR cannot cover all possible dilemmas or scenarios, but the ethical principles that are enshrined in the ASCR provide the framework for legal practitioners to deliver competent and quality legal service to clients. These non-statutory professional standards must be read in conjunction with the common law and equity (branch of law focused on fairness).

Workplace policies

Given the growing complexity of client's needs and a greater emphasis on the accountability and efficiency of service providers, almost all organisations, big or small, should have *at least* the most basic of workplace policies. These policies may deal with anything from workplace conduct, human resource management and workplace safety, to information storage, cultural awareness and complaint resolution processes. In an organisation providing legal services such as Legal Aid New South Wales and the Aboriginal Legal Service for example, it would be important to immediately familiarise yourself with their conflict of interest, client eligibility and client confidentiality policies.

Well-written workplace policies:

- are consistent with the values of the organisation

¹³ *Privacy Act 1988* (Cth) s 14; For more detailed discussion of the APP's see generally Oaic.gov.au, (2014). *Privacy fact sheet 17: Australian Privacy Principles* | Office of the Australian Information Commissioner - OAIC. [online] Available at: <http://www.oaic.gov.au/privacy/privacy-resources/privacy-fact-sheets/other/privacy-fact-sheet-17-australian-privacy-principles> [Accessed 14 Oct. 2014].

¹⁴ See *Privacy Act 1988* (Cth) sch 1.

¹⁵ See for example, the Law Society of New South Wales, New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)

- compliment legislation relevant to the workplace (e.g. Privacy Act 1988 (Cth), Workplace Health & Safety 2011 (Cth), Fair Work Act 2009 (Cth) & Public Services Act 1999 (Cth)).
- demonstrate that the organisation is operating in an efficient and professional manner
- ensure uniformity and consistency in decision-making and operational procedures
- add strength to the position of staff when possible legal actions arise
- save time when a new problem can be handled quickly and effectively through an existing policy
- foster stability and continuity
- maintain the direction of the organisation even during periods of change
- provide the framework for business planning
- assist in assessing performance and establishing accountability
- clarify functions and responsibilities¹⁶
- are non-discriminatory, as well as embrace equality and diversity

Researching and applying duty of care requirements towards clients and other stakeholders- the tort of negligence

An introduction to tort law

The term 'torts' is applied to a miscellaneous and more or less unconnected group of civil wrongs other than breach of contract. The law of torts is concerned with *the compensation of losses* suffered by *private individuals* in their legally protected interests. Unlike criminal proceedings which are commenced by the police, proceedings for a breach of a tort law are brought by an individual against another individual or organisation. Torts may serve to protect a person's interest in his or her bodily security (e.g. the torts of battery, assault & false imprisonment), tangible property & financial resources (e.g. the torts of trespass & negligence), use of land (e.g. tort of nuisance) or reputation (e.g. tort of defamation).

In the course of providing legal services to a client, either in the capacity of a legal practitioner or a legal support office, you owe the client a duty of care. Duty of care here refers to the obligation of the party providing the legal service/s to avoid causing damage or loss to the client, where that damage or loss could have been reasonably foreseen. Understanding the concept of negligence and the various elements of the tort is important when purporting to provide any type of services to a client, especially those of a professional nature.

What is negligence?

Legally speaking, negligence is a failure to take reasonable care to avoid **foreseeable** harm to other people or their property. This is not to say that negligence is a failure to achieve

13. New South Wales Government, Industrial Relations. (2013). *Workplace policies and procedures*. [online] Available at http://www.industrialrelations.nsw.gov.au/oirwww/Employment_info/Managing_employees/Workplace_policies_and_procedures.page [Accessed 2 Oct. 2014]

perfection. The law recognises there are certain accidents that are unavoidable and for which legal blame should not be allocated. However, negligence may result from a 'failure to exercise the degree of care and skill that could reasonably be expected in the circumstances from someone with the particular profession's training, skill and experience'¹⁷.

Elements of Negligence

1. Defendant owed a **duty of care** to the plaintiff to take reasonable care to prevent him/her from suffering injury, loss or damage.
2. There was a **breach of the duty of care** by failing to adhere to the standard of care expected.
3. The **breach of duty caused damage** to the plaintiff and damage that was of a kind which was reasonably foreseeable (i.e. was not too remote)

These principles were laid down in the English case of *Donoghue v Stevenson* [1932]¹⁸ and were adopted in Australian law in *Grant v Australian Knitting Mills* in 1933 by the High Court.

***Donoghue v Stevenson* [1932] UKHL 100**

Donoghue v Stevenson is a rather famous case.

FACTS: Donoghue (who is now known as 'the most famous litigant of all time') sought to recover damages from Stevenson, who was a soda manufacturer. Donoghue sustained injuries as a result of drinking some of Stevenson's brand of ginger beer which happened to contain the decomposed remains of a snail.

The ginger beer was served in a non-clear bottle, bought for Donoghue by a friend in a café in Paisley (near Glasgow, Scotland). She suffered shock and severe gastro-enteritis as a result. She alleged that Stevenson was to blame for her condition as he had failed in his duties to provide an efficient system of inspecting bottles.

OUTCOME: Donoghue brought an interlocutory action against Stevenson in the Court of Session (Scotland's highest civil court). Her claim was dismissed due to the lack of a relevant precedent, with Donoghue having no cause of action against the manufacturer since she was not privy to the contract between the manufacturer (Stevenson) and the retailer of the ginger beer. However, Donoghue's lawyers successfully appealed the matter to the House of Lords arguing negligence- that a duty of care was owed by Stevenson to Donoghue and that duty was breached.

Following the successful appeal, the case was returned to the Court of Session for costs assessment in Donoghue's favour. However, Stevenson died on 12th November 1932, so the

¹⁷ Barry, R. (ed.). (2007). *The Law Handbook* (10th edition). Sydney, NSW: University of New South Wales Press Ltd.

¹⁸ *Donoghue v Stevenson* [1932] AC 562

claim was settled out of Court in December 1934. This trial did not go ahead due to Stevenson's death.

Grant v Australian Knitting Mills [1936] A.C 85

FACTS: Dr Grant who lived in Adelaide, bought underpants from a retailer who had purchased them direct from the manufacturer- Australian Knitting Mills. Dr Grant wore the underpants for a day after which he began experiencing a horrendous itch.

At one point he treated himself with calamine lotion, but the irritation was so bad that he scratched his skin until he bled. He consulted a dermatologist, Dr Upton who advised Dr Grant to discard the underwear. At the end of the week he changed them for another pair.

Dr Grant's condition worsened; the rash spread further and became acute. He developed dermatitis so badly he was forced to spend 17 weeks in hospital. The illness was severe, and at times Dr Upton feared that his patient might die.

Dr Grant claimed that the disease was caused by the presence of an irritating chemical, namely sulphite, in the cuffs or ankle ends of the underpants which he purchased and wore.

HIGH COURT OF AUSTRALIA HELD: Dr Grant was successful in the initial proceedings, yet when Australian Knitting Mills later appealed to the High Court of Australia, the Court held that the evidence was not sufficient to find in favour of Dr Grant. The main reasoning of the High Court was that the underpants had been washed resulting in problems proving the presence of the chemical sulphites. Dr Grant then appealed to the Privy Council in England (the Highest Court in Australia at the time).

PRIVY COUNCIL IN ENGLAND HELD: Ultimately it was found that the manufacturer had been negligent in the process of manufacture. In this case, Dr Grant sued the retailer in contract law and the manufacturer in tort law (for negligence).

In every case involving negligence, the Plaintiff must establish 3 elements:

1. Did the defendant owe the plaintiff a duty of care?

- Is it reasonably foreseeable that the defendant's act or omission could have caused harm to the plaintiff (or the class of person to whom the plaintiff belongs)?
- Is there sufficient proximity between the defendant and the plaintiff?

The duty of care test is **objective**: whether an ordinary, reasonable person in the circumstances of the defendant could have foreseen that loss or injury could occur.

Was there a **recognised relationship**? Such as employer-employee, manufacturer-consumer, lawyer-client, doctor-patient.

2. Did the defendant breach that duty of care?

The Court will consider the following factors in deciding whether a duty of care has been breached:

- Likelihood of injury (in negligence, a person cannot be liable for failing to take precautions against an unforeseeable risk¹⁹)
- Gravity of harm
- Degree of effort to eliminate the risk
- Social worth of Defendant's conduct
- Accepted standard (the defendant's conduct is to be judged by the standard of care that a prudent person would have exercised in the circumstances).

3. Did the breach cause the damage?

The defendant's wrongful act must have caused or contributed to the harm for which the plaintiff seeks damages. Determining questions of causation can prove difficult in a great many circumstances. As an example, on the way to work person A accidentally runs over a cat, five minutes later person B stops to tend to the cat, person B arrives late to work and is fired as a result, is person A then the cause of person B being fired? In certain ways one might think this is so, yet in other ways it seems a ridiculous conclusion to draw. Determining whether the actions or omissions of one person/organisation are the cause of particular damage or loss to another person/organisation for the purpose of establishing *legal liability* is a complex task.

One approach the courts in Australia have taken over the years is the application of a 'but for' test- 'but for' the act or omission of person A, person B would not have suffered the injury or loss in question. Put differently, 'If the damage would have occurred notwithstanding the negligent act or omission, the act or omission is not a cause of the damage and there is no legal liability for it²⁰'. Another way the courts have addressed the question of causation, is by determining whether it was **reasonably foreseeable** that person A's actions would have caused the harm or loss experienced by person B in the given circumstances.²¹ This test holds the same as the objective test in the breach of duty.

Negligence in legal practice

Lawyers owe their clients a duty of care. Clearly, the mere fact that a lawyer fails to achieve a client's desired outcome does not, of itself, mean that the lawyer was negligent. However, a lawyer who fails to provide a legal service to a client with at least reasonable care and skill, causing the client to suffer financial or other loss, may well have breached his or her duty of

¹⁹ *Roe v Minister of Health* [1954] 2 All ER 131

²⁰ *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 as per McHugh J.

²¹ See *The Wagon Mound (2)* [1967] 1 AC 617.

care. Breach of this duty may amount to negligence and the client may be entitled to compensation for the loss.²²

Further to this, a legal practitioner may be in breach of a statutory code or professional standard impacting on the jurisdiction(s) in which they operate. In Queensland, the *Legal Profession Act 2007* refers to **unsatisfactory professional** conduct as including “conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner”.²³ The Act also goes on to define **professional misconduct** as involving a substantial or consistent failure to reach that same standard. This is therefore generally more serious and less likely to be a “one-off”, accidental oversight or failure.²⁴ Breach of these rules may result in disciplinary action by the relevant regulatory body (e.g. suspension, disqualification or termination of practicing certificate).

How the tort of negligence impacts on legal support staff (i.e. field officers, paralegal officers, and administrative officers)

We owe a duty of care to others in a great many different circumstances throughout our lives. In a professional context, it is mainly the responsibility of the employer (i.e. the organisation) to ensure that employees are aware of relevant codes of conduct and professional standards. Where there is an alleged breach of confidentiality or negligence on the part of a legal support officer, typically the employer will be vicariously liable for the employee’s action. Regardless, it makes a great deal more sense for complainants/applicants to go after employers, as they generally have more money than respective employees. The usual elements of negligence apply in the context of any role you may fill in a legal organisation. All legal support workers should be aware of the duty they owe their clients and must be capable of performing those duties to a reasonable professional standard.

Employees are generally protected by their employer as long as they follow policies and reasonable instruction. Where an employer will not be vicariously liable for damage or loss incurred by a client, is when an employee acts outside the course of their employment..²⁵ Particular circumstances where an act is outside the course of employment include:

²² Legal Services Commission, (2014). *Fact Sheet 3*. [online] Available at http://www.lsc.qld.gov.au/_data/assets/pdf_file/0009/97749/FACT-SHEET-3-Negligence-June-2012.pdf [Accessed 29 Sep. 2014].

²³ Legal Services Commission, (2014). *Fact Sheet 3*. [online] Available at: http://www.lsc.qld.gov.au/_data/assets/pdf_file/0009/97749/FACT-SHEET-3-Negligence-June-2012.pdf [Accessed 29 Sep. 2014].

²⁴ Legal Services Commission, (2014). *Fact Sheet 3*. [online] Available at: http://www.lsc.qld.gov.au/_data/assets/pdf_file/0009/97749/FACT-SHEET-3-Negligence-June-2012.pdf [Accessed 29 Sep. 2014].

²⁵ *Century Insurance Co Ltd v Northern Ireland Road Transport Board* [1942] AC 509.

- **Passion and resentment** – A barmaid threw a glass filled with beers at a customer as she was angry at this foul behaviour²⁶
- **Unconnected acts** – employee on a ‘frolic of his/her own’²⁷
- **Employer prohibitions** – express limits on conduct within sphere of employment²⁸
- **Criminal acts of employees** – employer may still be liable usually considered a personal issue.²⁹

Vicarious Liability

Vicarious liability refers generally to a situation where someone is held responsible for the actions or omissions of another person. In a workplace context, an employer can be liable for the acts or omissions of its employees, provided it can be shown that these actions took place in the course of their employment. If those actions are found to be unlawful, both the employee responsible for the action/s and the employer or principal may be held responsible. That is, unless an employer can show that ‘all reasonable steps’ were taken to reduce liability or that the employee was acting in a personal capacity (i.e. they were acting outside the course of their employment).³⁰

What does ‘all reasonable’ steps mean?

‘All reasonable steps’ is not defined in the legislation as what is reasonable for a large corporation may not be reasonable for a small business. Rather it is worked out on a case-by-case basis. This means employers must actively implement precautionary measures to minimise the risk of employees acting in an unlawful manner in the course of their employment.

²⁶ *Deatons Pty v Flew* (1949) 79 CLR 370.

²⁷ *Aldred v Nacanco* [1987] IRLR 292.

²⁸ *Rose v Plenty* [1976] 1 WLR 141.

²⁹ *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716.

³⁰ Humanrights.gov.au, (2014). *Employer Responsibilities: A Guide to Vicarious Liability*. [online] Available at: <https://www.humanrights.gov.au/employer-responsibilities-guide-vicarious-liability> [Accessed 26 Sep. 2014].

Criminal negligence

Civil negligence, such as that discussed above, is very different from criminal negligence. Criminal negligence is not an offence in itself, it is rather a factor considered by courts when deciding the guilt of an accused for certain defined criminal offences (e.g. manslaughter by criminal negligence, negligent driving, causing grievous bodily harm by a negligent act or omission, etc.). Criminal negligence requires a greater degree of culpability than civil negligence.

In order to be found guilty of a criminal offence generally, an accused must be shown to possess a guilty state of mind ('mens rea') at the time of committing the offence. For example, where it can be shown that an accused physically assaulted a victim, it must further be proven that the accused had an intention to assault the victim. If for example, an accused was going to shake a person's hand and in doing so accidentally crushed it, he will not be guilty of assault. If however, the prosecution can prove that in shaking the person's hand, the accused had the intention to crush it, then it's likely they will be guilty of assault.

There are certain offences however, where the requirement of the accused possessing a guilty mind or criminal intent is not necessary. In some instances, recklessness or negligence will satisfy the mental element of a crime. To convict an accused of criminal negligence the prosecution must still prove the three elements of negligence as set out above, but they must go further and prove that the particular negligence was of such a serious *degree* that it amounted to a crime.

Following are some examples of criminal negligence:

- A person who drives 40 km/hr over the speed limit in a really dangerous way and who causes a car accident and injures.
- A person who breaks texting-and-driving laws and who causes an accident whilst typing a text message resulting in someone's death.
- A nurse in a nursing home who forgets to feed a patient who cannot feed himself, causing the patient to starve to death.
- A caregiver in a hospital who isn't paying attention and who gives someone a deadly dose of a medication.
- A doctor who prescribes addictive drugs to a known drug addict because he gets paid for his services.

Determining and applying appropriate cultural protocols and processes when dealing with Aboriginal and Torres Strait Islander clients³¹

“Dealing with white fella law is like playing football when the other team and the umpire are applying basketball rules. Not only have the goal posts been moved but there is not even a goal post anymore”.

(Observation by Anangu1 about the Australian legal system)

Explaining your role to the client

You should explain your role as a lawyer or field officer to your client at the first opportunity.

This may be done by:

- Defining who your client is and who your client is not,
- Defining what the matter is and your role in taking instructions and acting on those instructions
- Explain the private and confidential nature of your communications with the client
- Do not make promises to the client that you are not able to commit to

Using Plain English

Firstly, check whether or not you need an interpreter.

Ensuring that you use Plain English when speaking and writing is one of the keys to ease the stress that you and your client may experience. For example, don't overuse legal expression or terminology. You should ask your client how they wish you to communicate with them when you are not able to see each other face to face.

Sometimes it may be easier for you to communicate with your client in written Plain English rather than spoken, as some clients may have someone whom they can ask to help them read your letter or translate it for them.

Recognition and respect of relevant customs and heritage

While cultural protocols vary from community to community and individual to individual, there are many that communities have in common. Some examples of common protocols to respect are listed below.

▪ Kinship

It is always important to ask and to listen carefully to what you are told about the use or not, of the names and images of deceased people.

³¹ Law Society of South Australia. 2010. *Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia*. [online] Available at [http://www.lawsocietysa.asn.au/PDF/ProtocolAboriginal and Torres Strait IslanderClients.pdf](http://www.lawsocietysa.asn.au/PDF/ProtocolAboriginal%20and%20Torres%20Strait%20IslanderClients.pdf) [Accessed 26 September 14].

For many Aboriginal people, kinship systems not only imply who is related to whom but also how they must act towards each other in particular circumstances. For example, do not pressure your client to talk about someone if they seem unable to offer you any information about that person. If you do, you may be forcing them to speak about somebody of whom they must not speak.

- **Avoidance Relationships**

There are some persons of whom, for example, a male client may have an avoidance relationship with, which prevents them from talking to or addressing that person, or even being in the same room as that person. Obviously an avoidance relationship of this sort will have a significant impact on the person's ability to communicate with you, regarding the person with whom the avoidance relationship applies. It may be best to make yourself aware of the avoidance relationship, and find out from your client who is an appropriate person from whom to seek information or to take a statement etc.

- **Eye Contact**

In certain circumstances sustained eye contact is considered rude and disrespectful. This is not a custom that applies to all Aboriginal communities. During your initial contact with a client take notice of how they act and respond accordingly. If you are unsure about a particular custom, it is often appropriate to simply ask the client how they would like you to act.

- **Sorry business**

When a person has passed away there are certain obligations that family members need to fulfil. These vary from region to region and between communities. It is usually important that people participate in funerary ceremonies called sorry camps. These obligations are stronger, depending upon the proximity of the relationship of the client to the deceased. It is highly advisable to avoid visiting a community or engaging a community member during the course of sorry business.

- **Visiting a community**

While each community is different, often the cultural protocols will be similar. You should gather as much information as you can about the community before you go there.

For example it may often be useful to speak to Aboriginal and Torres Strait Islander people you know who live at or visit that community to find out what the community is like.

It is always considered a matter of respect to communicate with the community well before you arrive to arrange the date of your arrival, to explain in advance your business, and to ensure that your business is able to be dealt with by the community on the day you propose to attend.

- Communicating

If your client lives in a remote or regional community, they may have to collect their mail from a post office many kilometres away or from their community centre. In certain communities, the public telephone may be the only one to be shared by everyone. It may only work between certain hours when the generator is switched on. It is advisable to ensure a communication portal is set up with the client.

When engaging any Aboriginal and Torres Strait Islander client for the first time, it is very important that you enquire about their literacy and numeracy levels. This may be a confronting question to ask, but it is necessary. It is important your client is able to read and comprehend any correspondence you, the police or the court may send them.³²

Principles of non-discrimination, equality and diversity

“In Australia, national and state laws cover equal employment opportunity and anti-discrimination in the workplace. You're required by these laws to create a workplace free from discrimination and harassment. It is important employers and employees understand their rights and responsibilities under human rights and anti-discrimination law. By putting effective anti-discrimination and anti-harassment procedures in place in your business you can improve productivity and increase efficiency.

The Australian Human Rights Commission has a range of fact sheets to help you develop effective policies and best practice guidelines. The Fair Work Ombudsman provides education and assistance for employees and employers on preventing discrimination in the workplace.

Taking on people facing barriers to employment is often overlooked by employers and can be a useful way of diversifying the skill set within a business. There are funding and incentive schemes available for businesses that support people with a disability, Aboriginals and Torres Strait Islanders, the long-term unemployed and the mature-aged.³³”

³² Legal Aid Queensland. (2011). Best practice guidelines for lawyers providing legal services to Aboriginal and Torres Strait Islander Clients. [online] Available at http://www.legalaid.qld.gov.au/services/Aboriginal_and_Torres_Strait_Islander-Queenslanders/Documents/bpg-Aboriginal_and_Torres_Strait_Islander.pdf. [Accessed 26 September 14].

³³ Business.gov.au. (2014). *Equal employment opportunity & anti-discrimination* / *business.gov.au*. [online] Available at: <http://www.business.gov.au/business-topics/employing-people/Pages/equal-employment-opportunity-and-anti-discrimination.aspx> [Accessed 14 Oct. 2014].

Examples of anti-discrimination legislation in Australia:

- *Age discrimination Act 2004* (Cth)
- *Sex discrimination Act 1984* (Cth)
- *Racial discrimination Act 1975* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- There are also various state-based pieces of anti-discrimination legislation (e.g. *Anti-discrimination Act 1977* (NSW))

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