REDRESSING THE IMBALANCE AGAINST ABORIGINALS IN THE CRIMINAL JUSTICE SYSTEM

(Hon. Justice D. Mildren, Supreme Court of the Northern Territory)

The problems of providing a fair and just system for the investigation of complaints made by and against Aboriginal people, the trial of Aboriginal defendants and the appropriate use of the court's sentencing powers has been a subject of much academic discussion for a very long time. It is a topic which has worried successive judges of The Supreme Court of the Northern Territory ever since the time of Judge Bevan. Whilst many of the worst inequities have gone, there are still many problems which remain to be adequately addressed. There is no shortage of academic writings about what the problems are; suggested solutions are, however, much harder to find. Most writers do not suggest solutions. Those who do, fall broadly into two classes. First, those who suggest radical change. Secondly those who suggest gradual change by increased education and cultural and social awareness. The main plank of the former is the establishment of village courts run by the Aboriginals themselves.[1] This solution has not gained widespread support and was recently rejected by the Australian Law Reform Commission.[2] There are obvious and serious flaws in conferring jurisdiction upon specially constituted courts. The purpose of this article is not to suggest radical change to the present criminal justice system, but to examine the present system and to see what can be done by police, advocates and judges to improve upon it, especially where no legislative change is necessary.

THE INVESTIGATIVE PROCESS

There is little doubt that the Northern Territory has pioneered changes in the way evidence is gathered, particularly from Aboriginal suspects. The main reforms have been achieved by the Anunga Rules[3], the Commissioner of Police's General Standing

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[1] See for example the review article by Luke MacNamara in (1993) 16(1) University of New South Wales Law Journal at page 302.

[2] Report number 31 The Recognition of Aboriginal Customary Laws Summary Report paragraph 132.

[3] R v Anunga (1976) 11 ALR 412.

Orders and by the provisions of the Police Administration Act relating to the recording of confessions. Although the main problems which these measures have been designed to redress are well-known, it is worth briefly recapitulating them. Language difficulties and cultural differences may place an Aboriginal at a disadvantage in communicating with the police. Whilst most Aboriginals are able to speak some English, few are completely fluent in the language even today, and the vast majority are illiterate. Even those who speak English are liable to be misunderstood. Quite ordinary common English words are not infrequently used by Aboriginal speakers in quite a different sense to their common meaning: for example, the word "kill" is often used in the sense of "injure". Competent interpreters are very difficult to find and in any event many English words and concepts do not have an equivalent word or concept in the relevant Aboriginal language. It is not uncommon to find Aboriginals who speak a mixture of languages, the speaker using words from whichever language he considers most appropriate. Cultural difficulties can also lead to barriers. Apart from shyness there maybe reluctance to discuss certain topics for various reasons. Some Aboriginals find it difficult to distinguish between what they know of their own knowledge and what they have learned from others. It is often assumed that these problems are restricted to full blood Aboriginals who have been living a traditional lifestyle. There is ample evidence to suggest that there are similar problems amongst even urban part Aboriginal people.

It is submitted that the time has come to review the Anunga Rules in the light of the experience of the court since 1976.

Rule 1 requires an Aboriginal suspect to have available to him an interpreter "unless he is as fluent in English as the average white man of English decent". Recent decisions of the court have tended to water down this requirement. In R v Butler (No.1) (1991) 102 FLR 341; (1991) 57 A.Crim.R 451, Kearney J said:-[4]

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[4] At FLR, 346; at A.Crim.R 455.

> "But here the accused has as far as concerns simple concepts expressed in uncomplicated English, as was the case throughout the record of interview, as good a practical understanding of English as the 'average white man of English decent', in terms of Anunga guideline No. 1 ... he was not at a disadvantage in respect of the investigation, in comparison with members of the general Australian community. That is what the Anunga guidelines were designed to achieve..."

Thus the spirit of the guideline was observed even if the letter of it was not. This approach has been followed by other members of the Court including myself. Due to the difficulties in obtaining competent interpreters a practical approach in accordance with the spirit of the guideline has been adopted. In other cases the prisoner's friend has been able to act as interpreter, but what we often see is that the interpreter's comprehension of English is little better than that of the suspect.

There are plainly difficulties in obtaining competent interpreters, although there are some competent interpreters around. The main difficulty is that there are not enough of them. Those who do exist are usually not in government employ and have to be seconded by the police to perform their task. Only rarely will an interpreter, even a competent one, have sufficient knowledge of police or court procedures or of the criminal law to be able to achieve a high level of mutual understanding, let alone the "complete" mutual understanding which guideline 1 seeks to achieve.

I do not think that enough is being done to require the significant effort which needs to be made to ensure that there is an adequate supply of interpreters in the main Aboriginal languages. I see no reason why the courts should exercise undue leniency in relation to Rule 1 based on pragmatic considerations unless the Court concerned is persuaded that all that could have been done was done to secure the services of a competent interpreter. I do not think that courts should too readily reach the conclusion that because the interview was conducted in simple English the required level of mutual understanding had been achieved. I would suggest that the Aboriginal legal aid agencies are probably best equipped to be involved in the identification of

those people adequately equipped to act as interpreters and who are willing to act in that capacity upon payment of a fee. It may be that the Land Councils, some of the church organisations and other bodies and institutions such as Batchelor College, and Aboriginal Councils also know of such people. So far as I am aware, there is no data base anywhere recorded in the Territory containing a list of these persons. I think such a list needs to be prepared and made generally available to police, legal aid agencies, members of the legal profession and the courts. I suggest also that effort should be made towards some practical training of these people, perhaps by courses run by the Criminal Lawyers Association or by the Law Society, in criminal law and procedure and in what to do during a record of interview or during a trial. There are courses run at Batchelor College, but these courses may not go far enough. Ideally, interpreters should have familiarity with police and court procedures and a reasonable understanding of the criminal law.

It is often assumed that an interpreter who has done the National Accreditation Authority for Translators and Interpreters Level III Exam is ex hypothesi a professional interpreter competent to interpret in a court or in legal matters. However it is clear that the accreditation to NATI Level III by examination is no substitute for tertiary and specialist training and that the skill of interpreters varies widely.[5] Nevertheless the fact that the record of interview has been recorded means that any errors of interpretation can be corrected later.

Rule 2, which deals with the prisoner's friend, aims to ensure that the suspect will have someone with him during the course of the interview in whom he has confidence and by whom he will feel supported. The list of probable persons contained in Rule 2 (mission or settlement superintendents etc.) is now very out of date. It is rare for the prisoner's friend to be a white person and usually the suspect will chose a close friend or tribal relative. Often these persons are the least helpful to the accused, either due to their own lack of comprehension of English, or due to their own cultural difficulties in dealing with the interview process. Nevertheless it is clear that the choice must be that

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[5] See The Way, the Truth and the Right to Interpreters in Court Alan Crouch (1985) 59 Law Institute Journal No.7 page 687.

of the suspect.[6] In Jimmy Butler No. 1, Kearney J emphasised that the prisoner's friend should be aware of the respective rights and duties of the police and of the suspect in the interview so that he can ensure that the suspect is aware of the possible consequences of the answers that he gives; he should be seen to be independent of the police and have a temperament such that he is not himself intimidated by the interviewing environment; and he should be able to speak the suspect's principle language. For the suspect's choice of friend to be an effective one it is clear that the suspect as well as the friend must know what function it is that the friend is to perform so as to avoid the danger that the choice will be an entirely inappropriate one. The accused should be told that the function of the friend is to act in an advisory role to the accused and to assist him in his understanding of the matters which the police wish to speak about, that preferably the friend should be someone who is able to speak the same language as he can and someone who is also reasonably fluent in English. He should be told that the prisoner's friend should be someone that he trusts and has confidence in and will feel supported by. He should also be told that he will be afforded the chance to speak privately to the friend if he wishes to do so before any formal record of interview takes place, that his choice should be someone who is aware of his rights and the rights and duties of police when interviewing suspects, that he should be someone independent of the police, someone not likely to be afraid of the police and someone not involved in the investigation either as a suspect or as a witness.[7] Clearly this explanation should be recorded as should the explanation of the friend's role by the police to the friend. Both explanations should be given at an appropriate time. It is no use telling the accused what the friend's role is so as to help him make an appropriate choice if the choice has already been made. It is of little use explaining to the friend and to the accused that they can have a private conversation if the record of interview has already commenced.

One problem which fortunately has so far not yet arisen, is whether any admissions made privately to the prisoner's friend is to be adduced by the crown. Nevertheless

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[6] See Gubadi (1984) 1 FCR 187 at 199-200; 12 A.Crim.R 70 at 82.

[7] See R v Weetra (1993) 93 NTR 8 at 11.

there have been cases where the suspect has been "dobbed in" by the prisoner's friend during the formal record of interview. There is no rule of evidence which attaches to such admissions any privilege. It is likely that any such admissions would be excluded in the exercise of the fairness discretion, given that the police have suggested to the accused that he may speak to the friend privately. But as the matter is not free from doubt, it is important that both the accused and the prisoner's friend are told that whatever the prisoner's friend is told by the suspect is confidential and that the prisoner's friend has no right to volunteer information which has been told to him by the suspect during the record of interview.

There is, of course, no requirement that the prisoner's friend need be a solicitor; nor is there a requirement to advise the suspect that he has a right to see a solicitor before the interview starts. Many Aboriginal legal aid services have Aboriginal field officers who can serve as prisoner's friends but no doubt their resources, both in terms of field officers and solicitors, would become stretched if they routinely were required to perform this role. The temptation might be to advise their client in each case to exercise their right of silence for reasons of personal convenience to the friend rather than what is necessarily in the best interests of their client.

The third rule, which deals with the administration of the caution, is the one which causes the police the most practical difficulty. Notwithstanding that the rule states that "it is simply not adequate to administer it in the usual terms and say, 'Do you understand that?', police officers invariably create difficulties for themselves which could be avoided if this rule was strictly observed.

The main difficulties seem to be as follows:

1. It is common practice for the police to breakup the caution, usually into three segments, and at the end of each segment ask the suspect 'Do you understand that?', to which the subject will usually reply 'yes'. In most cases the value of that answer is nil. It would be better to avoid the question 'Do you under that?'

completely, and instead ask the suspect to repeat what has just been said in his own words.

2. There is a problem with the expression "you are not obliged to answer any questions"[7] which is often explained by police as "you do not have to answer any questions". Most Aboriginals have difficulty with the expression 'have to' and will frequently answer 'yes' if asked the question "Do you have to answer my questions?" The reason for this for this may be because the suspect uses the expression 'have to' to mean 'want to'. Alternatively, he may be answering the question 'yes' out of politeness, or 'gratuitous concurrence'[8] or he may be using the expression 'have to' correctly. There may be cultural reasons why he 'has to' answer the question; pressure may have been brought to bear upon him by his relatives who do not wish to suffer 'payback' if he is not dealt with by the police. It would be better to avoid the expression 'have to' all together. A similar problem arises with 'forced to'. The expression 'make you' seems to create fewer difficulties. It would also be preferable to avoid questions starting with parts of the verb "to be". Aboriginals do not usually frame questions this way, but ask questions by making statements using rising intonation or using 'eh' or 'hey' at the end of the sentence.[9]

If a suspect is told that he can remain silent and in fact he does so when invited to repeat back the caution it may not be clear whether he is exercising his right of silence or whether he is simply unable to repeat the caution. It is inherently contradictory to tell a suspect that he does not have to answer your questions and then insist upon an answer to the very question which he has been told he does not have to answer. Similarly the caution is usually preceded with a number of questions designed to elicit the level of education and general background of the suspect to assess his suitability to being interrogated in English and to introduce to him the topic the police wish to speak to him about. In most cases when a record of interview is rejected by the court it is

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[8] See Diana Eades, Aboriginal English and The Law, Continuing Legal Education Department, Queensland Law Society Inc. (1992), p53.

[9] See Eades, op.cit., p.33-43.

because the trial judge is not satisfied that the suspect understood his right of silence or alternatively the trial judge forms the view that he was attempting to exercise it by saying nothing but eventually made a confession due to police insistence to answer their questions. In most cases there is a reluctance by police to use the prisoner's friend to explain the caution who is often some assistance as an interpreter. Aboriginal suspects are often shy and it takes a fair while for them to gain the confidence needed to answer questions except in monosyllabic 'yes' or 'no' answers. The use of the friend as an interpreter is likely to enhance understanding about the meaning of the caution whenever these difficulties arise. Police clearly need more training and practice in dealing with this difficult part of an interview.

I doubt if there is anything more difficult than trying to explain the caution in simple English. Obviously there is no easy solution to this. Much will depend upon the circumstances of the individual case. If the caution is to be administered in English to an Aboriginal who speaks Aboriginal English as a second language, I suggest that something like this might be effective:

> "Question: I have been told about that trouble last night about Amy Smith. Amy says she was hit on the head with a nulla nulla. I want to talk to you about that trouble. I need to know if you know what I want to talk to you about. Can you please tell me what I want to talk to you about?
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> Question: Before I ask you any questions about that trouble I must tell you that you have a choice. You can answer my questions about that trouble if you want to. If you do not want to answer my questions about that trouble, you can tell me that you do not want to say anything about that trouble, and I will finish talking to you now. It is your choice. I need to know if you understand what I have just said to you. Can you please tell me what I just said to you about your choice?
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> Question: I also must tell you that if you tell me about that trouble, what you say will be recorded on this tape and this video. I need to know if you

understand this. Please tell me what I just said to you about that tape and that video?

Question: I also must tell you, that if you tell me about that trouble, maybe I will take that tape and that video and show it to the magistrate and maybe show it to the judge in the big court in Darwin, and maybe if they listen to it they might think about sending you to gaol. I need to know if you understand what I might do with that tape and that video. Please tell me what I just said to you about that tape and that video.

Question: I need to know what your choice is about answering my questions about that trouble last night. Can you please tell me what your choice is? or

Question: Maybe you want to tell me about that trouble. Maybe you don't want to tell me about that trouble. Which one?"

None of the remaining Anunga Rules have caused any difficulty in practice although occasionally rule 8 is not observed (requests by an Aboriginal to seek legal assistance ignored; Aboriginal stating that he does not wish to answer any further questions ignored).

CONDUCT AT TRIALS

It is widely recognised that the trial process operates unfairly to Aboriginal witnesses and accused, because that process is often outside of their experience, either linguistically or culturally. Apart from the use of interpreters, very little effort has been made to make the process fairer and more understandable to those involved.

It is trite to say that counsel, judges, juries and witnesses all need to be culturally educated. The recent experience of the Court is that there are fewer counsel with much idea of how to elicit information from Aboriginal witnesses than there were ten years

ago, or to put it another way, there is a preponderance of counsel now who have little or no idea how to go about this task, despite the impact of Aboriginal land hearings.

There is little in the literature about this topic, at least so far as the Northern Territory is concerned, although there is an excellent work entitled Aboriginal English and The Law, by Diana Eades, published by the Continuing Legal Education Department of the Law Society of Queensland, which is concerned with the situation in that State. In my opinion much of what is there written is applicable to the Northern Territory, and this work should become a standard reference book for every judge, magistrate, lawyer and police officer likely to be involved in dealing with aboriginal witnesses and accused persons. I suggest that the Law Society or the N.T. Criminal Lawyer's Association should engage a suitable linguist to prepare a similar publication for the N.T. and that there should be workshops to assist in the training of interested individuals.

So far as the courts are concerned, there are at least two things which should be routinely done during every trial in which Aboriginal witnesses or accused persons are involved. The first is that the trial judge should give suitable directions to the jury, before the prosecutor opens his case, to enable the jury to make a suitable evaluation of the evidence. This will enable juries to make a better assessment of the evidence of the witnesses as well as the accused's record of interview, which in nearly every case will be video taped.

It may be objected that this goes beyond the trial judge's function, and that such information should be lead by the calling of a suitably qualified expert.

In Condren (1987) 28 A.Crim R.261, the Court of Criminal Appeal of Queensland held that evidence of the general characteristics of the speech of persons of Aboriginal descent and the general pattern of their responses to questions is inadmissible. Macrossan J, at 267-8 said:

> "....although I need express no concluded view on this proposition, I am disposed to think that, in cases like the present, evidence of what are

> said to be normal characteristics of Aboriginal speech and behaviour is no more admissible than evidence of any other aspect of normal human behaviour would be, or the normal behaviour of persons of Anglo-Saxon descent or the Australian community in general and is not a proper subject for expert testimony..."

Ambrose J, with whom McPherson J concurred, said, at 297:

> "I concur with the views expressed by Macrossan J that evidence as to the general speech habits of persons described as "Aboriginals" in Australia or of any tendency that persons within that category may have because of their racial background to make inculpatory statements which are unreliable is inadmissible. It is inadmissible because it is irrelevant to the only issue before the jury - the characteristics of the appellant and not characteristics commonly found within a category of persons described as "Aboriginal"...It seems to me unlikely that there exists a specialised field of knowledge which qualifies as "expert" within it to attribute "unusual" characteristics to all "Aboriginals" (comprising person of widely varying genealogical and cultural backgrounds) relevant to the issues which differ significantly from the "usual" characteristics of persons generally in the community with respect to which of course expert evidence may not be given."

This is to be contrasted with the attitude of the courts to the calling of expert evidence on the stylistic analysis of a person's speech pattens (see R. v. Tilley (1985) VR 505) or the calling of linguistic evidence relating to an individual's speech patterns to assist the jury to evaluate the reliability of a confession, or indeed, whether it was made at all: see Barry (1984) 1 Qd. R. 74; Condren, supra, at 273, 298, at least so far as written documents are concerned.

Although Diana Eades suggests that Aboriginal English is a "dialect" of standard English, she recognises that there "are a number of forms of Aboriginal English or

more accurately a continuum of Aboriginal-English varieties ranging from those close to Standard English at one end (the acrolect or "light" Aboriginal English), to those close to Aboriginal Kriol at the other (the basilect or "heavy" Aboriginal English)."[10] Further, racial background is not the sole test of whether or not a particular speaker uses a form of Aboriginal English. Consequently, one cannot assume that generalisations about Aboriginal English speaking patterns will be applicable to any particular witness or accused person. Nevertheless awareness that there may be such factors applicable, would give a jury some basis for forming a view, having seen and heard the particular witness, as to whether or not those generalisations are of any assistance in understanding or forming a view as to the reliability of the evidence of that witness.

If expert evidence on the topic is unlikely to be admissible, is this a basis for rejecting my suggestion that the trial judge should give the jury some preliminary advice concerning this topic? It is submitted that in principle there is no objection to this course. Judges frequently give directions to juries concerning the way evidence should be treated where the purpose of the direction is to enhance a fair trial. This is no principle limiting the type of direction which may be given to a particular class of case. The most familiar type of direction commonly given concerns the need for corroboration. The underlying assumptions upon which a corroboration direction is given are based on the court's experience. As the court's experience changes, so may there be a perceived need for a new direction, for example, the McKinney direction (McKinney v R (1991) 98 ALR 577). Nor are directions universally confined to assisting the accused: eg. in some jurisdictions, although not the Northern Territory, it is permissible for the trial judge to comment on the accused's failure to give sworn evidence. Similarly the trial judge may comment on the failure of the accused to call a witness in a situation where the rule in Jones v Dunkel (1959) 101 CLR 298 applies. Directions are also required where the Crown relies upon circumstantial evidence designed to assist the jury to give that evidence proper weight. The underlying principle upon which each of these types of directions rests, it is submitted, is to ensure

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[10] Op.cit., p.21.

the fairness of the trial: see McKinney v R, supra, at 586 per Brennan, J. The purpose of the proposed direction is not to usurp the jury's function as the finders of fact, but to draw their attention to matters which in the court's experience may assist them in their function of evaluating the evidence. Given that in most cases where the Crown calls Aboriginal witnesses, the accused will also be an Aboriginal, and that in most cases the Crown will be relying upon a video recorded confession, the directions may in fact be of as much assistance to the accused as it is to the Crown and will therefore not be seen as an attempt by the court to bolster the crown case. A suggested form of direction is set out in the schedule to this paper.

The second area where trial judges could do more to assist juries in the evaluation of Aboriginal evidence, is the trial judge's power to exercise control over the trial itself, and, in particular, to disallow questions, or forms of questioning, which are unfair. To some extent this is already done. Most judges will intervene if questions which are too convoluted or contain double negatives are put to an aboriginal witness. In my opinion the following types of questions may be objectionable and should be disallowed by the trial judge in a proper case:

1. Leading questions: In R v Anunga, supra, the Court recognised that Aboriginals have a propensity to answer leading questions in the way the Aboriginal thinks the questioner wants. Similar observations appear in much of the literature.[11] This is not confined to leading questions put by non aboriginal authority figures. Eades, supra, at 26, observes:

> "Aboriginal English speakers often agree to a question even if they do not understand it. That is when Aboriginal people say "yes" in answer to a question it often does not mean "I agree with what you are saying to me". Instead, it often means "I

[11] See, for example, A.P. Elkin, Aboriginal Evidence and Justice in North Australia, (1947) 17 Oceania 173 at 176.

> think that if I say "yes" you will see that I am obliging, and socially amenable and you will think well of me, and things will work out between us."

2. "Either..or..." questions. Eades observes, p 55:

> "Aboriginal English speakers are often confused by "either-or" questions, that is, questions which ask the respondent to chose one of two alternatives. Aboriginal answers to such questions often but not always, refer to the last alternative proffered."

Eades suggests the following alternative technique (p 8)

> "DON'T ASK: Were you at the camp then or were you already at the pub?
>
> INSTEAD, ASK: *Maybe you were at the camp. Maybe you were already at the pub. Tell me where you were then?"*

3. Questions seeking quantifiable specification either as to numbers or time. Aboriginal languages have no counting system similar to English, and this is often reflected in Aboriginal English.[12] Aboriginals will respond either by listing, e.g. if asked how many people were there, they will list the people present, or by using expressions such as "mob" or "big mob". Very few Aboriginals wear watches or have any familiarity with the western concept of time. Questions seeking quantifiable specification as to time or numbers need to be carefully constructed to avoid misleading answers, and also to avoid demeaning the witness. Thus it may

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[12] See Eades, p.29.

not be helpful to ask if there were six or seven people present, but there is no objection to asking the witness to say the names of the persons present. Similarly it may not be helpful to ask what time the event occurred, but there is no objection to asking if, when the event occurred the sun was up, or it was dark, or was Fred there then etc.

4. Questions which it may be proper to put to persons of other cultures may be offensive to Aboriginal English speakers, and therefore objectionable vide s.16 of the Evidence Act. For example, it is well known that one should never refer to a deceased Aboriginal by name: see R v Bara Bara (1992) 87 NTR 1. Similarly it is considered extremely rude to refer to words for the genitalia, and this should be avoided unless it is absolutely necessary. On the other hand swear words and obscene language is not culturally offensive as a general rule.

5. Direct eye contact with many Aboriginals is seen as threatening or rude and should be avoided by counsel.

It is generally thought that counsel has the right, in cross-examination, to put leading questions to any witness. However, that is not the case. The trial Judge has a discretion to disallow them. [13] In Mooney v James (1949) VR 22 Barry J, at 28, said:

"The basis of the rule that leading questions may be put in cross-examination is the assumption that the witness's partisanship, conscious or unconscious, in combination with the circumstance that he is being questioned by an adversary will produce a state of mind that will protect him against suggestibility. But if the Judge is satisfied that there is no ground

[13] See Cross on Evidence, para 17465.

> for the assumption, the rule has no application, and the Judge may forbid cross-examination by questions which go to the length of putting into the witness's mouth the very words he is to echo back again.(cf. R v Hardy, (1794) 24 How. St. Tr.659, per Buller J., at p. 755). Answers given in such circumstances usually would not assist the Court in its investigation because they would be valueless, and in the exercise of his power to control and regulate the proceedings the Judge may properly require counsel to abandon a worthless method of examination. This brings out an essential feature of trial by British courts, namely, that it is the duty of the Judge to regulate and control the proceeding so that the issues for adjudication may be investigated fully and fairly."

It is submitted that more use should be made of this power to prevent questions being put unfairly to Aboriginal witnesses in leading form in cross-examination whenever it appears or is made to appear to the trial judge that the witness is likely not be protected from suggestibility. As a general rule, it is submitted that the cross-examiner of a witness who is plainly Aboriginal by culture should not put leading questions to such a witness without the leave of the trial judge.[14] That is not to say that counsel should be prevented from putting his case or otherwise vigorously, if necessary, testing the reliability of a witness's testimony. For example:

Q: You hit Fred with that nulla nulla first, didn't you?

could be asked in a variety of ways which are not leading or require a yes/no answer:

Q: I'm wondering about who hit Fred with that nulla nulla the first time?

A: Matthew.

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[14] See also the recommendation of the Australian Law Reform Commission, on Evidence, Report No.38, pp65 and 66, paras 115 and 116.

or

Q: I need to know who hit Fred with that nulla nulla the first time?

A: Matthew.

(Note: Questions in Aboriginal English are commonly asked with a rising intonation, or by adding "eh"? or "hey"? to the end of a question put in statement form, followed by silence from the questioner.)

Of course, the answer given may not be helpful to the cross-examiner, and it may be then necessary to follow it up with something like this:

Q: I'm thinking maybe it wasn't Matthew who hit Fred that first time, hey?

A: (no response)

Q: Who hit Fred that first time?

A: Matthew.

Q: I think maybe some one else hit Fred that first time, eh? I need to know who hit Fred that first time?

A: Matthew.

Q: I think maybe you hit Fred that first time is a true story, hey?

The ultimate question, although strictly leading, may be unavoidable. Where the cross-examiner has given the witness several opportunities to change his story without leading, I concede that fairness would require the trial judge to permit a question in this form.

Another common problem is that Aboriginal witnesses often refuse to answer questions, or questions on a particular topic. There may be many reasons for this other than deliberate evasion. First, silence is an important and positively valued part of many

Aboriginal conversations, and it may simply indicate a desire for time to think in the way in which he or she is accustomed and for time to get comfortable with the courtroom situation. Secondly, the information sought may be something which the witness is culturally unable to give, either because there is someone else more appropriate to give it, or because it is inappropriate for it to be given in the presence of certain persons who happen to be in the court room. Thirdly, there may be a fear of retribution if the question is properly answered, either because the matter has already been dealt with and is finished business so far as the witness is concerned, or out of genuine fear of the accused's relatives, or the witness's own relatives who happen to be sitting in court.

It may not be possible to be sure why the witness has retreated into silence. It is suggested that there are techniques which can be used which may show what the reason is:

1. Adjourn the witness until later in the day, or the following day to complete his or her evidence. This may be effective if the reason for the silence is the first reason given.

2. Skip the question and move onto another topic. This may be effective if the reason is for the second reason given.

3. Ask the witness if there is anyone in the courtroom he or she is afraid of ("little bit frightened of"). Look for eye movement or slight hand movements which may indicate the source of concern. If so, ask the court to invoke the provisions of S.21A. of the Evidence Act. Note that S.21A is not confined to sexual cases. S.21A (1) (d) includes, in the definition of "vulnerable witness", "a witness who is, in the opinion of the Court, under a special disability because of the circumstances of the case, or the circumstances of the witness." Ask for a voire dire hearing if necessary, to establish this, and to establish which procedure will best meet the circumstances (screening, closed circuit TV, having a relative or

friend in the witness box, closed court; or a suitable combination of these.) This may be effective if the reason for silence is the third reason given.

Of course it is possible to ask the Court to direct the witness to answer the question in pain of being in contempt, and no doubt this could be done in a proper case. In my experience this is rarely done in practice, particularly with Aboriginal witnesses, and it would take a strong case to make out the grounds for such an order. If, having tried each of the above techniques, the witness still refuses to answer, the only course which may be left is to ask the Court to release the witness and direct the jury that the whole of the witness's evidence is to be ignored: see Cross, para 17480.

Another matter worth mentioning is that occasionally there may be a need to consider whether an all male or all female jury should be empanelled, having regard to the subject matter or the evidence to be led by the Crown or by the Accused. The Australian Law Reform Commission's Summary Report No 31 on The Recognition of Aboriginal Customary Laws, para 118, states:

> "...one issue that has arisen is the question of the composition of juries in cases involving Aboriginal customary laws. In several cases in recent years, juries composed entirely of persons of one sex have been empanelled because it was submitted that evidence to be called in the trial about Aboriginal customary laws relevant to the offence could not be disclosed to persons of the other sex. Some knowledge about Aboriginal traditions, rituals and customary laws is regarded as falling within the domain of a particular sex (male or female). It may be that a witness will be unwilling to give evidence, or will be reticent or evasive in giving evidence, where to do so in the presence of persons of the opposite sex would infringe the witness's customary laws. Before making such an order, the court would need to be satisfied that some lesser restriction (eg prohibiting publication of the evidence in question) would not be sufficient. It would also be necessary

> to ensure that no similar difficulties would arise (with respect to persons of the other sex) to evidence of other witnesses, including especially the victim of the offence."

McRae, Nettheim and Beacroft [15] observe that this result is usually achieved by the use of challenges by agreement between prosecution and defence and with the Court's consent. Given that the Crown may stand aside up to 6 witnesses as well as exercise the usual peremptory challenges, this may work in practice where the Crown choses to be cooperative. However in the trial of Sydney Williams, Wells J (Supreme Court of South Australia) excluded women from the jury panel by ordering women from the Court at the time the jury were selected and during the whole of the trial, apparently relying upon s.69 of the Evidence Act (SA), which permitted such action where it appears to the court that the publication of any evidence is likely to offend against public decency. His Honour also apparently took judicial notice of the fact that publication of tribal secrets would offend Aboriginal standards of decency.[16] It may be that s. 15 of the Juries Act, which provides that a Judge may excuse a person summoned to attend as a juror "for sufficient cause" is wide enough to empower the Court to make such an order in the Territory. A prohibition order could also be made under s.57 of the Evidence Act which is in para materia to s.69 of the S.A. provision.

INTERPRETERS

I have already briefly discussed some of the problems relating to the use of interpreters in connection with the process of interrogation of suspects. However similar problems exist in relation to the provision of interpreters during the trial. The position is that an accused person who does not understand the language of the court is entitled to an interpreter and this right cannot be waived unless he is represented by counsel: see R v Lee Kun (1916) 1 KB 337. In civil cases a party, and, it is submitted, in both civil and criminal cases, a witness, may have the services of an interpreter only with the leave of

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[15] See Aboriginal Legal Issues, Law Book Company, 1991, p.261.

[16] See, Andrew Ligertwood, *The Trial of Syndey Williams* Legal Service Bulletin, Dc. 1976, Vol 2, No.4, p.136.

the court: Dairy Farmers Cooperative Milk Co. Ltd v Acquilina (1963) 109 CLR 458 at 464. In practice, the problem is not so much whether an interpreter will be permitted, but whether one will be able to be provided, and if so, at whose cost. In the Northern Territory the courts do not have a court-based interpreter service, and so far the Court has resisted applications made to it to find and employ suitable interpreters, both on the basis that the Court has no funds to do so, as well as on the basis that the Court has no resources to find an appropriate person to act as an interpreter where Aboriginal languages are involved. Nevertheless Article 14(3) of the International Covenant on Civil and Political Rights (1966) to which Australia is a party guarantees the right to have "the free assistance of an interpreter if (an accused) cannot understand or speak the language used in court".

It would seem that if an Aboriginal accused was unrepresented the Court would have no option but adjourn the proceedings until a suitable interpreter could be found, and that if it failed to do so, any verdict of guilty would be liable to be set aside on the ground that the accused did not have a fair trial: see Ngatayi v R (1980) 30 ALR 27 at 33 per Gibbs, Mason and Wilson JJ. I suggest that the result would inevitably be the same if the accused was represented but no interpreter was provided by the accused's lawyers because no suitable interpreter could be found. Having regard to the fact that the accused has a right to an interpreter and that right cannot be waived except by his counsel, it may also be that if his counsel's instructors refused to provide an interpreter for any reason whatsoever, and his counsel refused to waive the right, the trial could not proceed and it would be then up to the prosecution to remedy the matter. Further, it must not be overlooked that the right to an interpreter includes a right to have the evidence interpreted to the accused, as well as generally as to what was happening in court: see Gradidge v Grace Bros. Pty. Ltd. (1988) 93 FLR 414 (NSW Court of Appeal).

Even if interpreters are made available, there remain many potential problems. Competence amongst interpreters varies widely. One writer has suggested that "where interpreters in the courts are concerned, they should be required to wear a badge indicating their level of interpreting competence so that the judge, barrister, police and

the accused all know, at least *prima facie*, what standard of interpreting can be expected."[17] For the reasons previously discussed, the standard in the Northern Territory ranges from excellent to rather poor, with most Aboriginal interpreters at the lower end of the scale. There is a significant danger, particularly when interpreting evidence, of the evidence being misunderstood.

CROSS EXAMINATION AS TO DOCUMENTS

It is still a not infrequent occurrence to see counsel for an accused person attempt to cross-examine an Aboriginal witness on the evidence he gave at the committal proceedings with a view to showing that his evidence is unreliable. Kriewaldt J deprecated this practice, and proposed that committal proceedings be abolished where Aborigines are concerned. [18] Few counsel appreciate that in the Northern Territory s.20 of the Evidence Act puts serious obstacles in the path of the cross-examiner. The effect of S. 20 is that, although a witness may be cross-examined about what he said in the committal proceedings, (or for that matter what he said in a prior written statement) without the transcript of the written statement being shown to him, the witness may not be contradicted (e.g. by tendering the document or transcript pages) without calling to the witness's attention "those parts of the writing which are to be used for the purpose of so contradicting him". Presumably in the case of an illiterate witness, not only must the document be shown to him, but it would have to be read to him as well.[19] Further, the trial judge has a discretion to exclude matters irrelevant to the inconsistency, and should inspect the document so that a decision can be made as to what parts of the document or transcript should be read to the witness and admitted in evidence: see R v Walker (1993) 61 SASR 260 @268. That case is also authority for the proposition that there must be proof of adoption of the document by the witness before it can be tendered, which, in the case of evidence taken at a committal hearing, but not signed by the witness or acknowledged by him to be accurate, can be

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[17] see Alan Crouch, supra, at 688.

[18] M. Kriewaldt, The Application of the Criminal Law to Aborigines of the Northern Territory (1961-2) 5 Uni. W.A. Law Rev. 1.

[19] See generally Cross, para 17545.

attended to by calling the relevant reporter. In the Northern Territory, the Records of Depositions Act provides a basis for tendering recorded testimony provided that the deposition has been authenticated by the proper officer of the Court. Nevertheless, a trial judge has a discretion to prevent crossexamination as to credit under s.15 of the Evidence Act if the imputation is of "such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies." It is submitted that more use should be made of this section in relation to Aboriginal witnesses cross-examined as to discrepancies in their evidence given at committal proceedings. The trial judge should be invited to examine the transcript to see if the evidence at the committal was elicited fairly from the witness, or whether, as is sometimes the case, the witness's evidence is a confused muddle due to the techniques used by counsel at the committal hearing, or for any other cause, which would make persistence with the proposed cross-examination as to credit virtually worthless. Of course, the authorities show that the trial judge has to give counsel for the accused considerable latitude, and should not exclude matters which are relevant to credit unless they are clearly of no material weight: Wakeley v The Queen (1990) 64 ALJR 321 at 325; R v Aldridge (1990) 20 NSWLR 737; even to the point, at least in the opinion of Hunt J, (with whom Newman and Aberdee JJ agreed), of allowing a merciless and prolonged crossexamination:

> "Others would prefer to keep going, extracting every ounce- no matter how repetitive or remote- until the eyes of every juror were glazed over and until each juror had completely "turned off". I have in the past sat through such cross-examinations which have lasted days; some have lasted over a week. They reminded me of a dentist continually probing a hole in a tooth without the patient having the benefit of an anaesthetic. And I am sure that in many cases such cross-examinations are quite counter-productive. All of this is permissible, of course: *Wakeley* (1990) 64 ALJR 321. The point is that different counsel have

> different views as to the effectiveness of such cross-examinations."[20]

With the greatest of respect to the New South Wales Court of Appeal, I do not think that the authorities suggest that the cross-examiner has a right to go that far. In Wakeley the High Court clearly recognised that, although cross-examination must as far as possible be left to the cross-examiner's discretion and judges should give the cross-examiner leeway, particularly at the start of the cross-examination, "there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case."[21]

CONCLUSIONS

There has been considerable progress made in the trial of Aboriginal accused persons over the last 50 years to make the system fairer. Clearly they have benefited considerably from the emergence of the Aboriginal Legal Aid agencies, the Anunga Rules, police techniques in recording interviews, which I think must be acknowledged as more advanced in the Territory than elsewhere, the development of the case law relating to the sentencing process, the improved general education of the Aboriginal population, schemes devised to prevent drunken Aboriginals causing mayhem on the settlements, better awareness of cross-cultural problems amongst police, lawyers and judges, the decriminalisation of public drunkenness, the establishment of "dry" communities and so on. However, the time has now come to look more closely at some of these issues again, and in particular, to the techniques and methods which may be used to make the existing system work better, not only for Aboriginal accused persons, but for Aboriginal witnesses as well. It is submitted that the proposals in this paper, although some might think them novel, or even radical, are no more than logical

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[20] Dib & Dib (1991) 52 A.Crim.R 64 at 71.

[21] supra, at 325.

extensions of existing principles, or the application of existing principles which might be used by Judges, Magistrates and counsel to redress the imbalance in the criminal justice system which presently exists whenever people who are culturally Aboriginal are involved. I am not opposed to legislative change, but recommendations by law reformers are not always acted upon by governments, and often take many years to implement even when they are acted upon. In the meantime, there is, it is submitted, much that can be done within the existing system which will enhance public confidence in the fairness of the criminal trial process.

DIRECTIONS TO JURY CONCERNING ABORIGINAL WITNESSES

I understand that the Crown intends to call a number of witnesses in this case who are Aboriginal or of Aboriginal descent. I understand that the accused is also an Aboriginal or of Aboriginal descent, and that the Crown intends to lead evidence of a video recorded record of interview which the accused had with the police.

You are the judges of fact in this case. It is therefore your function to decide which evidence you accept, and which evidence you reject. You, and you alone, are the judges of the facts, and anything I may later say to you about the facts is not binding upon you. However, you may be assisted by what I am about to tell you, when it comes to the Aboriginal witnesses.

Many Aboriginal and part Aboriginal people do not speak English as their first language. Some who do speak English as their first language have been taught to speak English in a manner which is different from Standard English. It is important that you listen carefully to the context in which words are used to ensure that there is no misunderstanding as to meaning. Sometimes ordinary English words are used by them in a way which is different from that of Standard English. Counsel will do their best to ensure that this becomes clear to you as the evidence unfolds, but you can generally realise this for yourselves if you listen carefully to the context.

Many Aboriginal people suffer from hearing problems. It has been estimated that hearing loss is as high as 40 per cent in some Aboriginal communities. It may be that if

a witness has a hearing difficulty, he or she may have problems understanding questions put to them, and answer inappropriately, or ask for the question to be repeated.

Many Aboriginal people speak a form of English where the rules of grammar have been borrowed from Aboriginal languages. Consequently the verb "to be" may not be used in sentences, and all the verbs may be in the present tense, even though the context shows that the verb should be in the past or future tense. You may also notice that pronouns, such as "he", "she" and "you" are used quite differently. People who speak like this are recognised by some linguists as speaking a dialect of the English language which is called "Aboriginal English". The dialect may be heavy or light, depending on the individual. Counsel will do their best to make sure that you understand what is being said, but if you are having any difficulty, please let us know immediately through the foreman that you are unsure of what the witness has been saying and counsel will try to clarify it for you.

Aboriginal English speakers may also have different cultural values which affect the way they speak and behave. It is very common for these people to avoid direct eye contact with those speaking to them, because it is considered to be impolite in Aboriginal societies to look a person directly in the eye, whereas in our society people who behave like this are regarded as shifty, suspicious or guilty. You should be very careful not to place any weight on this when you are evaluating their demeanour, as an indicator of their truthfulness.

Some concepts, such as time, and numbers, are understood by Aboriginal English speakers very differently from Standard English speakers. Hopefully witnesses who do not use numbers and measurements the same way we are used to using them, will not be asked questions by counsel about those sort of things, but will ask the question in a different way. However, it may be that a witness will say it was five o'clock, for example, or that there were six other people present at the time, and if this happens you should be aware that this may not be very reliable. I would expect counsel will try to make this clearer to you with further questioning, should this kind of thing occur.

Sometimes Aboriginal English speakers speak very softly and are hard to hear. If you are having trouble hearing the evidence, please let me know at once. Usually what happens is that counsel, who is used to this, will repeat the witness's answer, and I will do my best, as will counsel for the other side, to ensure that the witness's evidence has been repeated to you accurately.

You should also be aware that many Aboriginal English speakers use gestures which are often very slight and quick movements of the eyes, head or lips to indicate location or direction. They may also use other gestures as well, which you may not so readily understand.

It is customary amongst many speakers of Aboriginal English to have long lapses of silence from time to time, even in everyday speech. You should be careful not to jump to the conclusion that a witness who is doing this is being evasive or untruthful about the matter he or she is being asked about. Many Aboriginal English speakers are not used to direct questioning in the way in which it is used in the court room, and it may take time for them to adjust to this method of imparting information.

Finally, many Aboriginal people have trouble with some of the consonants used in the English language, especially *f, v* and *th.F* and *v* are often replaced with *p* or *b*; so the word "fight" might sound like "pight" or "bight", and so on, and this can give rise to misunderstanding. Once again, if you have any difficulty understanding, and it is not cleared up, please put your hand up, and get the foreman's attention and tell him what is wrong so that we can see if the matter can be remedied.