

Anunga in the new century –
How our criminal courts are interpreting the rules 35 years after *R v Anunga*.

CLANT Bali Conference 2011

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R.-v-Anunga and others; R.- v-Wheeler and another (1975) 11 ALR 412

Per Forster J: Listed as 9 Guidelines in the judgement, but really 11.

- 1 When an aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding;
 - 2 Desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal has apparent confidence.
 - 3 Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer questions?' Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent.
 - 4 Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used;
 - 5 Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources.
 - 6 Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody tea or coffee, drink of water, lavatory;
 - 7 It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court.
- 1 Interrogation should not continue for an unreasonable long time;
 - 2 Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance.
 - 3 If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue; and
 - 4 When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.'

Relevant Legislation

WESTERN AUSTRALIA

Criminal Investigation Act 2006 (ss 138-140- & s 155)

137 . Arrested people, rights of

...

- (3) *The arrested person is entitled —*
- (a) *to any necessary medical treatment; and*
 - (b) *to a reasonable degree of privacy from the mass media; and*
 - (c) *to a reasonable opportunity to communicate or to attempt to communicate with a relative or friend to inform that person of his or her whereabouts; and*
 - (d) *if he or she is for any reason unable to understand or communicate in spoken English sufficiently, to be assisted in doing so by an interpreter or other qualified person.*

138 . Arrested suspects, rights of

....

- (2) *In addition to the rights in section 137 an arrested suspect is entitled —*
- (a) *to be informed of the offence for which he or she has been arrested and any other offences that he or she is suspected of having committed;*
 - (b) *to be cautioned before being interviewed as a suspect;*
 - (c) *to a reasonable opportunity to communicate or to attempt to communicate with a legal practitioner;*
 - (d) *if he or she is for any reason unable to understand or communicate in spoken English sufficiently, not to be interviewed until the services of an interpreter or other qualified person are available.*
- (3) *The officer in charge of the investigation must, as soon as practicable after the arrest of an arrested suspect —*
- (a) *inform the suspect of his or her rights under section 137(3)(c) and subsection (2)(c); and*
 - (b) *afford the suspect his or her other rights under section 137 and subsection (2).*

WESTERN AUSTRALIA
Criminal Investigation Act 2006

155 . Inadmissible evidence, court may allow admission

...

- (2) *The court may nevertheless decide to admit the evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.*

- (3) *In making a decision under subsection (2) the court must take into account —*
 - (a) *any objection to the evidence being admitted by the person against whom the evidence may be given;*
 - (b) *the seriousness of the offence in respect of which the evidence is relevant;*
 - (c) *the seriousness of any contravention of this Act in obtaining the evidence;*
 - (d) *whether any contravention of this Act in obtaining the evidence —*
 - (i) *was intentional or reckless; or*
 - (ii) *arose from an honest and reasonable mistake of fact;*
 - (e) *the probative value of the evidence;*
 - (f) *any other matter the court thinks fit.*

- (4) *The probative value of the evidence does not by itself justify its admission.*

NORTHERN TERRITORY

Police Administration Act (ss140-143)

140 Person to be warned and given opportunity to inform friend or relative of person's whereabouts

Before any questioning or investigation under section 137(2) commences, the investigating member must inform the person in custody that the person:

- (a) does not have to say anything but that anything the person does say or do may be given in evidence; and*
- ☐(b) may communicate with or attempt to communicate with a friend or relative to inform the friend or relative of the person's whereabouts, and, unless the investigating member believes on reasonable grounds that:*
- ☐(c) the communication would result in the escape of an accomplice or the fabrication or destruction of evidence; or*
- ☐(d) the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed,*
- ☐the investigating member must defer any questioning or investigation that involves the direct participation of the person for a time that is reasonable in the circumstances and afford the person reasonable facilities to enable the person to make or attempt to make the communication.*

NORTHERN TERRITORY

Police Administration Act

143 Certain evidence may be admitted

A court may admit evidence to which this Division applies even if the requirements of this Division have not been complied with, or there is insufficient evidence of compliance with those requirements, if, having regard to the nature of and the reasons for the non-compliance or insufficiency of evidence and any other relevant matters, the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice.

QUEENSLAND

POLICE POWERS AND RESPONSIBILITIES ACT 2000 (SS 39, 391 & 414- 433)

420 Questioning of Aboriginal people and Torres Strait Islanders

- (1) This section applies if--
 - (a) a police officer wants to question a relevant person; and
 - (b) the police officer reasonably suspects the person is an adult Aborigine or Torres Strait Islander.

- (2) Unless the police officer is aware that the person has arranged for a lawyer to be present during questioning, the police officer must--
 - (a) inform the person that a representative of a legal aid organisation will be notified that the person is in custody for the offence; and
 - (b) as soon as reasonably practicable, notify or attempt to notify a representative of the organisation.

- (3) Subsection (2) does not apply if, having regard to the person's level of education and understanding, a police officer reasonably suspects the person is not at a disadvantage in comparison with members of the Australian community generally.

- (4) The police officer must not question the person unless--
 - (a) before questioning starts, the police officer has, if practicable, allowed the person to speak to the support person, if practicable, in circumstances in which the conversation will not be overheard; and
 - (b) a support person is present while the person is being questioned.

...

QUEENSLAND
POLICE POWERS AND RESPONSIBILITIES ACT 2000

418 Right to communicate with friend, relative or lawyer

- (1) *Before a police officer starts to question a relevant person for an indictable offence, the police officer must inform the person he or she may--*
- (a) *telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and*
 - (b) *telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.*
- (2) *The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to a person mentioned in subsection (1).*

431 Cautioning of persons

- (1) *A police officer must, before a relevant person is questioned, caution the person in the way required under the responsibilities code.*
- (2) *The caution must be given in, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person can not hear adequately.*
- (3) *If the police officer reasonably suspects the person does not understand the caution, the officer may ask the person to explain the meaning of the caution in his or her own words.*
- (4) *If necessary, the police officer must further explain the caution.*
- (5) *This section does not apply if another Act requires the person to answer questions put by, or do things required by, the police officer.*

Police Guidelines - NT

General Order Q1, Q2 & A1 - NT

- Guidelines apply to persons who are “not as fluent in English as the average white person of English descent”. Sets out Anunga rules
- Anunga guidelines should be interpreted broadly and applied at every stage of the investigation
- Notes developments since Anunga, e.g
:Role of prisoners friend must be explained to person and police must make sure he understands
: Conversation with prisoner’s friend should be recorded
- A1 – Aboriginal suspect to be asked if they want ALS informed when they are taken into custody

Police Manual – WA

AD-1.3 Interview of Aboriginal & Torres Strait Islander Persons

- A member shall ensure that any interview conducted with an Aboriginal or Torres Strait Islander person shall be done in accordance with those guidelines known as the Anunga Rules.
- Ensure questions are short and easily understood.
- Establish that the suspect understands the consequences of making admissions.

Operations Procedure Manual – Qld

Re summary offences - Judges Rules, incorporating Anunga

2.14.11 – The Anunga Rules - Aboriginals and Torres Strait Islanders

Re indictable offences - Police Powers and Responsibilities Act

Recent Cases

Northern Territory

R v Cotchilli [2007] NTSC 52

- Aboriginal male with limited intelligence (report of Mr Franklin, Psychologist)
- Failure to record parts of confession
- Failure to get Accused to repeat caution phrase by phrase (Anunga Guideline 3)
- Unacceptable period of detention
- Failure to stop interview when Accused indicated he wanted to “sit quiet”
- First and second records of interview not voluntary.

R v Weston & Williams [2005] NTSC 49

- Arrest unlawful
- Police made no effort to contact ALS for juvenile – contravention of Police Gen Order C1 3.5
- No suitable prisoner’s friend (even though there was a parent/guardian present)
- No interpreter

Western Australia

Matthew Martin and The State of Western Australia [2008] WASC 105

- *Not arrested and informed of rights asap*
- *Not given reasonable opportunity to communicate with a lawyer*
- *No clear understanding of what A was being arrested for*
- *Interview voluntary, but excluded in exercise of discretion*

Marshall Auburn and the State of Western Australia (March, 2010) WADC

- *No reasonable opportunity to communicate or to attempt to communicate with a legal practitioner (s.138(2)(c) of the CIA.*

The State of Western Australia and Ishmail [2010] WADC and *Wright v The State of Western Australia* [2010] WASCA 199

Queensland

R v Wiley [2007] QDC 183 –

- failure to contact the Aboriginal Legal Service