ABORIGINAL WITNESSES
IN QUEENSLAND'S CRIMINAL COURTS

JUNE 1996

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CRIMINAL JUSTICE COMMISSION

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The Hon J M Macrossan AC
Chief Justice
Supreme Court of Queensland
BRISBANE QLD 4000

Dear Chief Justice

In accordance with section 27(1) of the *Criminal Justice Act 1989*, the Commission hereby furnishes to you its report on *Aboriginal Witnesses in Queensland's Criminal Courts*.

Yours faithfully

F J CLAIR
Chairperson

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FOREWORD

In line with the requirements of the *Criminal Justice Act 1989*, a key goal of the Criminal Justice Commission (CJC) is to promote an effective, fair and accessible criminal justice system. This report on *Aboriginal Witnesses in Queensland's Criminal Courts* is consistent with that objective.

Providing for the broadly equitable treatment of all groups within the community is one of the most important issues facing our criminal justice system. The CJC's research has established that, at present, Aboriginal people appearing in court as witnesses are often at a disadvantage relative to other witnesses, due to the law, the courts and legal practitioners not paying sufficient regard to the unique aspects of Aboriginal language and culture. This report identifies various strategies, most of which are quite simple and relatively inexpensive, for reducing these barriers to understanding. These recommendations are aimed at ensuring that courts have the best possible evidence on which to base decisions and are able to interpret that evidence properly. The CJC also hopes that implementation of these proposals will help increase the confidence of Aboriginal people in the criminal justice system.

This report falls within the scope of section 27(1) of the Act, which requires that reports of the CJC relating to the procedures and operations of any court of the State be furnished to the heads of the relevant court system, rather than being presented to Parliament in the normal manner. The CJC acknowledges the assistance of the Hon the Chief Justice of Queensland in ensuring that this report can be tabled and thereby made available to the general community.

F J CLAIR
Chairperson

ACKNOWLEDGEMENTS

The Criminal Justice Commission (CJC) wishes to express its gratitude to the many individuals, community groups, and agencies who took the time to express their views on the project and make suggestions in various forms, and who otherwise provided assistance. The contributions of the following deserve special mention.

The CJC benefited greatly from the collected experience and wisdom of the advisory group assembled for the purposes of advising on the project: His Honour Judge G S Forno QC, Mr Brian Williams SM, Ms Cheryl Buchanan (Chairperson, Aboriginal Justice Advisory Committee), Mr Brendan Butler SC (Deputy Director of Public Prosecutions), Ms Daisy Caltabiano (Aboriginal Co-ordinating Council), Ms Anita Herzig and Mr David Yarrow (of the Aboriginal Justice Advisory Committee Secretariat), and Mr John Leslie and Mr Geoff Atkinson (of the National Aboriginal and Islander Legal Services Secretariat).

Mr Brendan Butler SC and Mr Michael Byrne QC, of the Office of the Director of Public Prosecutions, and staff of the Cairns office of the State Reporting Bureau assisted in providing court transcripts.

Dr Diana Eades of the University of New England, in consultation with the Honourable Justice Dean Mildren of the Northern Territory Supreme Court and Mr Michael Cooke of Batchelor College, Northern Territory, collaborated in the revision of Justice Mildren's suggested directions to juries in cases involving Aboriginal English-speaking witnesses. Ms Helen Harper of Batchelor College prepared a version for speakers of Torres Strait Creole.

A number of people outside the CJC also gave generously of their own time to comment on drafts of this report: Dr Eades, Mr Cooke, members of the CJC's Aboriginal and Torres Strait Islander Advisory Committee, the Litigation Reform Commission and its Criminal Procedure Division, Mr Jeff Siegel, Ms Mary Denver, Ms Donna-Maree O'Connor, Ms Kerry Richards, Mr David Epworth, members of the Aboriginal Justice Advisory Committee, and the Honourable W J Carter QC.

The following people assisted in the field trips:

- Townsville and Cairns: Mr Algon Walsh (Palm Island Community Justice Group); Mr Henry ("Nipper") Miller and Mr Greg ("Bruno") Bryant (Queensland Corrective Services Commission); and Ms Shirley Law (Office of the Director of Public Prosecutions).

- Cape York Peninsula: Mr T Pollock SM; Mr R Fitzsimons SM; Ms Daisy Caltabiano and Mr Lloyd Fourmile of the Aboriginal Co-ordinating Council; Chairpersons and councillors of Kowanyama, Aurukun, Bamaga, Injinoo, New Mapoon and Umagico Aboriginal Councils and Bamaga and Seisin Island Councils (and particularly Ms Margaret Daniel of Bamaga Council); staff of Tharpuntoo Legal Service and Far Northern Region of the Queensland Police Service; and officers at Kowanyama, Aurukun, Bamaga and Lockhart River.

- Lismore-Casino: Ms Joanne Selfe and Ms Anne O'Connell (NSW Attorney-General's Department); Mr David Rawlinson (Aboriginal court liaison officer, Lismore); and staff at the Magistrates Courts and Probation and Parole Services in Casino and Lismore.

- Sydney: the Honourable D G Stewart.

This project was managed by Tony Keyes and, in the latter stages, Louise Gell, both of the CJC's Research and Co-ordination Division. These two officers were also primarily responsible for the writing of the final report. Other CJC staff who assisted in the project were Susan Johnson, Mary Burgess, Lisa Kennedy, Bernice Anning, Avril Alley, Bronwyn Springer and Daniel Abednego. Katrina Erueti was responsible for preparing the report for publication. The CJC thanks all of those involved for their efforts and their high standard of professionalism.

DAVID BRERETON
Director
Research and Co-ordination

CONTENTS

ABBREVIATIONS

ABS	Australian Bureau of Statistics
AIJA	Australian Institute of Judicial Administration
ALRC	Australian Law Reform Commission
ATJAC	Access to Justice Advisory Committee
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSISU	Aboriginal and Torres Strait Islander Studies Unit, University of Queensland
CJC	Criminal Justice Commission
HREOC	Human Rights and Equal Opportunity Commission
HRSCATSIA	House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs
Interpreters Report	Attorney-General's Department 1991, *Access to Interpreters in the Legal System: Report*
NAATI	National Accreditation Authority for Translators and Interpreters
NAILSS	National Aboriginal and Islander Legal Services Secretariat
ODPP	Office of the Director of Public Prosecutions (Queensland)
PCJC	Parliamentary Criminal Justice Committee
Progress Report 1993	Department of Family Services and Aboriginal and Islander Affairs, Aboriginal Deaths in Custody Secretariat 1994, *Royal Commission into Aboriginal Deaths in Custody: Progress Report on Implementation to December 1993*
Progress Report 1994	Department of Family Services and Aboriginal and Islander Affairs, Aboriginal Deaths in Custody Secretariat and Office of Aboriginal and Torres Strait Islander Affairs 1995, *Royal Commission into Aboriginal Deaths in Custody: Progress Report on Implementation: December 1994*
QPS	Queensland Police Service
QUT	Queensland University of Technology
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
Response by Governments	Joint Ministerial Forum on Response by Governments to the Royal Commission into Aboriginal Deaths in Custody 1992, *Aboriginal Deaths in Custody: Response by Governments to the Royal Commission*

TYPOGRAPHICAL CONVENTIONS

The bulk of the material gathered in consultations came from interviews. These were recorded in note form by CJC researchers. Accordingly, the record as quoted in this report is, on the whole, not verbatim. Interview notes are quoted as they were taken to give as close a sense as possible of the original.

There are also many references in the report to court transcripts. In most cases the CJC has used names that are part of the name of the case (unless they are subject to suppression orders, statutory or customary law prohibitions). It is possible that customary law prohibitions of which the CJC was not aware are in place. If so, the CJC apologises for any unintentional breach of them. Where names occur within the transcript itself, they are reduced to initials.

Many varying typographical conventions are used by different transcribing services. Where practical, they have been altered to conform to the following effect. The witness's name or identifying matter is not normally part of the transcript itself: it will normally be introduced in a preliminary way. The questioner is identified at the beginning of a passage, but not again until another questioner intervenes (where the intervening questioner is identified). The following markers are used:

---	denotes the break between question and answer
- - -	denotes interruption of the speaker by another party
–	denotes a pause or change in direction of speech by one party
. . .	denotes an ellipsis, not a pause
[ ]	brackets enclose words not actually used in the original; for example references to persons who are not named are initialised in brackets.

These features are not always recorded by transcribers other than the State Reporting Bureau, so that the absence of markers from a passage does not always denote forthright and pause-free testimony.

In some cases, names of individual participants have been initialised.

EXECUTIVE SUMMARY

This report is concerned with the barriers that face Aboriginal people who are called to give evidence as witnesses in criminal proceedings. These barriers arise largely from the clash of Aboriginal culture and language with the culture and language which prevail in the courtroom, and reflect the failure of the criminal justice system in many cases to recognise and allow for those differences. The report then proposes ways in which barriers to effective communication may be overcome. These recommendations are aimed at ensuring that:

- courts have the best possible evidence before them on which to base decisions
- courts have the facility to interpret that evidence properly
- the experience of giving evidence in court is made no more traumatic and foreign for Aboriginal witnesses than for others
- the confidence of Aboriginal people in the court system is enhanced and the system is made more accessible to them.

CHAPTER 1 – INTRODUCTION

This research project was triggered by public debate over the conduct of committal proceedings in the *Pinkenba Case* and several other prominent Queensland cases involving Aboriginal people. The lack of confidence expressed by many Aboriginal people in the criminal justice system was a particular cause for concern. It is clear that many Aboriginal people, particularly women, are reluctant to report offences, to appear as witnesses or, more generally, to access the court system.

The primary focus of the report is on cultural and language issues relating to Aboriginal people, rather than Torres Strait Islanders. This was done on the grounds that:

- The court cases involving indigenous people that have assumed the greatest prominence in the legal system have predominantly involved Aboriginal people.
- There is a considerable body of anthropological and linguistic research on the language and culture of Aboriginal people, which has enabled the CJC to speak with some confidence about these matters. By contrast, relatively little work has been carried out in relation to Islanders. Aboriginal people and Islanders are often grouped together by governments when developing policy, but there are, in fact, significant differences between the cultures.

Nevertheless, some of the recommendations, for example, about the availability and use of interpreters in court, are applicable to Torres Strait Islanders and other groups. Further, it is proposed that there be consultation with representatives of the Torres Strait Islander community to ascertain whether other recommendations contained in this report should also apply to Torres Strait Islanders.

The report does not examine more general issues concerning Aboriginal people in the criminal justice system or the particular needs of Aboriginal defendants. These matters have been the subject of several other reviews both in Queensland and nationally, whereas less work has been done on addressing the issues which arise in relation to witnesses. Although it is true that relatively few cases heard in the criminal courts involve Aboriginal witnesses, the *Pinkenba Case* illustrates that the handling of these matters can

have a significant effect on the confidence of Aboriginal people in the criminal justice system. The very low number of contested matters is at least partly attributable to shortcomings in ways in which the system currently deals with Aboriginal witnesses.

The report is confined to examining ways in which the existing adversarial legal system could be improved. Wider issues, such as the recognition of Aboriginal customary law and the adoption of more culturally appropriate justice systems, are not canvassed.

CHAPTER 2 – ABORIGINAL PEOPLE AS WITNESSES

This chapter documents various socio-cultural and linguistic issues which affect interaction between Aboriginal people and the court system and which may lead to misunderstanding. These include:

LANGUAGE ISSUES

- Most Aboriginal people in Queensland speak some form of English as their first language. The great majority speak a dialect of English known as Aboriginal English. While Aboriginal English shares most of its vocabulary with Standard English, there are crucial differences in grammar, word meaning, style, pronunciation and usage. There is a continuum of varieties of Aboriginal English, ranging from "light" Aboriginal English, which is very similar to Standard English, to "heavy" Aboriginal English, which may not be intelligible to Standard English speakers.

- Some Aboriginal people in the northern Cape York Peninsula and most Torres Strait Islanders speak Torres Strait Creole as their first language. Although Torres Strait Creole also shares vocabulary with English, it is a language in its own right and is often not intelligible to Standard English speakers.

- Some Aboriginal people in Queensland speak traditional Aboriginal languages, mostly in the far north and north-west of the State. A significant proportion of those people speak English either not well or not at all.

- Many Aboriginal witnesses have difficulty in fully understanding the questions put to them in court and in expressing themselves clearly in language that the court can understand. Unfamiliar legal concepts can cause particular difficulties.

CULTURAL ISSUES

- "Question-and-answer" interviews are not part of traditional Aboriginal communication styles, which emphasise more indirect forms of seeking information and dealing with conflict. Many Aboriginal witnesses give apparently contradictory answers in evidence, which tend to suggest that they have agreed with whatever the questioner has put to them.

- In Aboriginal culture, silence is a common and positively valued part of conversation, but silence in response to questioning in court may be misinterpreted as indicating agreement with the question or as insolence or guilt.

- Aboriginal people commonly avoid direct eye contact, which may be misinterpreted in court as deviousness or lying.

- Many Aboriginal witnesses give specific information such as numbers, dates and times in qualitative rather than mathematical terms, which may lead to confusion.

OTHER ISSUES

- Many Aboriginal people are extremely intimidated by the court process, some to the extent that they "freeze" in the witness box.

- There is a very high incidence of hearing impairment amongst Aboriginal people, which may cause difficulties in court.

CHAPTER 3 – BETTER UNDERSTANDING

Chapter 3 considers ways in which judicial officers, lawyers and jurors might better understand and interpret the evidence given by Aboriginal witnesses.

There was widespread agreement amongst those consulted about the importance of increasing cross-cultural awareness amongst judicial officers and lawyers. While most magistrates and judges in Queensland attended indigenous cross-cultural awareness seminars in 1995, these seminars should be seen only as the first step. Initiatives recommended in this chapter are:

- the provision of information in a resource kit for judicial officers

- support by the Queensland Government for a national judicial education program for new judges and magistrates, which should include a cross-cultural awareness component

- organisation of regional symposia for judicial officers, prosecutors, lawyers and members of local Aboriginal communities to improve understanding and liaison between Aboriginal people and those in the court system.

The adversarial system depends to a large extent on the skill of the advocates in ensuring that all relevant matters are put to the court and that witnesses' evidence may be properly interpreted and understood. Cross-cultural awareness training is particularly important for prosecutors and defence lawyers who are likely to come into contact with Aboriginal people. It is recommended that appropriate training be provided to staff of Aboriginal Legal Services, the Legal Aid Office, the Office of the Director of Public Prosecutions, police prosecutors and private practitioners who perform services on behalf of those agencies.

In some circumstances expert evidence may be called to explain aspects of Aboriginal culture and language to the court. However, there are various restrictions on the use of expert evidence which may present difficulties. It is therefore recommended that the Attorney-General request the Queensland Law Reform Commission to conduct a general review of the law of expert evidence in Queensland, having regard to the findings of this report.

A further proposal is that in appropriate cases a judge may provide jurors with specific information in court about aspects of Aboriginal culture and language which may affect witnesses' evidence, in order to assist jurors' understanding and assessment of that evidence. An example, based on a direction developed by Justice Mildren of the Northern Territory Supreme Court, is provided in Appendix 4.

It may often be necessary for lawyers to spend more time with Aboriginal clients and other Aboriginal witnesses than they might spend with most witnesses, in order to develop a relationship of trust which will enable the witnesses to be forthcoming about all relevant issues. In many cases, particularly in remote communities, this is not happening. The Queensland Government must ensure that funding is sufficient to ensure that lawyers providing services to Aboriginal communities, particularly in remote areas, have adequate preparation time.

CHAPTER 4 – GIVING EVIDENCE

Chapter 4 considers the process of giving evidence and the questioning of witnesses in court. The standard question-and-answer style of eliciting evidence has the danger of distorting testimony and may be particularly inappropriate for many Aboriginal witnesses. The use of "narrative" evidence, where a witness is not tied to responding only to specific questions, is possible under present law. The use of this form of evidence should be encouraged in appropriate cases by amendment to the *Evidence Act 1977* (Qld).

Leading questions (that is, those which suggest the desired answer) are widely employed in cross-examination of witnesses, although the right to use leading questions is not absolute. The presiding judicial officer in the exercise of his or her control over proceedings retains a discretion to disallow leading questions. There is evidence that many Aboriginal people have a tendency towards "gratuitous concurrence", that is, to agree with questions put to them, particularly in an intimidating environment. To deal with this situation the court's power to restrict leading questions in cross-examination should be spelt out in the *Evidence Act 1977* (Qld) and it should be stated that the factors to be taken into account by the court include the witness's use of language or cultural background.

Judicial officers have wide discretionary powers to regulate proceedings before them. In addition, sections 20 and 21 of the *Evidence Act 1977* (Qld) provide that a court may disallow questions which are indecent, scandalous, offensive or intended only to insult or annoy. These powers do not appear to be exercised as frequently as they might in cases involving Aboriginal witnesses. Crown prosecutors and police prosecutors should be instructed to object to questions asked of an Aboriginal witness where the witness's cultural or linguistic background puts him or her at a disadvantage. Section 21 of the *Evidence Act 1977* (Qld) should also be amended to provide that in determining whether to disallow a question, the court should have regard to the witness's cultural background.

CHAPTER 5 – INTERPRETERS

Chapter 5 considers how understanding in the courtroom can be enhanced by making greater use of interpreters. There is currently no statutory right to an interpreter in Queensland, either for witnesses or defendants. Whether an interpreter is provided for a witness is a matter within the discretion of the court, which will assess whether failure to provide an interpreter would affect the defendant's right to a fair trial. It appears that Aboriginal interpreters are rarely called in Queensland. This may be due to several reasons: lawyers often have a suspicion of interpreters which may cause them to believe that the services of an interpreter gives a witness an unfair advantage in cross-examination; the courts have shown a traditional preference to hear evidence firsthand from the witness without an interpreter; and there are very few professionally qualified interpreters of Aboriginal languages in Australia.

It is recommended that a witness should have a statutory right to give evidence through an interpreter unless he or she can speak English sufficiently to understand and make an adequate reply to questions about a fact. The language needs of witnesses should be assessed not only by initial impressions of the witness's demeanour, but by more objective standards such as those embodied in the Australian Second Language Proficiency Ratings. The courts and legal practitioners should recognise that faithful interpretation cannot always be literal and that explanation of apparently simple concepts, such as particular legal terms, may

be required. The interpreter's role should not be limited to continuous interpretation. Witnesses who speak Aboriginal English may require only occasional assistance. The cost of interpreters should be met by the State.

Wherever possible interpreters should be qualified as professional interpreters, or failing that as para-professionals. However, suitable members of the appropriate community should be allowed to act if qualified interpreters are not available. The Queensland Government should make a coordinated and concentrated effort to improve the availability of interpreter training. Prosecutors and lawyers who deal with Aboriginal people who may require interpreters in court should also undergo training in how to work with interpreters effectively.

CHAPTER 6 – THE COURT ENVIRONMENT

Many people consulted for this report indicated that feelings of intimidation, isolation and disorientation are common among Aboriginal people who give evidence in our courts. Chapter 6 considers changes that might be made to the court environment to make the experience of giving evidence less alienating for Aboriginal people. The location of the courtroom in the police station in remote Aboriginal communities can be particularly intimidating. More generally, the environment of the courtroom, including the wigs and robes worn by judicial officers and barristers and the fact that there are very few Aboriginal people amongst lawyers, jurors and court staff, is often very alienating. Poor acoustics can also present problems for Aboriginal witnesses given the high incidence of hearing impairment amongst Aboriginal people.

Special measures for witnesses who are likely to suffer trauma in court or to be particularly disadvantaged in giving evidence are currently available under section 21A of the *Evidence Act 1977* (Qld). Those measures include the provision of a support person for the witness in court or the exclusion of certain persons from the courtroom while the witness is giving evidence. However, it appears that those provisions are rarely used, other than for victims of sexual assault; the provisions are not used for Aboriginal witnesses on one of the available grounds, namely "cultural differences".

The recommendations which are made in this chapter include:

- locating remote community courts at venues other than the police station
- in appropriate cases, consideration of removal of wigs and robes in court
- establishment of a pilot scheme for Aboriginal court liaison officers to familiarise witnesses with the court environment and court processes
- increasing the number of Aboriginal court staff in "client-contact" positions
- increasing the use of existing measures under section 21A of the *Evidence Act 1977* (Qld), such as the presence in court of a support person for the witness.

CHAPTER 7 – ABORIGINAL WOMEN

This chapter addresses the particular, but often overlooked, needs of Aboriginal women. These needs arise from various socio-cultural factors including the high incidence of violence against Aboriginal women, and the traditional division of "women's business" and "men's business" which makes it exceedingly difficult for Aboriginal women to discuss sensitive matters in a predominantly male courtroom. To date, the delivery of legal and support services has not been adequate to meet the needs of Aboriginal women, who often face community pressure not to take action against another Aboriginal

person. It is also clear that many participants in the criminal legal system lack awareness of the particular issues affecting Aboriginal women and that expert evidence about Aboriginal cultural matters may not reflect women's perspectives.

Recommendations are aimed at improving awareness amongst lawyers and judicial officers of issues affecting Aboriginal women, and at ensuring that the proposed indigenous women's legal services are adequately resourced. It is also recommended that cross-cultural awareness programs include discussion of the use of support persons for Aboriginal women who are victims of violence and that funding be made available to ensure that women from remote communities are accompanied by a support person of their choice when required to give evidence at distant locations.

CHAPTER 8 – CONCLUSION

This chapter summarises the proposals outlined in other chapters and their implications for lawyers, judicial officers and others participants in the criminal justice system.

Some recommendations require action by the legislature to amend the *Evidence Act 1977* (Qld). These recommendations are largely aimed at clarifying, rather than significantly altering, the existing law. One exception which will change the existing law is the proposed amendment which allows witnesses to give evidence through an interpreter, unless they can understand and speak English sufficiently to make an adequate reply to questions put to them.

In order to redress the significant disadvantages experienced by Aboriginal people in the court system, it is unavoidable that some additional funds will need to be expended. The proposals which are likely to be most costly relate to the provision of interpreters for witnesses. It is not possible, on the information available, to predict the resource implications, but the increase in the number of cases where interpreters are used could be quite substantial, particularly as the proposal will be applicable to witnesses from other cultural backgrounds. In addition, there will need to be more spent on training interpreters of Aboriginal languages and Aboriginal English.

A second set of proposals which may have substantial resource implications concerns the Queensland Government's responsibility to ensure that Aboriginal people have proper legal representation in matters arising under State law. The Queensland Government should examine the funding of the proposed indigenous women's legal services and of Aboriginal Legal Services, particularly in remote areas. These bodies currently receive only Commonwealth funding.

Other proposals with more modest resource implications are those relating to cross-cultural awareness training and training in working with interpreters, the establishment of a pilot Aboriginal court liaison officer scheme and funding of support persons for Aboriginal women witnesses from remote communities.

Most of the recommendations are directed to the legal profession, the judiciary and magistracy, prosecuting authorities, legal aid bodies and court administrators. Many of the proposals necessitate an adjustment of priorities, rather than substantial additional resources, and an acknowledgement that the legal system has been insufficiently informed about, and sensitive to, Aboriginal cultural and language issues. In particular, priority should be given to cross-cultural awareness training of lawyers and prosecutors who are likely to come into contact with Aboriginal clients or witnesses. Training of other court personnel should likewise be undertaken as soon as possible. Judicial officers also have a major part to play in ensuring that Aboriginal witnesses are encouraged to be forthcoming in court and that their evidence is not misrepresented. Participation by judicial officers in measures such as regional symposia will help to increase understanding between both cultures.

The report stresses that Aboriginal people must be involved in, and consulted about, any initiatives to make the courts more responsive to the needs of Aboriginal witnesses. Several recommendations propose the involvement of the Aboriginal Justice Advisory Committee, while other recommendations stress the need to involve local communities, for example, in the implementation of the Aboriginal court liaison officer scheme. Efforts must also be made to ensure that Aboriginal women's perspectives are sought.

It is also recommended that the Attorney-General, through the Aboriginal Justice Advisory Committee, consult with members of the Torres Strait Islander community to ascertain how, and to what extent, the recommendations contained in the report should be modified to take account of language and cultural issues specific to Torres Strait Islanders.

LIST OF RECOMMENDATIONS

3.1 Recommendation – Judicial Officers' Cross-cultural Awareness Resource Kit (p. 36)

The CJC recommends that the Aboriginal Justice Advisory Committee, in conjunction with members of the judiciary and magistracy, develop and maintain a resource kit for judicial officers concerning the aspects of language and culture that affect the way Aboriginal people in Queensland give evidence and the way that evidence is interpreted and understood in court.

3.2 Recommendation – National Judicial Orientation Program (p. 37)

The CJC recommends that the Queensland Government support the development of the national judicial orientation program for new judges and magistrates and that such a program include indigenous cross-cultural awareness issues.

3.3 Recommendation – Regional Symposia (p. 37)

The CJC recommends that the Aboriginal Justice Advisory Committee organise regional symposia involving judicial officers, prosecutors, legal practitioners and members of local Aboriginal communities. Matters to be covered in these symposia may include local cultural traditions, availability of sentencing options in the local area and concerns about the administration of criminal justice in that area. Appropriate resources must be provided to the Committee to enable it to perform this role.

3.4 Recommendation – Cross-cultural Awareness Training for Lawyers (p. 40)

The CJC recommends that the Office of the Director of Public Prosecutions, the Legal Aid Office (Qld) and Aboriginal Legal Services ensure that any of their legal practitioners who are likely to come into contact with Aboriginal clients or witnesses undergo cross-cultural awareness training. That training should address aspects of language and culture that may affect the way in which Aboriginal people respond to questioning and give evidence. Private practitioners who are funded by those agencies to conduct cases involving Aboriginal clients or witnesses should be encouraged to attend. Attendance at such training should be a factor to be taken into account by those agencies when deciding which practitioners should be funded to provide the services. Training should be devised in consultation with the Aboriginal Justice Advisory Committee and could be run jointly by those organisations, or in conjunction with appropriate bodies such as the Queensland Law Society.

3.5 Recommendation – Police Prosecutors (p. 40)

The agencies organising the cross-cultural awareness training outlined in Recommendation 3.4 should invite police prosecutors to participate. The Queensland Police Service should make arrangements to ensure that police prosecutors are able to attend.

3.6 Recommendation – Expert Evidence (p. 42)

The CJC recommends that the Attorney-General and Minister for Justice request the Queensland Law Reform Commission to conduct a general review of the law of expert evidence in Queensland, having regard to the issues identified in this report.

3.7 Recommendation – Information for the Court (p. 44)

The CJC recommends that, in cases involving Aboriginal witnesses who are speakers of Aboriginal English or Torres Strait Creole, the proposed form of information for juries that appears as Appendix 4 to this report:

(a) be used by judicial officers as a basis for informing juries in criminal trials where such information may be necessary for the jury to assess Aboriginal witnesses' evidence fairly; and

(b) be included in the cross-cultural awareness resource kit referred to in Recommendation 3.1 above.

3.8 Recommendation – State Funding for Aboriginal Legal Services (p. 46)

The CJC recommends that once current reviews of Aboriginal Legal Services in Queensland have been finalised and the funding situation is clarified, the Queensland Government take steps to ensure that funding to Aboriginal Legal Services is sufficient to properly implement the Royal Commission into Aboriginal Deaths in Custody's Recommendation 108 (that it be recognised that lawyers need adequate time to take instructions and prepare cases, particularly in remote communities).

4.1 Recommendation – Evidence in Narrative Form (p. 51)

The CJC recommends that the *Evidence Act 1977* be amended to include a provision that a witness may give evidence-in-chief wholly or partly in narrative form and that a court may direct that evidence be given in this form.

4.2 Recommendation – Leading Questions in Cross-examination (p. 53)

The CJC recommends that the *Evidence Act 1977* be amended to include a provision that a party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it. In determining whether to disallow a question, the court should be required to take into account, among other things, the extent to which the witness's cultural background or use of language may affect his or her answers.

4.3 Recommendation – Instructions to Prosecutors about Control of Questioning (p. 56)

The CJC recommends that the Director of Public Prosecutions and the Commissioner of the Queensland Police Service instruct Crown prosecutors and police prosecutors respectively to object to questions asked of an Aboriginal witness which, because of the witness's linguistic and cultural background, are inappropriate. The basis for such objections may be either the court's discretionary power to control cross-examination or sections 20 or 21 of the *Evidence Act 1977*.

4.4 Recommendation – Control of Questioning (p. 57)

The CJC recommends that section 21 of the *Evidence Act 1977* be amended to require the court, in deciding whether a question is indecent, scandalous, insulting, annoying or offensive under section 21(1) or 21(2), to take account of the witness's cultural background.

5.1 Recommendation – Witness's Right to an Interpreter to Have Statutory Recognition (p. 66)

The CJC recommends that the *Evidence Act 1977* be amended to include a provision that a witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

5.2 Recommendation – Interpreter to Be Provided Where There Is a Doubt as to the Witness's English Language Proficiency (p. 66)

The CJC recommends that the proposed amendment entitling a witness to an interpreter include a provision that, where a court has any reason to doubt the capacity of a witness both to understand and speak Standard Australian English, proceedings should not continue until an interpreter is provided.

5.3 Recommendation – Information about Assessment of Language Needs (p. 71)

The CJC recommends that the Aboriginal Justice Advisory Committee, in preparing the cross-cultural resource kit for judicial officers referred to in Recommendation 3.1 and the training for lawyers referred to in Recommendation 3.4, work with suitable organisations (such as the Bureau of Ethnic Affairs and the Centre for Applied Linguistics and Languages) to prepare materials on working with interpreters in court and on assessing the proficiency of speakers of English as a second language.

5.4 Recommendation – Cost of Interpreter (p. 72)

The CJC recommends that the Government, through the Department of Justice, pay for the cost of interpreters for prosecution and defence witnesses, and defendants, in criminal proceedings.

5.5 Recommendation – Qualification of Interpreters (p. 73)

The CJC recommends that, where at all possible, interpreters in legal proceedings be required to be accredited at least to NAATI Interpreter level (formerly Level 3). Where no qualified interpreter is available to assist a person who is entitled to an interpreter in court, the court or legal representatives should invite local Aboriginal community groups to nominate a suitable person to act as interpreter.

5.6 Recommendation – Training of Interpreters (p. 73)

The CJC recommends that the Queensland Government increase its allocation of resources to the training of interpreters of Aboriginal languages (including Aboriginal English and Torres Strait Creole) for use in legal proceedings, and that the agency responsible for that training negotiate with Aboriginal organisations in the planning and carrying out of the training. Careful consideration should be given to concentrating the training in relevant regional centres, particularly as regards traditional languages. Training programs should include (at least on a trial basis) a condensed short course designed for people who already have bicultural competence and are bilingual, to give them particular skills as legal interpreters.

5.7 Recommendation – Material about Working with Interpreters (p. 75)

The CJC recommends that the Queensland Law Society and the Bar Association of Queensland, as part of their continuing legal education activities, consider making available for circulation to interested members material about working with interpreters. This material could be based on the Law Society of New South Wales' 'Guide to Best Practice' for lawyers and interpreters working in a legal environment.

on – Content of Training about Working with Interpreters (p. 75)

ımends that the training workshops for lawyers about working with interpreters ıe Bureau of Ethnic Affairs should:

larly address ways of identifying individuals who may require the assistance of an ..... reter, and

(b) so far as the workshops concern indigenous language and interpreter issues, be devised in consultation with the Aboriginal Justice Advisory Committee.

5.9 Recommendation – Training for Lawyers about Working with Interpreters (p. 75)

The CJC recommends that the Office of the Director of Public Prosecutions, the Legal Aid Office and Aboriginal Legal Services ensure that any of their legal practitioners who are likely to come into contact with Aboriginal clients attend the Bureau of Ethnic Affairs workshops on working with interpreters, or similar workshops. Private practitioners who are funded by those agencies to conduct cases involving Aboriginal witnesses should also be encouraged by those agencies to attend.

6.1 Recommendation – Location of Courts in Aboriginal Communities (p. 80)

The CJC recommends that, in Aboriginal communities, where at all practicable, courts sit at some suitable location determined in consultation with the community, and not at the police station.

6.2 Recommendation – Design of Court Buildings (p. 81)

The CJC recommends that, in considering the design of future court facilities, the Government have regard to the needs of hearing impaired persons, and the high incidence of hearing impairment among Aboriginal people.

6.3 Recommendation – Judges' and Barristers' Wigs and Robes (p. 82)

The CJC recommends that in cases which involve Aboriginal witnesses, the judge should discuss with counsel the appropriate court dress, given the nature of the case, the location of the court and the circumstances of the witnesses.

6.4 Recommendation – Aboriginal Court Liaison Officer Scheme (p. 85)

The CJC recommends that the Department of Justice run a pilot program for Aboriginal court liaison officers in two areas with significant Aboriginal populations. The general aims of the program should be to improve the way in which Aboriginal people understand and use the justice system. The Department should negotiate other aims, the venues for the pilot, the role of the liaison officers and the selection of individual liaison officers with a working party comprising representatives of the local Aboriginal community and the Aboriginal Justice Advisory Committee.

The role of liaison officers should be to:

- liaise with prosecution and defence agencies to find out in advance the details of Aboriginal people who are due to appear in court as witnesses or defendants
- liaise with those Aboriginal people, and familiarise them with the court environment and process, by providing an explanation of the positions and roles of the various people in court
- improve Aboriginal community awareness about the structures and processes of the criminal justice system.

At the conclusion of the pilot program, a public report should be made on the effectiveness of the program, and recommendations should be made to the Attorney-General and Minister for Justice as to the viability of establishing such programs in other communities.

6.5 Recommendation – Familiarisation of Witnesses (p. 86)

The CJC recommends that the Director of Public Prosecutions, the Legal Aid Office and the Commissioner of the Queensland Police Service instruct their officers who prepare matters for court, or appear in court, to take appropriate steps to ensure that Aboriginal witnesses are familiarised with the physical environment and the procedure of the court.

6.6 Recommendation – Aboriginal Employment Strategy (p. 87)

The CJC recommends that the Department of Justice expand its Aboriginal Employment Strategy to place Aboriginal court staff in client-contact positions in centres with significant Aboriginal populations, for example, at registry counters and in courtrooms.

6.7 Recommendation – Cross-cultural Awareness Training for Court Staff (p. 88)

The CJC recommends that the Department of Justice, as a matter of priority, implement cross-cultural training on indigenous issues for court staff whose duties bring them into contact with Aboriginal people. This training should be provided regularly for new staff.

6.8 Recommendation – Information for Lawyers about Special Witnesses (p. 91)

The CJC recommends that information about section 21A of the *Evidence Act 1977* concerning special witnesses, and the applicability of this section to Aboriginal witnesses, be included in cross-cultural awareness training proposed in Recommendation 3.4.

6.9 Recommendation – Information for Prosecutors about Special Witnesses (p. 91)

The CJC recommends that the Office of the Director of Public Prosecutions distribute material to Crown prosecutors and police prosecutors about section 21A of the *Evidence Act 1977* (special witnesses) and its applicability to Aboriginal witnesses. The Director of Public Prosecutions should also encourage Crown prosecutors and police prosecutors to consider the applicability of section 21A in cases involving Aboriginal witnesses.

6.10 Recommendation – Special Witnesses Legislation (p. 92)

The CJC recommends that section 21A of the *Evidence Act 1977* be amended to clarify that an order under subsection (2) may be made at any time, whether before or after the witness has begun to give evidence.

7.1 Recommendation – Cross-cultural Awareness of Gender Issues (p. 99)

The CJC recommends that Aboriginal cross-cultural awareness programs for judicial officers, prosecutors and legal practitioners should include education about gender issues, particularly in relation to violence. Aboriginal women must be fully involved in the development and presentation of training materials.

7.2 Recommendation – Representation of Aboriginal Women (p. 99)

The CJC recommends that any Aboriginal advisory or consultative groups with which the courts and other legal agencies deal include representation by Aboriginal women, to ensure that their views are properly considered.

7.3 Recommendation – Funding of Indigenous Women's Legal Services (p. 101)

The CJC recommends that the Queensland Government examine the funding of indigenous women's legal services within twelve months of their commencement. If the funding is found to be inadequate, the Government should provide additional funding.

7.4 Recommendation – Lawyers' Preparation Time (p. 102)

The CJC recommends that prosecuting and legal aid agencies ensure that lawyers conducting cases involving Aboriginal women have sufficient preparation time to allow for sensitive issues to be fully canvassed and for the particular experiences of Aboriginal women to be explored.

7.5 Recommendation – Use of Support Persons (p. 103)

The CJC recommends that discussion of the use of support persons for Aboriginal women witnesses, particularly in cases of violence, should be included in the cross-cultural awareness training for prosecutors and legal practitioners proposed in Recommendation 3.4.

7.6 Recommendation – Funding for Support Persons for Women from Remote Communities (p. 103)

The CJC recommends that funding should be made available to ensure that Aboriginal women from remote communities who are witnesses in cases involving violence against them may be accompanied by a person of their choosing when required to give evidence at distant locations.

8.1 Recommendation – Consultation with the Torres Strait Islander Community (p. 108)

The CJC recommends that the Attorney-General, through the Aboriginal Justice Advisory Committee, consult with representatives of the Torres Strait Islander community to ascertain how, and to what extent, the recommendations contained in this report should be modified to take account of language and cultural issues specific to Torres Strait Islanders.

CHAPTER 1
INTRODUCTION

This report presents the findings and recommendations of the Criminal Justice Commission's (CJC) research project on Aboriginal witnesses in the criminal courts. The report identifies barriers to Aboriginal people[1] communicating their evidence when called as witnesses and proposes ways of overcoming those barriers. The recommendations are aimed at ensuring that:

- courts have the best possible evidence before them on which to base decisions
- courts have the facility to interpret that evidence properly
- the experience of giving evidence in court is made no more traumatic and foreign for Aboriginal witnesses than for others
- the confidence of Aboriginal people in the court system is enhanced and the system is made more accessible to them.

This introductory chapter explains why the CJC initiated this project, defines the scope of the report, and describes the methodology and consultation strategies which were employed.

BACKGROUND TO THE REPORT

Section 21(1)(a) of the *Criminal Justice Act 1989* provides that:

> The Commission shall . . . continually monitor, review, co-ordinate and, if the Commission considers it necessary, initiate reform of the administration of criminal justice . . .

Under section 23 of the Act:

> The responsibilities of the Commission include . . .
>
> (e) researching, generating and reporting on proposals for reform of the criminal law and the law and practice relating to enforcement of, or administration of, criminal justice, including assessment of relevant initiatives and systems outside the State:
>
> . . .
>
> (l) taking such action as the Commission considers to be necessary or desirable in respect of such matters as, in the Commission's opinion, are pertinent to the administration of criminal justice.

In mid-1995, the CJC decided to exercise these statutory responsibilities to initiate a research project on the treatment of Aboriginal witnesses in the criminal courts.

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[1] This report uses the term "Aboriginal people" and derivatives. The CJC is conscious of the offence that this terminology may cause (Fesl c. 1989). While the use of indigenous people's own terminology is preferable, the use of terms like "Murri" and "Bama" is not universal in Queensland and could be unnecessarily exclusive.

The CJC's decision was prompted by public debate about aspects of the conduct of the committal proceedings in the *Pinkenba Case*.[2] This case, which arose out of a CJC investigation, involved six police officers who had been charged with the unlawful deprivation of the liberty of three Aboriginal boys. The boys had been picked up by police early one morning in Fortitude Valley, taken by police vehicle to Pinkenba, a remote industrial area of Brisbane, and left there. There was no evidence of any criminal conduct on the children's part, nor did the police concerned have any lawful reason for taking the children anywhere without their consent. However, at the conclusion of the proceedings the magistrate found there was insufficient evidence to commit the six police officers for trial, on the ground that the witnesses had not given evidence that their transport in the police vehicles was against their will.

The CJC accepts that the magistrate in the *Pinkenba Case* acted in good faith and made a decision which was appropriate on his reading of the evidence.[3] Nonetheless, as indicated, aspects of the conduct of the committal proceedings prompted extensive public debate and media attention. Defence counsel in the case employed questioning techniques which, in the view of some expert commentators, were culturally inappropriate for Aboriginal people (Eades 1995a; 1995b, p. 5). Some people also queried whether the magistrate should have exercised tighter judicial control over the proceedings and whether prosecution counsel should have, by objection, sought to neutralise the effect of the tactics employed by the defence.

Had the *Pinkenba Case* simply been an isolated event, it would not have been possible to justify devoting substantial resources to researching the topic of Aboriginal witnesses in the criminal courts. However, the CJC was conscious that some of the issues which arose in the *Pinkenba Case* had also arisen, to varying degrees, in other prominent recent cases involving Aboriginal people, such as the *Condren*, *Kina* and *Murgon* cases.[4] In the CJC's assessment, these cases highlighted possible systemic problems in the way in which the court system has dealt with Aboriginal witnesses.

The CJC was also well aware, from its own observations, and ongoing consultations with representatives of the Aboriginal community, that many Aboriginal people lack confidence in the legal system. Cases such as the Pinkenba matter, especially as reported in the media, have contributed to this atmosphere of mistrust.

Finally, the CJC was satisfied that no other body in Queensland had given – or was proposing to give – systematic consideration to the position of Aboriginal witnesses in the criminal justice system. The Queensland Law Reform Commission, which has its work program set by references from the Attorney-General, does not currently have any references relating to this general subject matter (Queensland Law Reform Commission 1995, pp. 2–17). The Litigation Reform Commission also does not have any relevant matters under consideration (1995, pp. 3–7, 9–11). Hence, the CJC's project did not unnecessarily duplicate work done or planned by other agencies [*Criminal Justice Act 1989*, s. 57(2)(b)].

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2 *Crawford v. Venardos & ors* (PS 2615–2620 of 1994, Magistrates Court Brisbane, 24 February 1995, unreported).

3 On 8 November 1995, Mr Justice Ambrose of the Supreme Court heard an application from the children under the *Judicial Review Act 1991*, arguing that the magistrate had erred in law in not committing the police officers for trial. On 14 February 1996 the children's application was dismissed. See Apn 190 of 1995, Queensland Supreme Court (Ambrose J), 14 February 1996, unreported.

4 *R v. Condren* (1987) 28 A Crim R 261 (CCA); *R v. Condren, ex parte Attorney-General* [1991] 1 Qd R 574; 49 A Crim R 79 (CCA); *R v. R B Kina* (CA 258/88; Court of Criminal Appeal Queensland, 23 November 1988, unreported); *R v. R B Kina* (CA 221/93; Court of Appeal Queensland, 29 November 1993, unreported); and *R v. A* (CA 294/94; Court of Appeal Queensland, 28 April 1995, unreported); see also CJC 1992.

SCOPE OF THE REPORT

The following points should be noted about the scope of this report:

- The focus is primarily, although not exclusively, on Aboriginal people, rather than on other indigenous groups.
- The report addresses issues relating specifically to witnesses. The position of suspects or defendants is not considered, except insofar as defendants may choose to give evidence and be cross-examined at their own trials. Similarly, the focus is on what happens in the courtroom, or in related proceedings such as coronial inquests and investigative hearings, rather than on the treatment of Aboriginal people by the police or the corrections system.
- The report is concerned with identifying ways in which the operation of the present adversarial system can be improved, rather than with proposing alternatives to this system.
- The report does not deal systematically with issues relating to Aboriginal customary law.

The justification for restricting the scope of the report is provided below.

ABORIGINAL PEOPLE

The CJC opted to concentrate its research and consultation on issues relating to Aboriginal people, rather than other indigenous groups such as Torres Strait Islanders. This was done on the grounds that:

- The court cases involving indigenous people that have assumed the greatest prominence in the legal system have predominantly involved Aboriginal people.
- There is a considerable body of anthropological and linguistic research on the language and culture of Aboriginal people, which has enabled the CJC to speak with some confidence about these matters. By contrast, relatively little work has been carried out in relation to Islanders. Aboriginal people and Islanders are often grouped together by governments when developing policy, but there are, in fact, significant differences between the cultures (ALRC 1986, vol. 1, pp. 73–75; Osborne 1986, p. 2).

Although the focus of this report is primarily on Aboriginal people, several of the issues canvassed, particularly in relation to language and the need for courts to be better informed about the culture of people appearing before them, apply equally to Torres Strait Islander people. In addition, it is recommended later in the report that there be consultation with representatives of the Torres Strait Islander community to ascertain whether other recommendations contained in this report should also apply to members of this community.

FOCUS ON WITNESSES

The report considers the position of Aboriginal people as witnesses in the criminal justice system, not as police suspects, arrested persons or defendants (unless, of course, they later become witnesses).

Some of the people and organisations who were consulted for this project queried this approach, on the grounds that:

- witnesses are called in only a very small proportion of the cases involving Aboriginal people, as Aboriginal defendants normally plead guilty[5]

- in most instances it is the initial questioning by police of the suspect and any witnesses which is crucial to determining the outcome of the case and how, if at all, the case is dealt with by the courts.

The CJC does not dispute the accuracy of these observations. However, there are also persuasive reasons for preparing a report which focuses specifically on issues relating to witnesses:

- Although it is true that relatively few cases heard in the criminal courts involve Aboriginal witnesses (see Chapter 2), the *Pinkenba Case* illustrates that the handling of these matters can have a significant effect on the confidence of Aboriginal people in the criminal justice system.

- The very low number of contested matters is at least partly attributable to shortcomings in ways in which the system currently deals with Aboriginal witnesses. The CJC found in its research and consultations that many matters do not proceed to trial because of concerns by prosecuting authorities that Aboriginal people will not be seen by juries or magistrates to be credible or impressive witnesses. Defence counsel are often reluctant to call Aboriginal witnesses for the same reason. It was also apparent that many Aboriginal people are unwilling to give evidence because they feel intimidated and are not confident that their evidence will be treated fairly.

- If this project had been expanded to examine the general position of Aboriginal people in the criminal justice system, it would have been necessary to substantially delay the completion of the report. In the CJC's view, it would be better to deal with these wider issues in a series of reports, rather than attempting to produce a single comprehensive study.

- Issues relating to the questioning of Aboriginal suspects have already been the subject of a number of reviews in Queensland and nationally, although many of the recommendations from those reviews have not yet been implemented (ALRC 1975; 1986, vol. 1, pp. 401–427; RCIADIC 1991, vol. 3, pp. 71–92; CJC 1992, pp. 70–91; 1994b, pp. 723–726; PCJC 1995, pp. 183–186). By contrast, relatively little work has been done on addressing the issues which arise in relation to witnesses.

THE ADVERSARIAL SYSTEM

During consultations for this report, many people expressed the view that the adversarial system is culturally inappropriate for Aboriginal people (see Chapters 2 and 3). For example, a submission from the Tharpuntoo Legal Service said:

> This raises the question, is the current adversarial system fundamentally flawed when it comes to delivering justice to Aboriginal and Torres Strait Islander people? . . . Perhaps a preferable method of investigating and dealing with breaches of the law would be a model similar to the French inquisitorial system whereby Magistrates investigate matters and take evidence in the field. Having gathered all the evidence they make a decision.

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[5] The issue of whether Aboriginal people understand the significance of a guilty plea was prominent in consultations. The difficulty of translating concepts like "guilty" into Aboriginal languages, having proper regard to the underlying legal concepts, has been amply documented (Cooke 1996; Goldflam 1995; see also *Ngatayi v. The Queen* (1980) 147 CLR 1). Proposals for safeguards to be applied when Aboriginal people plead guilty to offences were considered by the CJC, but, in line with the decision to limit the report to issues concerning witnesses, it was decided not to make a recommendation.

However, the CJC decided at an early stage that the project should be limited to an investigation of ways in which the treatment of Aboriginal witnesses within the existing legal system could be improved. Any proposal to move away from an adversarial system or towards a more culturally appropriate justice system would require much more extensive research. Furthermore, as a matter of practicality, there is a greater likelihood that recommendations will be implemented if they can be tailored to fit the existing system.

CUSTOMARY LAW ISSUES

Many individuals and groups consulted for this project argued that the report should address questions relating to the status of Aboriginal customary laws, and the way in which these laws are or should be recognised in the Australian legal system. Many saw the resolution of these issues, and the implementation of recommendations made in 1986 by the Australian Law Reform Commission (ALRC), as a prerequisite to resolving many other outstanding issues affecting indigenous Australians.

For reasons which have already been indicated, the CJC has decided not to canvass these wider issues in the present report. However, it should not be inferred from this decision that the CJC is opposed to giving greater recognition to Aboriginal customary laws. To the contrary, the report proposes changes which, if implemented, would ensure that the legal system pays more regard to important cultural traditions and customary laws which affect the way Aboriginal people give evidence in that system.

SHOULD ABORIGINAL PEOPLE BE SINGLED OUT FOR SPECIAL TREATMENT?

Some people and organisations consulted during the project argued that it was inappropriate to prepare a report focusing specifically on issues relating to Aboriginal witnesses, because the difficulties which Aboriginal people encounter are also experienced by many other witnesses appearing in the criminal courts. For example, one group of lawyers questioned the need for special rules for Aboriginal people. This group believed that any disadvantage could best be overcome by relying on the good sense of the judge, jurors and lawyers.

A related view, which was expressed in response to certain of the CJC's draft recommendations, was that proposals to make special arrangements for the treatment of one group in the community by the legal system may tend to evoke requests for similar treatment by other groups whose claims for special treatment are just as strong.

The CJC acknowledges that several of the issues canvassed in this report – such as the problems presented by language differences, the intimidating nature of court proceedings and the appropriateness of adversarial methods of questioning – do not arise only in relation to Aboriginal witnesses. In recognition of this fact, several of the recommendations made in the report, particularly in relation to interpreters, are intended to have wider applicability. However, the CJC does not resile from its decision to prepare a report which focuses primarily on improving the position of Aboriginal witnesses in the court system. This emphasis is justifiable on several grounds:

- Indigenous people *are* in a special position, in that they appear before the courts more frequently – as defendants if not as witnesses – than other identifiable racial or ethnic groups in our community. For example, in 1993/94, Aboriginal and Torres Strait Islander children in Queensland comprised 3.6 per cent of the juvenile population between 10 and 16 years, but accounted for 34 per cent of final court appearances by children and 56 per cent of detention orders made in respect of children (CJC 1995a, pp. 15–16). While a breakdown of court statistics is not available for adults, adult prisoner statistics show a similar over-representation of Aboriginal

and Torres Strait Islander people. In 1995 in Queensland, Aboriginal and Torres Strait Islander people over 17 years of age were approximately 15 times more likely to be imprisoned than non-indigenous people (ABS 1996, p. 9).

- Although other groups may also experience difficulties in their dealings with courts, due to language differences, cultural unfamiliarity and the like, Aboriginal people are exposed to a unique combination of disadvantaging factors. Aboriginal people have been dispossessed of much of their land and white colonisation has generally impacted adversely on their cultural identity and their social structures. Further, they continue to suffer very considerable socio-economic disadvantages. For example, according to the 1991 census (ABS 1993; Government Statistician's Office 1995):

  - The unemployment rate was two and a half times higher for indigenous than for non-indigenous people in Queensland. Nearly two-thirds of those indigenous people in Queensland who were employed were in unskilled (classified as "labourers and related workers") and semi-skilled occupations, which was a far higher proportion than for non-indigenous people.

  - Only six per cent of Aboriginal people earned individual incomes of more than $25,000 per year, compared with 19.8 per cent of non-indigenous people.

  - Only 6.7 per cent of Aboriginal people aged 15 or over in Queensland had post-secondary qualifications, compared with 24.4 per cent of non-indigenous people.

  - Seventy per cent of indigenous dwellings in Queensland were rented (compared with a national average of only 25 per cent for non-indigenous people). Almost eight per cent of their dwellings were classified as "improvised" (which includes sheds, tents and other temporary structures).

- As documented above, there is a strong legacy of mistrust amongst Aboriginal people towards the criminal justice system: a situation which has been exacerbated by the *Pinkenba Case* and some other recent highly publicised cases involving Aboriginal people. One manifestation of this distrust is the fact that many Aboriginal people, particularly women, are reluctant to report offences to police, to appear in court as witnesses, or, more generally, to access the court system. If Aboriginal people are to have the same access to, and protection of, the legal system as is enjoyed by other Australians, priority must be given to addressing Aboriginal concerns about that system.

METHODOLOGY

DATA SOURCES

This report has been prepared using the following information sources:

- extensive interviews and consultations with members of the Aboriginal community, judicial officers, prosecutors, legal practitioners and members of the public (see below for details)

- reported and unreported judicial decisions, and relevant legislation, from Queensland and other Australian jurisdictions

- transcripts of relevant cases identified by the above sources
- observations by CJC staff of the operation of Magistrates Courts on the Cape York Peninsula and in Lismore, New South Wales (where an Aboriginal court liaison office scheme is in place)
- published research on aspects of Aboriginal language and culture, and the relationship of these factors to the legal system
- relevant reports by other bodies, most notably the ALRC's reports on evidence and Aboriginal customary law (1985, 1986, 1987), and the Royal Commission into Aboriginal Deaths in Custody's (RCIADIC) National Report (1991).

CONSULTATIONS

Early in the course of the project, the CJC established an Advisory Committee consisting of representatives of the Aboriginal Justice Advisory Committee, the National Aboriginal and Islander Legal Services Secretariat (NAILSS), District Court judges, magistrates, the Office of the Director of Public Prosecutions (ODPP) and the Aboriginal Co-ordinating Council. The Committee met on four occasions and members were given the opportunity to comment on a draft report.

In August 1995 advertisements were placed in metropolitan and regional print media, and media statements were issued. This resulted in a number of indigenous, regional, state and national media outlets publicising the project. In addition, detailed letters outlining the aims and methods of the project were sent to about 200 interested parties, including:

- the Queensland Aboriginal Justice Advisory Committee[6]
- the Aboriginal and Torres Strait Islander Commission's (ATSIC) Queensland State and Regional Councils
- the National and Queensland Aboriginal and Islander Legal Services Secretariats, and Aboriginal Legal Services[7] throughout Queensland
- the Aboriginal Co-ordinating Council and all Queensland Aboriginal community councils
- the Aboriginal and Torres Strait Islander Deaths in Custody Overview Committee
- the Aboriginal and Torres Strait Islander Social Justice Commissioner
- chief judicial officers of the Magistrates, District and Supreme Courts and the Court of Appeal
- the ODPP and the Legal Aid Office (Qld)

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6 The RCIADIC recommended that each State and Territory establish an independent Aboriginal Justice Advisory Committee to advise governments on Aboriginal perceptions of criminal justice matters, and on the implementation of RCIADIC recommendations (1991, vol. 1, pp. 30-31, Recommendations 2 & 3). In Queensland, the Aboriginal Justice Advisory Group has a membership of five, representing both urban and regional areas.

7 Used as a generic term: the decentralised Aboriginal and Islander legal services in Queensland are mostly incorporated under the *Aboriginal Councils and Associations Act 1976* (Cwlth) under different names.

- the Queensland Law Society and the Bar Association of Queensland, and selected lawyers on a group and individual basis

- the National Accreditation Authority for Translators and Interpreters (NAATI).

Written submissions were received from 17 organisations and individuals (Appendix 1). In addition, interviews and meetings were held with more than 140 individuals and groups. Most of these are listed in Appendix 2, although some wished to remain anonymous.

Face-to-face interviews were conducted in Brisbane, Logan, Toowoomba, Cherbourg, Murgon, Kingaroy, Maroochydore, Townsville, Palm Island, Cairns, Yarrabah, Kowanyama, Aurukun, Bamaga, Lockhart River, Sydney, Casino and Lismore. Telephone interviews were conducted with people in Warwick, Doomadgee, Alice Springs, Batchelor, Darwin, Perth, Geraldton, Port Augusta, Adelaide, Melbourne and Canberra.

Officers of the CJC also met with the Queensland Aboriginal Justice Advisory Committee on three occasions. In addition, three meetings were held with the CJC's own Aboriginal and Torres Strait Islander advisory committee on Aboriginal issues to discuss the research methodology and a draft of the report. Members of both of these bodies were provided with the opportunity to comment on draft recommendations for inclusion in the report.

STRUCTURE OF THE REPORT

The key questions addressed in this report are: what barriers are there to Aboriginal people communicating their evidence in Queensland's criminal courts? and how can those barriers be overcome? The report deals with these issues according to the following structure:

- Chapter 2 identifies the major differences in culture and language that affect cross-cultural communication between Aboriginal and non-Aboriginal Australians. Examples are then given of the potential for misunderstanding in the courtroom.

- Chapter 3 examines how non-Aboriginal participants in the criminal justice process can obtain a better understanding of the cultural and language issues described in Chapter 2. The chapter examines means of enhancing cross-cultural awareness amongst lawyers, judicial officers and juries; considers the law relating to expert evidence; discusses other practical ways of putting information about Aboriginal language and culture (as it affects witnesses) before courts; and, looks at the provision of service by Aboriginal Legal Services to Aboriginal people in remote communities.

- Chapter 4 examines how the process of giving evidence can be improved for Aboriginal witnesses. The chapter considers: the use of narrative evidence; limits on the use of leading questions; and the need for clarification of legislative provisions which limit other types of questions.

- Chapter 5 reviews the way courts and lawyers work with interpreters for Aboriginal witnesses. The chapter addresses issues such as: whether witnesses should have a right to an interpreter; the appropriate role of the interpreter; who should bear the cost; and the training and qualifications of interpreters.

- Chapter 6 considers the environment of the courtroom and the intimidating effect it has on some Aboriginal witnesses. Matters canvassed include: the location of courts in Aboriginal communities; the needs of hearing impaired Aboriginal people in designing court facilities; the use

of wigs and robes by judicial officers and counsel; Aboriginal court liaison officers; and the use of current legislative provisions concerning special witnesses.

- Chapter 7 considers the particular cultural and gender issues which affect Aboriginal women witnesses, including the need for appropriate legal and support services.

- Chapter 8 provides a summary of key recommendations of the report and their implications for various participants in the criminal justice process.

The report also contains a bibliography and several appendices, including a comparative table of legislation relating to interpreters in Queensland and elsewhere and a summary of relevant information about language and cultural factors in a form that could be used in court. It is hoped that this material will be used as a resource for criminal justice system professionals interested in improving their knowledge about the culture and language of Aboriginal people, and in exploring policy issues relating to the treatment of Aboriginal witnesses by the courts.

CHAPTER 2
ABORIGINAL PEOPLE AS WITNESSES

INTRODUCTION

The view was frequently expressed to the CJC during consultations that Aboriginal people do not perform well as witnesses in court. It was also suggested that disputed matters often do not proceed to trial where the only witnesses are Aboriginal people.

Common observations included:

- Many Aboriginal people are extremely intimidated by the court process, some to the extent that they freeze in the witness box and are unable to give evidence (particularly in cases of a sensitive nature such as sexual assault).
- Many Aboriginal witnesses have difficulty in fully understanding the questions put to them in court and in expressing themselves clearly in language that the court can understand. Unfamiliar legal concepts can cause particular difficulties.
- Many Aboriginal witnesses give apparently contradictory answers in evidence, which in some cases suggests that the witnesses have agreed with whatever the questioner has put to them.
- Aboriginal people commonly avoid direct eye contact, which may be misinterpreted in court as deviousness or lying.
- Many Aboriginal witnesses give specific information such as numbers, dates and times in qualitative and relational terms rather than in mathematical terms.

These difficulties are not the result of any deficiencies on the part of Aboriginal people. Rather, the problems have arisen because the criminal justice system has failed to recognise and allow for important cultural and language differences, and to take account of the economic and social disadvantages which many Aboriginal people experience.

This chapter documents the causes and consequences of the difficulties which can arise when Aboriginal people appear in court as witnesses. To this end, the chapter:

- briefly outlines the way in which the adversarial legal system operates
- considers general issues relating to Aboriginal people in court
- describes how language differences add to the potential for misunderstanding in that legal setting
- identifies other key aspects of Aboriginal culture that can have an impact on communication in the courtroom
- examines the impact of other relevant matters such as health issues.