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.

ABORIGINAL PEOPLE IN COURT

GENERAL CONSIDERATIONS

In the 1991 Census there were 55,475 Aboriginal people in Queensland, accounting for 1.9 per cent of the State's total population, and 20.9 per cent of Australia's total indigenous population (Government Statistician's Office 1995, p. 3). There were also 14,649 Torres Strait Islanders in Queensland, comprising 0.5 per cent of the State's total population and 5.5 per cent of Australia's total indigenous population. Four times as many indigenous people lived in areas outside Brisbane as live in Brisbane, and a large proportion were in communities of between 200 and 999 people (ABS 1993, p. 2).

Many aspects of Aboriginal culture and language are fundamentally different from those of the society in which the adversarial legal system developed. However, the extent to which these factors present difficulties in court varies between and amongst different Aboriginal groups. There are significant variations between different regions and even within communities. For example, most sociolinguists acknowledge that language studies for people of a particular area are not directly applicable to all Aboriginal people throughout Australia (e.g. Eades 1992, p. 2). On the other hand, communication issues such as suggestibility, indirect seeking of information and avoidance of direct conflict are common to many Aboriginal people (Cooke 1995c, p. 16; von Sturmer 1981).

The extent to which an individual witness experiences difficulties in court will also vary with his or her degree of familiarity with Anglo-Australian culture and his or her ability to switch to the appropriate style of communicating. Aboriginal people who live and work with non-indigenous people maintain their cultural orientation but develop an awareness (conscious or unconscious) of the culture and language norms required in their interactions with non-indigenous people. A person who is able to switch successfully between the two styles of communication is "biculturally competent" (Eades 1992, p. 11).

People from more remote areas, such as Cape York, who have limited contact with non-indigenous people and who retain traditional languages and lifestyles, will experience the most difficulty in making themselves fully understood in the Anglo-Australian legal system. However, even outside these remote communities, Aboriginal culture and language remain strong in Queensland (Foley 1984, p. 168; Eades 1992, p. 11; Mildren 1996, p. 2). As one very experienced lawyer in a regional centre told the CJC:

> Most judges and magistrates have this view that there are classes of Aboriginal people. There are the "real ones", who are often quite old and who have lived in remote communities all their lives. Older men are seen as being the bearers of tradition. This is not always the case and white fellas must shed the mentality of thinking that people who live in urban areas and women have no culture. Even for Aboriginal people in urban areas language issues are still relevant as language is driven by culture and culture is still strong in urban communities! . . . Many people in urban areas think they know what is going on in their communication with Aboriginal people when they really haven't got a clue. Then they go off and bitch about Aboriginal people not doing what they thought they were going to do and this is really because they haven't understood the message that was intended.

HOW FREQUENTLY DO ABORIGINAL PEOPLE APPEAR AS WITNESSES?

It is very difficult to estimate exactly how many Aboriginal people appear as witnesses in court, as relevant statistics are not kept by the courts. Some lawyers told the CJC they call Aboriginal people to give evidence several times a week; others said that this occurs very rarely.

The CJC's own inquiries suggest that Aboriginal witnesses are called in only a very small proportion of cases. By way of illustration, Appendix 3 sets out the number of matters dealt with in Cape York Peninsula Magistrates Courts – where nearly all cases involve Aboriginal defendants – between July and December 1994 (inclusive). The appendix shows that contested matters were vastly outnumbered by guilty pleas.[10] Moreover, of those matters committed for trial from these courts, not many result in contested trials in the higher courts. According to information provided to the CJC by Tharpuntoo Legal Service (which services the Peninsula), there were only 18 jury trials in 1995 involving indigenous defendants from the Peninsula.

LANGUAGE

Language differences can lead to a witness misunderstanding a question or becoming confused, and can also provide scope for misinterpretation by the court of the witness's answers. This section provides a brief overview of the types of languages spoken by Aboriginal people, and illustrates how language differences can hamper effective communication in the courtroom.

WHAT LANGUAGES DO ABORIGINAL PEOPLE SPEAK?

It is estimated that at least 93 per cent of Queensland Aboriginal people now speak some kind of English when speaking to non-Aboriginal people (Eades 1992, p. 4). However, it cannot be assumed that, because familiar words are used, an Aboriginal person is speaking Standard Australian English. Many Aboriginal people will speak a number of different languages, according to the setting. Those languages include:

- traditional languages
- pidgins or creoles
- Aboriginal English.

TRADITIONAL LANGUAGES

Before colonisation, over 200 distinct languages were spoken in Australia (Eades 1992, p. 15, based on Schmidt 1990). There are thought to be now only four traditional Aboriginal languages in Queensland that have more than 200 fluent speakers. Of these, Wik Mungkan is the most widely spoken, with around 1,000 speakers (HRSCATSIA 1992, p. 25). A further nine traditional languages are spoken but are considered to be seriously threatened (Eades 1992, p. 17, based on Schmidt 1990; Harper, forthcoming). All these languages are confined to the Cairns, Cape York Peninsula and Gulf of Carpentaria regions.

People from communities where traditional languages have survived may not speak English as their first language. In the 1991 Census, over 10 per cent of indigenous people in Queensland aged five years or over reported that they spoke an indigenous language at home. Of these, one in five indicated that they spoke English "not well" or "not at all" (ABS 1993, p. 14).

[10] About 90 per cent of all defendants, whether Aboriginal or not, who appear in Magistrates Courts plead guilty (CJC 1995b, p. 10). Consultations indicate that the rate may be even higher for Aboriginal people, although State-wide statistics are not available.

PIDGINS AND CREOLES

A pidgin is a language that is formed from two or more different languages spoken by two linguistically distinct groups, and is used only for limited purposes arising from interaction between the groups. In Queensland in the nineteenth century, many forms of pidgin English developed for trade, agricultural and administrative purposes. These pidgins varied regionally according to the influences of local traditional languages: particularly in northern areas, they were influenced by pidgins in use in the Pacific. The usual pattern was that these pidgins had a largely English-derived vocabulary, but a grammar largely based on traditional languages.

Some pidgins develop to the point where they are used by a group for wider purposes than inter-group communication, and become the first language for some speakers. When that happens, the language is said to "de-pidginise": it becomes linguistically more complex than the pidgin from which it developed. In Queensland, de-pidginisation moved the language in two directions, resulting in two distinct forms: Aboriginal English, which is closer to standard English than to any traditional language, and creole.

With the relocation to missions and reserves of large numbers of Aboriginal people from different language areas throughout Queensland, Aboriginal English developed and became the first language for many Aboriginal people (see below). In Queensland, the process of "creolisation" gave rise to Torres Strait Creole. This has become the common language amongst Torres Strait Islanders in the Strait and in mainland Queensland (HRSCATSIA 1992, p. 27). Torres Strait Creole has also become the first language of most children in the Aboriginal communities of the northern part of the Cape York Peninsula (Injinoo, New Mapoon and Umagico) which are in close proximity to, and share many historical and relational links with, the mainland Islander communities (Bamaga and Seisia) and some Torres Strait Islands (Harper, forthcoming).

A second creole, known as Kriol, developed in a similar way in parts of the Northern Territory and Western Australia (Harris 1993, p. 147–150; Cooke 1995c, pp. 12–15). It is doubtful whether Kriol is spoken in Queensland, but it is said to be influencing the Aboriginal English which is spoken in the more remote parts of the State, particularly in the Gulf of Carpentaria (Eades 1992, p. 23).

ABORIGINAL ENGLISH

Aboriginal English is classified as a dialect of Standard Australian English (Eades 1992, p. 20; Foley 1984, p. 168) and has become the first language for most Aboriginal people in Queensland. Because Aboriginal English is a first language, it is not correct to refer to it as pidgin. Several kinds of Aboriginal English are spoken, ranging from near to Standard English spoken by people who have closer contact with non-indigenous people, to "heavy" Aboriginal English spoken by people who live in remote areas where Torres Strait Creole, Kriol or traditional languages are also spoken. Those heavier varieties of Aboriginal English may be quite closely aligned to the non-English language from which they have developed. In fact, it is considered to be often impossible to distinguish between a person who is speaking heavy Aboriginal English and a person who is speaking Kriol (Eades 1995b, p. 2; Foley 1984, pp. 164–170).[11]

Aboriginal English differs from Standard Australian English in pronunciation, grammar, vocabulary, use and style (Eades 1992, p. 22; Nash 1979, p. 106). A common example of different pronunciation is that the "h" at the beginning of a word is not pronounced. Since Aboriginal languages rarely have "f" or "v" sounds, the heavier varieties of Aboriginal English tend to change these sounds to "p" or "b". Consequently 'we had a fight' in Standard English becomes 'we ad a bight'. The tense of the verb may

[11] A detailed discussion of linguistic differences, concentrating on South East Queensland varieties, is contained in Eades (1992). Other examples of important, but not obvious, differences in Aboriginal English are provided in Nash (1979, p. 106) and Foley (1984, pp. 168–169).

not be indicated in the same way as in Standard English. For example, it is common in Aboriginal English to simplify the ends of words which have more than one consonant sound, so that 'they locked him up' in Standard English becomes 'they lock im up'. However, this does not imply that Aboriginal English has any greater potential for ambiguity, or lesser degree of grammatical rigour, than Standard Australian English, since the past tense may be indicated in other ways. This might include the use of "bin" (which is a feature borrowed from Kriol), as in 'they bin lock im up', or by a time indicator such as "before" or "that time".

Plurals may not be used in Aboriginal English as they are often signalled by the context, and this can be confusing for the unwary. Discourse features, such as repeated verbs, are different from Standard English: for example, 'we ran, ran, ran, ran', indicates that they ran for a very long time. This meaning may also be conveyed by a lengthened vowel: 'we raaaaan'. Multiple negatives are commonly used in Aboriginal English, but their use to indicate a positive statement is unfamiliar. Consequently, questions such as 'You didn't not want to go to the police station, did you?' will be extremely confusing to many Aboriginal people. Combined positive and negative questions (such as 'Is it correct that you didn't want to go?'), can also yield ambiguous answers (Lane 1985, pp. 197–198).

Standard English words may also have different meanings in Aboriginal English. For example, in some places "drunk" means "tipsy", and "choked down" means drunk or "very drunk". Aboriginal people often use words from their traditional languages, such as "Murri" (from at least one Aboriginal language meaning "person") or, in North Queensland, "Bama" (which in many North Queensland languages also means "person") to describe an Aboriginal person, and "Migaloo" (perhaps from the Mayi-Kutuna *migulu*) to describe a white person.

Even where traditional languages are no longer spoken, Aboriginal people are more likely to speak Aboriginal English or a creole than Standard Australian English (Eades 1992, p. 2).

CONSEQUENCES OF LANGUAGE DIFFERENCES

Several difficulties can arise when a court, hearing the use of some English words, does not appreciate that a witness is not fluent in Standard Australian English. The need for an interpreter to ensure that difficult concepts are translated with precision may not be recognised. The witness may not fully understand the questions which are put to him or her, or the legal terminology which is used, and may make an inaccurate or vague reply. The witness's responses may be open to misinterpretation because of the different meanings of common English words in Aboriginal English or in one of the creoles. If the prosecution or defence counsel is not aware of those possible alternative meanings, and either does not ask further questions to ascertain what is meant or does not introduce some expert evidence to explain these issues, the court may misunderstand the witness.

The risk of misinterpretation was considered in the recent case of *R v. Izumi*.[12] The defendant, a Torres Strait Creole speaker from Injinoo, had participated in a police record of interview in which she appeared to make admissions. A linguist was called to give evidence about language differences:

> DEFENCE COUNSEL: Then in relation to the language, in your report you refer to the problem of interference. Can you explain what's meant by that?---Yes, a lot of words coming into Creole from English actually take on new meanings, even though they're English words. The meanings might change when they get taken to Creole. Or they might be ambiguous. They might initially have been used for many meanings when they were in the pidgin. So, for example, people in the Northern Peninsula Area talk about going to have a swim. What they mean is they're going to go and have a shower . . .

[12] Queensland Supreme Court (Cairns and Townsville: Cullinane J), 22 May and 22 June 1995, unreported.

> HIS HONOUR: I'm a little confused about this. I heard the tape, of course, and the accused lady was, it seemed to me, speaking English to the police officers. Are you suggesting there is a tendency to slip between the two languages in some way?---By interference I mean that in using English it's possible to take words that seem to be English but to use them with a Creole meaning.
>
> Yes?---And I would go so far as to suggest that although she seems to be speaking English, it's not always English, Standard English, but it's similar enough to pass unnoticed. (Transcript, p. 50)

Later the linguist gave other examples of the different meanings of common English words in Torres Strait Creole:

> 'Kill' is ambiguous in that it can mean kill dead or it can have a weaker meaning which is hurt – which is not kill dead . . . 'Drown' can mean drown as in drown dead, or it can also mean just submerge, just get really wet. (Transcript, p. 51)

Another important linguistic phenomenon is the tendency for people whose first language is not Standard Australian English to use the words of the other speaker in order to construct their reply. This is known as "scaffolding" (Cooke, forthcoming, p. 3; 1995c, p. 19). The words which are "borrowed" from the questioner may not convey precisely what the person intends. An example cited by Cooke concerns a woman from Arnhem Land who was charged with the murder of her de facto partner. In the police interview the following exchange took place (Cooke, forthcoming, p. 9):

> Did you ring the ambulance?---No.
>
> Why not?---I was scared.
>
> Right. Before you said there was a reason why you didn't ring the ambulance?---Beg you pardon?
>
> Before, when, when I was asking these questions, there was something in here you said about why you didn't want to ring the ambulance?---Because I wanted him to be dead.
>
> So if he didn't get any help he could've died. You were hoping?---I was hoping.

The last answer replicates the wording and grammatical structure used by the questioner. Where this happens between fluent speakers of the same language, it is known as "leading" or "suggestion". By comparison, scaffolding refers to the situation where one person is not a fluent speaker of the language and may not have the language skills to frame a different and more precise reply if he or she wishes to elaborate: hence, the reliability of the answer is open to doubt. In the above case it was only during the court proceedings, with the aid of an interpreter to whom the defendant could turn when she needed, that the defendant was able to explain her state of mind and feelings more adequately. Her evidence cast a quite different light on the events. As a result, the prosecution withdrew the murder charge and substituted a manslaughter charge, to which the defendant pleaded guilty.

Clearly misunderstandings caused by language differences can have profound effects on the outcome of proceedings; for example, in determining a defendant's criminal intent.

DIFFERENT CULTURAL VALUES

This section briefly describes the methods of giving and seeking information and dealing with conflict which form part of Aboriginal culture and compares these with those methods employed in the courtroom.

Consideration is then given to the difficulties which can result when Aboriginal people are in the witness box. Aspects examined are:

- suggestibility
- complex questions
- misinterpretation of silence
- avoidance of eye contact
- methods of giving specific information
- how kinship affects witnesses
- reluctance to speak on some matters.

WAYS OF SEEKING INFORMATION AND DEALING WITH CONFLICT

The importance of indirectness in Aboriginal styles of communication has been noted by Eades (1992, pp. 27–28) and von Sturmer (1981). Some of the main features of communication styles are explored below.

TRADITIONAL WAYS OF SEEKING INFORMATION

Question-and-answer interviews are culturally alien to many Aboriginal people, who are accustomed to a less direct form of information gathering. White Australian children are typically socialised into question-and-answer information exchange in the most obvious way by parents who constantly ask infants 'What's that?', knowing the answer and seeking to find out whether the children can respond correctly. Socialisation continues in the classroom where question-and-answer sequences are a primary teaching strategy. Aboriginal socialisation strategies, at least for those beyond the infant stage of learning language, are far more reliant on learning through listening and observation of social interaction (Malcolm 1982; Gray 1990; Bavin 1993, pp. 86–87).

In Aboriginal communities, complex information is usually built up over a period of time and through a series of interactions amongst those involved. Knowledge of the social context and appreciation of non-verbal cues is also important to understanding. If something is not immediately understood, it is often assumed that clarification will come from continued interaction, and the appropriate response is to wait. To state that one does not understand what has been said can be humiliating.

For many Aboriginal people, it is bad manners to ask curious questions, especially of older people. In some Aboriginal communities, such as amongst the Yolngu people of North-East Arnhem Land, children who ask too many questions are criticised or teased for behaving like white people (Cooke, forthcoming, p. 1). Some information is not freely available to everyone, as only certain people have rights to particular knowledge. Aboriginal people tend to judge the appropriateness of questioning according to how, where, when, by whom, to whom, and for what purpose the questions are being asked. A person's standing in society and his or her authority to speak are much more important than whether the person was present at a particular incident. When Aboriginal people do seek direct information it is often to place a person in context; for example, by asking where a person is from.

When Aboriginal people volunteer information about a matter, it can be intensely embarrassing for them to have their knowledge questioned. Aboriginal people commonly communicate by way of messages sent through intermediaries: asking a person to comment on another's information is a challenge to the dignity of the person who gave the information. It is seen as quite ignorant to say something like 'Oh, Harry says such and such. Is this true?' rather than 'Oh, someone has told me this, but it might or it might not be right' (von Sturmer 1981, pp. 5, 18). As one writer has stated:

> There should be no challenge to a person's existential status in a public context, no cross-examination of an individual to determine his or her opinion or views on any matter. People may wish to state their views but they must not be called upon or required to offer further elucidation. Attempts to do this will be met by immediate confusion and embarrassment. Such behaviour will always be taken as constituting a questioning of the information, and this questioning will be interpreted as a personal attack. (von Sturmer 1981, p. 10)

TRADITIONAL WAYS OF DEALING WITH CONFLICT

Aboriginal people usually seek to express their opinions in ways which avoid open disagreement and criticism. In the absence of alcohol, conflict is managed and dealt with in Aboriginal communities less overtly than is common in English-speaking cultures (Eades 1992, pp. 93–95). When conflict is brought to the fore in an Aboriginal community, it is managed by members who have the right to be involved, and the involvement of the whole community in reaching consensus is emphasised. Difficult issues are approached with circumspection and disclaimers, to avoid the inference that the speaker has reached a pre-determined position against the listener(s). Thus, a topic may be introduced with apologies for raising the subject and avoidance of 'linking oneself too closely with one's own ideas' (von Sturmer 1981, p. 18).

In situations where it is clear that there is a disagreement between the parties, each person is often careful not to accuse the other of being wrong. Vague references may be made to the other's position while restating one's own position. There may be statements made about not wanting to convert the other's opinion, but rather to arrive at a mutually acceptable position. It is important that a speaker is not interrupted, even if he or she is long-winded. In some cases the person who speaks may be expressing the views of someone who is too shy to do so. The person initiating a sensitive discussion will usually make a statement about his or her intentions in a way which avoids the necessity of the other person having to directly refuse or disagree with the statement (von Sturmer 1981, p. 5). Only if one of the parties is senior to the other and/or feels extremely provoked may the disagreement be directly stated. It is rare for the views of community elders to be publicly challenged, particularly by a younger person or a person who has not been through ceremonies.[13]

Avoiding loss of personal dignity is central in dealing with conflict. Public humiliation (often referred to as "shame") is felt deeply not only by the person concerned, but also by other Aboriginal observers. A key strategy for avoiding loss of dignity in public encounters is to feign disinterest. This might involve being late for the meeting or adopting a decidedly casual posture and apparent lack of attention to the discussion.

IN THE COURTROOM

The adversarial system relies heavily on the question-and-answer method of seeking information in court. Witnesses are usually not permitted to give information in a narrative form, but rather are required to respond to specific questions. Counsel will often interrupt a witness to seek detail or to curtail the

[13] These are sometimes referred to by non-Aboriginal people as "initiation". This is inaccurate in many Aboriginal communities because ceremonies are conducted throughout a person's life, so that there may be many stages of a person's acquisition of knowledge, both before and after initiation.

witnesses from relating information that he or she sees as relevant, but which may be irrelevant in a legal sense. The interruptions and the sometimes aggressive tactics that are employed would be interpreted in Aboriginal culture as extreme rudeness.

A prime cautionary rule in a courtroom is that counsel should only ask the witness questions for which an answer is already known. The process of a person in a position of authority asking questions about something to which that person already knows the answer is often perplexing for Aboriginal people, who cannot understand why information which they have already given in a police statement or in evidence-in-chief is being sought again, or why they are being challenged (Eggleston 1976, p. 167).

Under such circumstances many Aboriginal people will react by remaining silent, responding with 'I don't know' or agreeing with the answer suggested in the question.

SUGGESTIBILITY OR "GRATUITOUS CONCURRENCE"

Members of the community and the legal profession who were interviewed for this project generally agreed that Aboriginal witnesses were susceptible to saying "yes" to a question (or "no" to a negative question), rather than openly disagreeing. This tendency, which has been termed "gratuitous concurrence", has been observed to be particularly strong if the questioning takes place in an oppressive environment and over a lengthy period of time (Eades 1995d). Where gratuitous concurrence is a factor, agreement with a statement may simply mean 'I 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' (Eades 1992, p. 26; see also Strehlow 1936, p. 334).

Some interviewees referred to the desire of Aboriginal people to say whatever is required to appear agreeable and to maintain social links between the parties:

> People just say *Yes* because it's a matter of history. Saying *Yes* means we'll be friends if I agree with you. (Aboriginal employees of the Department of Family and Community Services)

> The biggest problem for Aboriginal people in court was their 'suggestibility'. This is a salient issue for Aboriginal people who are from both urban and rural communities . . . One of the reasons why Aboriginal people are so suggestible is their desire to please and be seen as agreeable. (Judge)

> Prosecutors smile knowingly when there is an Aboriginal witness, especially when there are more than one. I try to make the witness understand that they must answer only 'Yes', 'No' or 'I'm not sure' and to go no further. But they get so scared in the box they forget. They are suggestible (e.g. in relation to quantities of alcohol). They just want to be obliging. If they perceive that saying yes will help the fellow with the blue uniform, they will say yes. (Barrister)

Another comment was that the propensity of Aboriginal people to agree with things for the sake of harmony, even where what was said was not true, contributed to a very high proportion of guilty pleas. It was suggested that this was particularly likely to occur with children, who are less assertive.

Other people stated that Aboriginal people were likely to agree with statements put to them because they feel overwhelmed by the criminal justice system and they would say anything they thought was required to remove themselves from the situation. For example:

> Ordinary people don't understand the way solicitors speak. Murris have to learn to speak up, to learn to say 'I don't understand', as well as white people being more accommodating. There is a fear of persons in authority. Murris are disinclined to challenge anyone about anything, let alone a well dressed official in an official setting. They won't object, as it brings unwanted attention to themselves. Gratuitous concurrence can thus be explained in terms of not wanting to make a scene. (Aboriginal Legal Service employees)

> They will say the thing that they think will get them out of that place the quickest. It's an issue of conflict avoidance. (Crown Law employee)

> Aboriginal people often plead guilty or just say 'yes' because they want to get things over and done with. They do not think the police or courts will believe them if they do present their side of the story. Young people feel this most keenly. Many young people are not aware that the court sees them as being innocent before proven guilty and they think people will not believe them if they say they did not do it. (Aboriginal community meeting)

Several practitioners disagreed that Aboriginal witnesses were subject to gratuitous concurrence, with one suggesting that any tendency to agree was due to a lack of respect for proceedings. However, this view was not shared by the vast majority of interviewees. One police prosecutor commented in relation to gratuitous concurrence:

> I observed [gratuitous concurrence] in the north-west in about 10 per cent of cases. The magistrate was inclined to reject such evidence where it occurred (without necessarily rejecting the witness entirely). Magistrates in the north-west must have taken communication difficulties into account, without necessarily saying so. The difficulties were so well known up there that nothing needed to be stated.

It has also been suggested that gratuitous concurrence can occur simply because the person being questioned does not understand what is being put to him or her or what is expected by way of response. A number of people who were interviewed agreed that it can be humiliating for Aboriginal people to state that they do not understand:

> There are established issues, such as reticence of Aboriginal people to make eye contact and gratuitous concurrence. Often people agree to things because they do not wish to admit that they do not know what has been asked of them. (Aboriginal lawyer)

One clear example which took place during a police interview rather than in a courtroom was in a Northern Territory case, *R v. Kennedy*[14] (Coldrey 1987, pp. 84–85). The accused, Cedric, fired at his wife but instead shot a bystander. The audiotaped police record of interview includes the following passages:

> Right. Now Cedric, I want to ask you some questions about what happened at Jay Creek the other day. Do you understand that?---Yes.
>
> Right. Now it's in relation to the death of [that dead fellow]. Do you understand that?---Yes
>
> Right. Now I want to ask you some questions about the trouble out there but I want you to understand that you don't have to answer any questions at all. Do you understand that?---Yes.
>
> Now. Do you have to tell me that story?---Yes.
>
> Do you have to, though?---Yes.
>
> Do you, am I making you tell me the story?---Yes.
>
> Or are you telling me because you want to?---Yes.
>
> Now I want you to understand that you don't have to tell me, right?---Yes.
>
> Now do you have to tell me?---Yes.

As this case demonstrates, 'Do you understand?' as a question is useless; the only reliable answer to that will be 'no' (Sutton 1995, p. 7).

---

[14] Northern Territory Supreme Court (Gallop J), 30 November 1978, unreported.

COMPLEX QUESTIONS

The legal terminology used in the courtroom can be quite foreign and difficult for witnesses to understand. While this may be a common experience for many witnesses, the effect may be particularly severe for Aboriginal witnesses because of their reluctance to admit that they did not understand the propositions which had been put to them.

Questions which are multi-faceted can be very confusing. The use of "either-or" questions is particularly unfamiliar to many Aboriginal people. For example, in response to a question such as 'Were you at your house when you first met Fred, or were you at the meeting place?', the response will usually repeat the last alternative ('at the meeting place'), or simply 'yes', which often but not always refers to the last alternative (Eades 1992, p. 55). In one summary trial observed by the CJC's officers, the following exchange took place in the cross-examination of one Aboriginal witness:

> SOLICITOR: All right then. So he was - he was pretty cranky about the door being opened and I'm just saying to you - suggesting that what happened; he was cranky, you'd made him coffee, you had this disagreement about the door being opened, he got up, grabbed his cup, lifted it off the table and as he was walking out just lost the grip on it and it came out of his hand and was flung across to you and cut you and actually hit your cup and smashes and caused your leg to be cut?
>
> PROSECUTOR: Well perhaps that might be broken up a little bit Your Worship.
>
> BENCH: Yes.
>
> PROSECUTOR: There's about twenty different things she could answer yes or no to in [that].

Such questions are a poor communication technique, because they generate ambiguity even where cross-cultural difficulties are not present.

Negatively worded questions can also cause great confusion to Aboriginal people, so that exactly what the witness has agreed to can be easily misinterpreted. Cooke (1995b, pp. 108–109) illustrates this point with the following excerpt from a coronial inquiry in the Northern Territory.

> COUNSEL: But the old man didn't go in the boat, did he?---Yes.
>
> I beg your pardon?---Yes.
>
> INTERPRETER: Yes, he's affirming [that] he didn't go in the boat.
>
> CORONER: The old man didn't go in the boat.
>
> SECOND COUNSEL: He's answering you exactly on point.
>
> CORONER: You ask these questions that way and that's what you get.

THE USE OF SILENCE

Another feature of Aboriginal communication styles that may be misunderstood in court is the use of silence. Silence in response to a question is often interpreted amongst non-Aboriginal people as an indication of a breakdown in communication, insolence or guilt. However, there are several other reasons why an Aboriginal person may be silent in response to a question:

- In Aboriginal culture silence is a common and positively valued part of conversation in that it allows time for thinking.

- Where there is conflict within an Aboriginal community, silence may imply criticism or disapproval or an element of "touchiness" about the topic (von Sturmer 1981, p. 17).

- In an uncomfortable situation such as in a courtroom, silence may also imply that the person is not in control of the discourse, or is not comfortable with it.

- Silence may indicate a lack of authority to speak about a particular matter (Kearins 1991, pp. 4–5). Aboriginal people have quite different views about who has the right to speak about particular issues or topics – it is a function of age, gender and kinship ties. Being a witness to an event does not necessarily bestow the right to speak about this knowledge.

- The person who is being questioned may not understand what is being asked of him or her and does not wish to state this.

The danger of misinterpreting silence in the courtroom has been commented on in the literature (Kearins 1991, p. 4; Eades 1992, p. 46), and was an issue raised by many of the people interviewed for this project.

The issue of silence, and how to interpret it, figured prominently in the *Pinkenba Case*, as illustrated by the following transcript excerpt.

> COUNSEL: . . . I'd suggest the reason to you, because you don't want everyone to know the little criminal that you are, do you? That's the reason, isn't it? Isn't it? Isn't it? Your silence probably answers it, but I'll have an answer from you. That's the reason, isn't it?
>
> BENCH: D——, I am asking you to answer the question. Ask the question again, please, Mr ——.
>
> COUNSEL: I'm suggesting to you that you don't want the court to know the little criminal you are. Isn't that right?---Yes. (20 February 1995, pp. 47–48)

The reliability of the witness's answer (as evidence of the truth of the proposition in the question) is arguably suspect (Eades 1995b, p. 7). The use of silence may indicate several things, including dissent. The final 'yes' answer may be an example of gratuitous concurrence. The fact that the answer was only made in response to sustained questioning may also cast some doubt on its reliability. Both the silence and the eventual concurrence are consistent with the witness's discomfort and alienation.

Another witness was questioned as follows:

> Now, A——, his Worship's told you to answer the question. Will you or won't you? We have to take your silence as no, don't we? A——?---Yes.
>
> All right. (21 February 1995, p. 143)

Unfortunately the transcript does not record pauses, but it is clear that persistence was required of counsel to obtain the answer and that the witness remained silent for at least some time.

AVOIDANCE OF EYE CONTACT

Aspects of body language can have a significant impact on the understanding of both parties to a conversation (Nash 1979, pp. 106–107; von Sturmer 1981, pp. 3–4; Figueroa 1994, pp. 111–142). One of the most commonly noticed differences which can cause misunderstanding is the use of eye contact.

In the cross-examination of the young witnesses in the *Pinkenba Case*, defence counsel sought to imply that avoidance of eye contact indicated that the witnesses were lying:

> You're telling me a lie there, aren't you?---No.
>
> Look at me for a minute. Can you look at me? Can you look at me? You're telling lies, aren't you. Can you look at me and tell me that you're not telling lies?---No.
>
> Can you look at me?---No. (Transcript 21 February 1995, p. 116)

And later:

> You'd lie, wouldn't you, to get even with the police, wouldn't you?---No.
>
> I beg your pardon?---No.
>
> You wouldn't. Why can't you look at me. Has someone told you not to look at me? Have they?---No.
>
> I beg your pardon?---No.
>
> Why can't you look at me? I might not be the prettiest picture in the world, but why can't you? Is it because you think that I'll see things on your face that show you're lying? Well? Is it?---No. (p. 119)

However, avoidance of sustained eye contact is common to Aboriginal people throughout Australia. Maintenance of eye contact is seen as threatening or rude, although, as with many other issues, the extent to which an Aboriginal person avoids eye contact with non-Aboriginal people will vary according to his or her level of bicultural competence (Kearins 1991, p. 4). There is often less eye contact in conversations between people of a different age and gender, and between people who have and have not been through ceremonies.

SPECIFIC INFORMATION

The way in which Aboriginal people deal with specific quantities can also contribute to confusion in the witness box. Traditionally, Aboriginal people did not develop complex systems of counting to specify quantities. Instead, items, people and places were listed or named. If an Aboriginal person who is not used to non-Aboriginal communication styles is asked to specify time, distance or quantity in numerical terms, the answers will often be vague, inconsistent or inaccurate. For example, if an Aboriginal person is asked 'How many people were there?' he or she will often answer by naming the people present (Eades 1992, p. 29). In one Queensland case, an Aboriginal witness was cross-examined as follows:

> See, you were sitting in the back of this Toyota, weren't you?---No, we was all bunched up in the front.
>
> All in the front?---There was four of us: the driver, and there was A, me and RK.
>
> What about PL?---Yeah, he was there too.
>
> That's five, isn't it?---No, four, just PL, that bloke named A, RK and there was me.
>
> And C?---No, that was C, that was me, RK and PL. There was four of us.
>
> What about A? That makes five, doesn't it?---No there is four. I said A's name before. There was A, PL, RK and there was me. There was four. (*R v. Gaarke*,[15] transcript, p. 39)

[15] Cairns District Court (Judge Botting), unknown date 1991, unreported.

Cooke (1996) gives examples of the difficulties some Aboriginal witnesses have had in quantifying lengths, which they can describe more accurately by physical demonstration or by comparison to visible objects.

Misunderstanding can also occur when specific information is sought about spatial arrangements or directions. Cooke (1991) has pointed to the difficulties which can arise when an Aboriginal witness is questioned by reference to a map with which he or she is unfamiliar, or reference is made to compass directions. In 1990–91 in the Northern Territory there was a coronial inquest into the death of an Aboriginal man who was shot on Elcho Island while police were trying to apprehend him. An Aboriginal eyewitness was questioned at length about the direction in which the man had been running before he was shot. Although the witness had indicated that he was familiar with the English terms of north, south, east and west, Cooke, who was acting as interpreter in the inquiry, commented that it had not been established that the witness was able to use the terms correctly (1991, p. 723). However, the witness maintained his awareness of where places were in relation to his actual position in the courtroom. The extract below (1991, p. 725) includes the author's comments.

> COUNSEL: Well, when you said he was running north – remember you told [the other counsel] – he asked you what direction he was running on the compass and you said north?---Yes, what's you call this way? [The witness points in a direction across the courtroom seeking to establish with counsel a common understanding of the meaning of this word *north*, before proceeding further]
>
> I beg your pardon?---What's you call this way? I just want to get it clear.
> [Again the witness gestures in the same direction. Counsel is put in a difficult position as, in common with most Europeans, he is unlikely to be able to spontaneously respond with the correct compass direction.]
>
> When he asked you the question about compass . . . ?---Yes, I know, but I just want to . . .
>
> Did you know what he meant about compasses?---Yes, I know, but I just want to get it clear first, see. Don't mix me up.
> [The witness appears indignant, perhaps because counsel has challenged his knowledge and yet will not provide him with the opportunity to clear himself by actually stating what direction he, counsel, means by north – not by the map, but by physical demonstration.]

And later:

> Well, what did you mean when you talked about – which direction is west when you said west?---Well, I don't know about the map or what you got there. I can only see it.

If persistent requests are made for specific information in unfamiliar forms of measurement, the response may simply reflect the person's attempts to be cooperative by answering with whatever he or she thinks is desired.

Many of those interviewed for this report also referred to difficulties which can arise when Aboriginal witnesses are asked to give evidence about precise times. In Aboriginal culture the notion of time is less mathematical and may be established by reference to other matters. One example of the contradictory answers which may be given when a witness attempts to answer questions in an unfamiliar way is provided by the evidence-in-chief of a witness in *R v. Gaarke* (referred to above).

> Do you know what time you went to the hotel that day?---About 10 o'clock at night.
>
> What time did you go to the hotel?---I beg your pardon?
>
> What time did you go to the hotel?---About 10 o'clock at night.
>
> What time did you leave the hotel?---About 10 o'clock that night.

How long had you been there?---I was there for a couple of hours.

You were there for a couple of hours?---Yeah. (*R v. Gaarke*, transcript, p. 37)

HOW KINSHIP AFFECTS WITNESSES

Kinship ties are a critical part of social interaction amongst Aboriginal people. They can affect the manner in which witnesses give evidence in several ways:

- Aboriginal people usually communicate with people with whom they share kinship ties, or who are known to them, although the connection may be distant. Consequently, to be in the unfamiliar surrounds of a courtroom facing an unknown person who demands information may evoke feelings of fear (Cooke 1995b, quoting Lester (n.d.); Eades 1992, pp. 27–28; von Sturmer 1981, pp. 1–2).

- There are complex rules for behaviour based along kinship lines; for example, in some communities mothers and sons-in-law rarely speak directly to each other (Foley 1984, p. 168). An understanding of kinship ties may be relevant both for interpreting an Aboriginal person's actions, and for ensuring that Aboriginal witnesses are comfortable giving evidence in the presence of others in the courtroom.

- The standard English terms for relatives often have different meanings for Aboriginal people, reflecting the importance to Aboriginal people of the wider kinship network (Eades 1992, p. 74). For example, the word "mother" may be used to indicate a person's biological mother and her sisters, while "auntie" and "uncle" are commonly used for other adult female and male relatives respectively. Failure to recognise these differences can cause misunderstanding in the court and embarrassment to Aboriginal witnesses (see Lloyd & Rogers 1993, p. 155).

RELUCTANCE TO SPEAK ON SOME MATTERS

Many Aboriginal people are reluctant to speak about a deceased person, particularly when they have had close kinship ties with that person. Often people will refer to the deceased indirectly in order to avoid saying his or her name. In some communities the prohibition on mentioning the deceased may continue for some years. Courts have recognised this issue in a number of cases and have ordered that the name of the deceased person be suppressed.

There are also strong cultural traditions about the matters which are appropriate for discussion in mixed company. The vast majority of Aboriginal men will not speak about "women's business" and vice versa. Aboriginal women, in particular, do not generally discuss matters concerning sex or genitals, and it can be extremely difficult for them to give evidence about matters such as sexual assault in a courtroom where most of those present are likely to be male. This and other difficulties that are experienced by Aboriginal women in the court process are explored in more detail in Chapter 7.

OTHER ISSUES

Other issues which may affect an Aboriginal witness in the courtroom include feelings of alienation and fear in the courtroom environment and common health issues such as hearing loss.

ALIENATION IN THE COURTROOM

The courtroom environment is intimidating for all witnesses, but especially so for many Aboriginal people. Particularly in remote communities where there is no permanent court presence, the justice system (and especially the courts) is, at best, misunderstood and, at worst, feared. This reflects in large part the history of poor relationships between Aboriginal people and police. More generally, for many people the justice system represents only the place where people are either locked up or which takes away their children. A number of Aboriginal people commented on the fear that arises simply because of the close location of the local court to a police station, or the appearance of uniformed police in the courtroom. This sense of fear can be exacerbated by the unfamiliar arrangement of the courtroom.

An illustration of how Aboriginal people regard the court process is provided by Cooke (1995b, p. 101) who quotes Yami Lester, an Aboriginal man from Central Australia who has worked as an interpreter for many years:

> As soon as Aboriginal people enter the courtroom, they feel different, they become afraid. I have seen old men (i.e. men who have power and stature in Aboriginal society) shaking with fear. When I ask them: 'What is the matter?', they say: 'I don't know what's going on.'
>
> The people are afraid of authority. There are so many uniformed police figures and figures of authority in the court . . .
>
> People who are frightened of the court will often plead guilty, even when they are innocent, so as to get finished and out of court quickly. They can also plead guilty because they don't know what's going on. One old lady from Maryvale Station was picked up on a "drunk" charge. She doesn't drink at all. She went to the hotel looking for her daughter; she was worried about her. I said: 'Why did you say "guilty"?' She said: 'I didn't understand what was happening, so I said the same as the woman in front of me.'

During consultations, a representative of the Aboriginal Legal Service commented:

> The court system is foreign; Aboriginal people in it have to straddle two cultures, particularly for those clients who are "still mission".

Similar findings have been reported in relation to young Aboriginal people in New South Wales (Howard 1996, p. 13) and Aboriginal people in Canada (Law Reform Commission of Canada 1991, p. 56).

HEARING PROBLEMS

It is sometimes overlooked that because of inadequate health care services in many Aboriginal communities, there is a high incidence of hearing problems amongst Aboriginal people. Several Aboriginal groups and individuals expressed concern that failure to understand or respond to a question may simply result from the witness not having heard it properly, particularly in a courtroom where the acoustics are inadequate.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HRSCATSIA), in the course of its inquiry into implementation of the recommendations of the RCIADIC, made a number of findings about the prevalence and effects of the disease Otitis Media in Aboriginal and Islander communities (1994, pp. 325-331). Otitis Media is a middle ear infection that 'affects most Aboriginal children and leaves scars not just on their eardrums but on their language, literacy acquisition, self-esteem, schooling and post education and life opportunities' (Sherwood 1993, p. 15 quoted in HRSCATSIA 1994, p. 325). The Committee found that Otitis Media is 'extremely prevalent in most Aboriginal and Torres Strait Islander communities' (1994, p. 326).

Estimates given to the Committee of the proportion of indigenous children with hearing impairment due to Otitis Media ranged from 70 per cent to 98 per cent. Accurate figures relating to adults are more difficult to find. However, according to sources cited in Howard et al. (1993) about 40 per cent of the population of all ages in Aboriginal communities suffer hearing loss, mostly related to Otitis Media. Aboriginal and Torres Strait Islander people in a 1994 national survey reported ear or hearing problems as the second most common long-term illness, particularly amongst children under 15 years of age (ABS 1995a, pp. 10, 17). In the Cooktown ATSIC region (which covers the Cape York Peninsula) ear or hearing problems were reported as the most common long-term illness (ABS 1995b).

It is likely that many legal practitioners and judges are not aware of the extent of health issues that may affect Aboriginal people in the criminal justice system and of the possible effect on Aboriginal witnesses.

CONCLUSION

This chapter has drawn attention to various features of Aboriginal culture, language and living conditions which make it difficult for Aboriginal people to communicate effectively and be understood properly as witnesses in the courtroom. These factors include:

- language differences which may not be appreciated by the court, including lack of fluency in Standard English, and the use of Standard English words to convey different meanings
- different ways in traditional Aboriginal culture of seeking and giving information and resolving conflict, including avoidance of open disagreement or interruption of speakers, and avoidance of eye contact
- the importance of kinship ties, and the inappropriateness of speaking of deceased people or about certain topics in the presence of both men and women
- fear and intimidation felt by many Aboriginal people in the courtroom
- health issues such as widespread hearing loss.

The next chapters discuss how the legal system can be made more responsive to the needs of Aboriginal witnesses.

CHAPTER 3
BETTER UNDERSTANDING

INTRODUCTION

In criminal trials, it is critical that lawyers, judicial officers and juries are properly equipped to interpret and understand the evidence they hear from witnesses whose cultural background is different from their own. This chapter considers ways of overcoming the communication difficulties which can arise between the courts and Aboriginal people. Some of these strategies have been used in practice, others are embodied in legislation and some were suggested in the literature and in consultations. They include:

- cross-cultural awareness training for judges, magistrates and lawyers
- admission of expert evidence on cultural and language issues
- provision of information for juries and judicial officers
- ensuring that legal representatives have adequate preparation time.

A related subject, the role of court interpreters in assisting understanding, is dealt with in Chapter 5. Another issue raised by a number of people was the need for better understanding amongst Aboriginal people of the way in which the criminal justice system operates and of individuals' obligations and rights within it. That issue is considered in Chapter 6.

IMPROVED CROSS-CULTURAL AWARENESS

People consulted by the CJC generally agreed that it was important to increase the awareness of all relevant officers in the criminal justice system – judges, magistrates, prosecutors, lawyers, corrections officers, court staff and police – about Aboriginal language and cultural issues, including issues that are specific to Aboriginal women (see Chapter 7). Education for court staff and judicial officers about these issues has been recommended in a number of reports (RCIADIC 1991, vol. 3, p. 79; ALRC 1992, p. 34; ATJAC 1994, pp. 56–57, 373–379). The education of two of the most important participants in the courtroom, lawyers and judicial officers, is considered below. The training of court staff is addressed in Chapter 5.

JUDICIAL OFFICERS

According to a former Chief Justice of Australia, the Honourable Sir Anthony Mason, '. . . the fundamental role of the judge is to administer justice according to law, not only with fairness and integrity, but also with understanding. The community is entitled to no less' (1994, p. 166). How that understanding is to be achieved has been subject to some debate. As a former Victorian Supreme Court judge, the Honourable Richard McGarvie, said recently:

> I consider that Australian judges do their difficult and responsible work very well. It is undeniable though that they are better equipped to do it when dealing with persons so similar that they can fairly infer how it feels to be that person. But does a white judge know how it feels to be an Aborigine? Does a male judge know how it feels to be a pregnant woman? Without having taken steps to become aware, does a judge understand the reality of poverty, unemployment, illiteracy, discrimination or sexual abuse?
>
> There is no part of the ordinary experience or training of a judge which gives awareness of those things. (1996, p. 144)

In the past there has been very little education or training to prepare people for the specific role of judicial officers. Judges have been drawn largely from the ranks of barristers, many of whom have specialised in a particular area of law. While they are experienced in advocacy, as judges they have a different range of duties and may be expected to deal with a quite different range of legal matters. Queensland magistrates, on the other hand, have traditionally been drawn from the ranks of court officers rather than experienced legal practitioners, at least until the enactment of the *Stipendiary Magistrates Act 1991*. Given the specialised backgrounds of both magistrates and judges, it cannot be assumed that either group will have fully developed the skills necessary to ensure that the evidence of Aboriginal witnesses appearing before them is properly interpreted.

In Canada, the United States, England and Wales, extensive judicial education programs have been accepted for some time (see Sallmann 1993; Wood 1993). These programs may take the form of orientation for new judicial officers or seminars on specific topics, such as new developments in the law or cultural or gender issues. By contrast, in Australia there was, until recently, a noticeable reluctance to develop judicial education programs, with concerns being raised that the introduction of such programs would be an attack on the independence of the judiciary, or that the very existence of education programs would be likely to have an adverse effect on judges' public standing (Kennedy 1987, p. 48).

Fortunately, there is now a growing acceptance, both amongst the judiciary and more widely, of the need for judicial education and skills enhancement programs across a range of issues, including cross-cultural awareness (see Kennedy 1987; Malcolm 1994; McGarvie 1996; Mildren 1996; Sackville 1994; Williams 1994; Wood 1993; see also ATJAC 1994, pp. 373–379). It has been argued that education programs for judges about important social issues actually help preserve judicial independence, in that such programs will increase community confidence in judges, the law and democracy (McGarvie 1996).

This section describes recent initiatives in Queensland to inform judicial officers about Aboriginal cultural issues, and recommends ways of improving the effectiveness of these programs.

PROMOTION OF CULTURAL AWARENESS

RCIADIC Recommendation 96 (1991, vol. 3, p. 79) called for increased participation of judicial officers and court staff, amongst others, in training and development programs which would explain contemporary Aboriginal society, customs and traditions. In response to that recommendation, Commonwealth funding was allocated to the Australian Institute of Judicial Administration (AIJA) to develop pilot Aboriginal cross-cultural awareness programs for judicial officers in each State and Territory. In Queensland the Aboriginal Justice Advisory Committee met with AIJA representatives to discuss development of a program.

There are 71 magistrates and 53 judges in Queensland (CJC 1995b, pp. 10, 15). During 1995 most attended two-day cross-cultural seminars conducted by the Aboriginal and Torres Strait Islander Studies Unit (ATSISU) of the University of Queensland as part of the AIJA program. The development of the Queensland program was overseen by a committee which included representatives from the Aboriginal Justice Advisory Committee, the Office of Aboriginal and Torres Strait Islander Affairs, Aboriginal Legal Services and other relevant agencies, and members of the judiciary. All presenters and facilitators were indigenous people.

The first seminar for Supreme Court and Federal Court judges, held on 12–13 April 1995, included discussion of customary law, kinship and social structures, communication (including strategies for seeking information, use of expert witnesses and issues specific to women), land claims, health issues and violence. Separate seminars were held later in the year for magistrates, District Court judges and Family Court judges. With the exception of a seminar conducted in Townsville for magistrates from northern Queensland, all seminars were held in Brisbane.

Judicial officers consulted by the CJC expressed a range of views about the effectiveness and quality of the AIJA seminars. These responses reflected to some extent variation in the quality of individual presentations to the seminars, but also point to different views amongst judicial officers as to the desirability of such exercises in general.

Several judges and magistrates spoke in very positive terms about the seminars. For example, one judge said the workshop was a 'valuable exercise' and particularly noted the discussion of witnesses and Aboriginal English issues. He said that 'it wouldn't hurt to revisit the workshops now and again, particularly if changes ensue from the CJC's research. The main thing I got out of it was "Listen to us and take some notice. You've pretended before but nothing happens. Let's talk about it."'

Similarly, a magistrate said that cross-cultural workshops were worthwhile in giving a greater understanding of the difficulties of Aboriginal witnesses having to appear in the courts, and that this aspect needed to be developed. Others commented that discussion of the significance to Aboriginal people of the extended family had been particularly valuable.

Other judicial officers found the seminars less helpful, although some offered suggestions about how the courses might be improved. The main criticisms were that:

- Aboriginal participants in the seminar did not always have a good understanding of the role of the judge. One judge said that he would have been in favour of having the Aboriginal participants 'spend a few days attached to a Judge to sit in court and to discuss with the Judge the way things work'.

- The seminar was too general in its focus: regional based workshops would have been more effective. (The form of the AIJA seminars was partly due to the general nature of the recommendations of RCIADIC from which the seminars evolved, and partly because of restrictions imposed by limited funding.)

- There was too much focus on problems and not enough on solutions. In the view of one of the judges, there was 'half an hour on Torres Strait culture which was OK', but he considered the rest of the time was 'a tirade against the damage the white community has done to Aboriginal people. I, and others, kept asking about culture, and we were told over and over that it's "unknowable"'.

A number of Aboriginal people consulted by the CJC expressed surprise and some disappointment at learning that the AIJA seminars had taken place without their input and involvement. This occurred despite the AIJA's considerable efforts to consult with Aboriginal and Torres Strait Islander people in the development and presentation of the program. The extent of consultation was restricted by the limited funding available. Some Aboriginal people suggested that future cross-cultural awareness programs should address cultural issues in greater depth. This accorded with the report on the first judicial seminar which commented that '[t]he range of topics and presenters was probably too great to permit time for more detailed discussion of issues and implications'.[16]

A number of lawyers and Aboriginal people commented that courses should be conducted in the communities, rather than 'in a flash hotel', in order to appreciate the pressures of life there. The 10 day training course that the Kowanyama community conducts for senior police officers was suggested as a model. Officers from the Anti-Discrimination Commission expressed the view that while 'hotel workshops are better than nothing', the Aboriginal people who participated were not representative of most Aboriginal people. These officers argued that 'serious training is required: a combination of a lecture program and immersion in the community', and that those judicial officers who had not undergone such training should

[16] Information provided by the AIJA.

not sit on cases involving Aboriginal people. It was said that customary law studies were a good idea, but 'even then they can't appreciate it if they haven't been there [in the community]'. The officers commented that it was important to introduce magistrates to the community in such a way as not to alienate them.

A senior court employee commented that magistrates had told him that 'they don't want to be lectured about Captain Cook, but they wanted more details about how to deal with Aborigines in a day-to-day sense'.

FUTURE PROGRAMS

The AIJA program in Queensland was a useful first step. However, as a pilot program it was only intended to be a starting point which would give rise to further state-based initiatives. Consequently, as several of the judges and magistrates who spoke to the CJC acknowledged, the program only went some way towards informing judicial officers about Aboriginal language and cultural issues. For example, one magistrate said he would have liked more explanation about the history of Aboriginal people, while another was interested in hearing more about the role of traditional punishment. The organisers of the AIJA seminars noted that a number of judges and magistrates who participated had commented that further information may have been useful on such topics as customary law, sentencing and the role of elders, and that they would have liked more information on a number of other topics, such as Aboriginal English, Aboriginal people as witnesses and law, kinship and custom. The organisers also recommended that future seminars incorporate strategies for focussing information on legal and judicial processes.[17]

Several judges who spoke to CJC staff supported some form of ongoing education about cultural issues, with one judge expressing the view that 'most judges would be interested in this concept'. The Chief Judge of the District Court indicated that he was very supportive of further programs. The Trial Division of the Supreme Court reported that after evaluation of the AIJA program 'consideration will be given to follow-up processes' (Supreme Court 1995, p. 10). Even those judicial officers who were critical of the AIJA program expressed a desire to know more about relevant issues.

Unlike New South Wales, which has a Judicial Commission with a statutory responsibility to develop judicial education programs, Queensland does not have an independent body which is responsible for judicial education. There is no formal process for continuing judicial education in the District Court or the Magistrates Court, although there is an annual magistrates' conference at which topics of concern such as recent changes to the law may be discussed. The Trial Division of the Supreme Court has plans to conduct annual seminars on a variety of subjects (Supreme Court 1995, p. 10).

There are moves to develop a national judicial education program, in line with the recommendations of the Access to Justice Advisory Committee (ATJAC) report (1994). This committee considered that it would be more efficient for a national body to provide a range of appropriate courses, particularly for new judges and magistrates, rather than this being done on a State basis (pp. 377–379). The first national judicial orientation program for new judges and magistrates was conducted jointly by the AIJA and the Judicial Commission of New South Wales over five days in October 1994, and was attended by participants from around Australia, including Queensland. A second course for new judges is planned for October 1996. Amongst the topics which the first course covered were communication skills, gender issues and race and cross-cultural awareness. The Commonwealth is currently developing proposals for a national judicial education program, subject to consultation with the States.

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17 See above.

The CJC considers that the proposed program would be beneficial, particularly if it includes cross-cultural awareness programs and coverage of indigenous issues. However, additional Queensland-specific initiatives should also be developed. These could include:

- development of written or audio-visual material to be made available to judges and magistrates
- promotion of informal contact with local Aboriginal communities and extended visits to remote communities
- organisation of regional symposia, preferably also involving other participants in the criminal justice process.

PREPARED MATERIAL

Some judges and magistrates may prefer to be provided with written information about matters of cultural and language significance for Aboriginal people. A selection of reading materials was given to judicial officers prior to the AIJA seminars, including excerpts from various reports and articles on a wide range of issues, such as Aboriginal English, recognition of customary law, family violence, social structures and cultural identity. However, further information on matters specific to Queensland and the experience of Aboriginal people in the criminal legal process would be helpful. To this end, a resource kit should be developed and made available to judges and magistrates. The appropriate body to develop such a kit would be the Aboriginal Justice Advisory Committee, in conjunction with judicial officers. Such information may also be useful reference material for legal practitioners.

INFORMAL CONTACT

There is a clear wish on the part of Aboriginal people and many judicial officers to develop more locally based mechanisms for exchanging information about cultural and language issues which affect Aboriginal people and shape their experiences in the court process. One judge said that he had lived many years in towns where there were large Aboriginal populations and believed that understanding of culture came through familiarity with the culture and the people. Another judge thought that sending judges and magistrates out to Aboriginal communities sounded like a good idea and said that he would like to see magistrates mix with the Aboriginal community more on an informal basis. A police prosecutor also commented that what was needed was for magistrates to get out into the community.

Increased informal contact between judicial officers and members of Aboriginal communities was recommended by the RCIADIC (1991, vol. 3, p. 79). Arranging visits by judges or magistrates to local Aboriginal communities could be one of the functions of an Aboriginal court liaison officer (see Chapter 6). The advantages of such visits are that Aboriginal communities will become more aware of the courts' functions and processes, and that the courts will become more attuned to matters of concern to Aboriginal people at a community level. Such a proposal would also address the criticisms made in remote Aboriginal communities that the courts arrive, convene, determine matters and depart without ever getting to know the communities they are judging.

REGIONAL SYMPOSIA

Several people consulted for this project noted that there were significant regional variations within Queensland and that future seminars should take account of this fact. Regionally based symposia could be arranged to discuss issues of general concern and to provide information both to the courts and to Aboriginal people. Such arrangements could involve not only local judicial officers but others in the

criminal justice system, such as prosecutors, defence lawyers and court staff. For example, the New South Wales Attorney-General's Department organised a "law and culture" day on an Aboriginal community in Lismore. A number of judicial officers, court staff and corrections officers attended to discuss relevant issues with local Aboriginal people, and a variety of useful suggestions were made, including the appointment of an Aboriginal court liaison officer (see Chapter 6).

The Aboriginal Justice Advisory Committee is responsible for providing advice about indigenous views of criminal justice matters (*Progress Report 1993*, vol. 1, p. 38) and has been involved in previous cross-cultural awareness programs, including the AIJA program. This committee would be the appropriate body to take responsibility for organising such symposia in consultation with members of the judiciary, magistracy and other interested agencies. However, the committee cannot be expected to fully fund the symposia. Funding from participants such as the courts and prosecution authorities should be forthcoming. The program could be tailored to provide for the different needs of magistrates and judges: for example, discussion of issues relevant to juries would be relevant only to the Supreme Court and District Court.

An important benefit of regional symposia is that they can provide an opportunity to improve links between judicial officers and members of particular Aboriginal communities. Should judicial officers wish to seek further information on matters of particular interest or significance, a network of local Aboriginal people would then be available for consultation.

SCOPE AND COST OF FUTURE PROGRAMS

It was suggested in consultations that awareness programs need not extend to all courts. Some people said that the Supreme Court deals with very few cases involving Aboriginal people; others that the Magistrates Court deals only with less serious matters. However there are good reasons why all levels of the judiciary should be properly informed about Aboriginal cultural issues.

- Magistrates Courts finalise over 90 per cent of criminal proceedings, including many quite serious matters. Aboriginal people are more likely to have contact with this level of the court system than any other.

- District Courts deal with most of the more serious criminal offences.[18]

- Although the Supreme Court hears a much smaller number of cases which involve Aboriginal witnesses, those cases concern the most serious offences, and often attract considerable attention. Such cases therefore can have significant symbolic value.

3.1 Recommendation – Judicial Officers' Cross-cultural Awareness Resource Kit

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.

[18] About 90 per cent of the depositions received by the ODPP relate to matters in the District Court (CJC 1995b, p. 12).

3.2 Recommendation - National Judicial Orientation Program

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

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.

LAWYERS

In the adversarial model of criminal justice much depends on the awareness and diligence of lawyers in conducting proceedings so as to ensure that a witness's evidence is not misinterpreted by the judge, magistrate or jury. For example, the decision about what is called in evidence is the responsibility of legal representatives, not the judge or magistrate. Because most lawyers are Anglo-Australians and their education and training is specific to Anglo-Australian culture, they often lack awareness of Aboriginal culture. Consequently significant issues may not always be brought to the court's attention.

Three attributes are crucial for lawyers who deal with Aboriginal people:

- the ability to use clear and unambiguous language when questioning witnesses, so as to minimise any possibility of misunderstanding
- awareness of matters of cultural significance when dealing with Aboriginal clients or other Aboriginal witnesses, including matters which should be put before the court
- skill in using interpreters.

The development of these attributes is important not only to enable lawyers to perform their role effectively, but because it is from the ranks of lawyers that future judges and magistrates are likely to be appointed. The use of interpreters is discussed in Chapter 5. The other matters are considered below.

UNAMBIGUOUS QUESTIONS

At a general level, it is very important that a lawyer is able to frame clear and appropriate questions. Lawyers have often been criticised for using complicated terminology. As one person who was interviewed put it, 'ordinary people don't understand the way solicitors speak'. While this can present a problem for any witness in the unfamiliar surroundings of the courtroom, the potential for misinterpretation is much greater where there are language difficulties. Complex questions such as those which contain either/or options can cause particular difficulties for Aboriginal witnesses, as was explained in Chapter 2. The use of such questions increases the risk that the witness's answers may be unreliable, either because of his or her misunderstanding of the question or the court's misunderstanding of what it is that the witness is actually agreeing to. Where the witness's first language is not Standard English and

no interpreter is provided, the potential for misunderstanding on both sides is even higher. In recognition of this problem, the ALRC recommended that cross-cultural training programs for lawyers should emphasise the need to use plain language in court procedures (ALRC 1992, p. 34).

It is also important that lawyers communicate clearly with Aboriginal people outside of the courtroom. A useful initiative in this regard was the publication by the Continuing Legal Education Department of the Queensland Law Society in 1992 of Eades' handbook for legal practitioners about communicating with Aboriginal English-speaking clients (Eades 1992). The handbook offers clear, basic advice about asking questions in appropriate language. Its use should be encouraged amongst those practitioners who have any contact with Aboriginal clients or witnesses.

CROSS-CULTURAL AWARENESS

Cross-cultural awareness training for lawyers might be provided at a number of stages:

- undergraduate education in law schools
- practical legal training courses prior to admission as a barrister or solicitor
- Continuing Legal Education courses for practising lawyers
- "on the job" training.

These are discussed in turn below.

It was suggested by several people that university law courses should include greater exposure to indigenous legal issues. Traditionally undergraduate courses have not included such perspectives, although there is a semester unit on Aboriginal and Islander legal issues at the Queensland University of Technology (QUT). In 1995, the then Commonwealth Department of Employment, Education and Training provided funding for development of cross-cultural training in law curricula throughout Australia. An elective subject on cultural awareness is being developed at the Griffith University Law School as part of that project and it is anticipated that the unit will be available for dissemination to other universities.

The CJC acknowledges that the issues surrounding legal education extend well beyond the scope of this report and that there is some danger of slipping into tokenism by recommending, for example, that an elective subject on indigenous people and the law is introduced into the curriculum. Nevertheless, the CJC supports any initiative which will assist in the education of lawyers about Aboriginal and Torres Strait Islander issues through such measures as closer liaison between law schools and relevant research and studies centres.

It is particularly important that legal graduates who intend to practise as barristers or solicitors develop practical skills in conducting interviews with people from different cultures and receive some training in the use of interpreters (ALRC 1992, pp. 32–33). Law graduates must complete a period of practical training before being qualified to practice as solicitors. In Queensland this may happen in one of two ways: by completing the Legal Practice course run by QUT, or two years' training as an articled clerk with a law firm. In the QUT course, there is a very limited amount of cross-cultural awareness training through the invitation of guest speakers from the South Brisbane Immigration and Community Legal Service and from the ATSISU of the University of Queensland. Those who complete the Bar Practice course (required for admission as a barrister) also attend a short presentation by ATSISU. Those sessions last at best for several hours.

While those initiatives expose lawyers to some of the issues, they clearly cannot be relied on to provide the depth of understanding which is necessary for lawyers who deal frequently with Aboriginal clients. It appears that practising lawyers have very limited opportunities to upgrade their awareness of and skills in cross-cultural issues, even where their work may involve a large number of Aboriginal clients. During consultations there appeared to be an attitude that lawyers who needed to do so would learn on the job, much the same as judges and magistrates have been expected either to have the necessary skills or to learn by experience. There do not appear to be any continuing legal education courses or materials available from the Law Society for those lawyers who may be interested in finding out more about Aboriginal cultural issues, apart from the handbook by Eades referred to above.

Cross-cultural awareness is particularly important for prosecutors, Aboriginal Legal Service lawyers and Legal Aid Office staff. The CJC was informed that the Legal Aid Office conducted indigenous cross-cultural awareness training for lawyers and paralegal staff during 1995 in Brisbane. However, Aboriginal Legal Services in Queensland do not provide any ongoing cross-cultural awareness training for their lawyers, many of whom have not had any training in communicating with Aboriginal people. As one solicitor put it, 'sympathy alone is not enough, and in any event the Aboriginal Legal Services attract all types including those fishing for experience'. This lack of training appears to be an experience common to Aboriginal legal services in other states. It was suggested to the CJC that lack of funding was a serious constraint, but that additional funds could be sought for this purpose from the Commonwealth Department of Employment, Education, Training and Youth Affairs or from RCIADIC funding. The CJC was also told that the NAILSS is developing a code of practice for its lawyers and that the draft code includes a requirement for cross-cultural awareness training.

The CJC believes that training for Aboriginal Legal Service staff, especially in an area as important to their work as cross-cultural awareness, should be a core activity and should not be available only where excess funding permits. It may be that, if staff were properly trained, a better and more efficient service could be delivered within existing resource allocations.

The need for training of prosecutors also attracted comment. Several lawyers, including two Crown prosecutors, suggested that prosecutors should be given specific training in dealing with Aboriginal witnesses. These interviewees drew attention to the model of specialist training for Crown prosecutors who deal with child witnesses in sexual assault cases.

The CJC believes that training about significant issues of Aboriginal culture and language is very important for prosecutors and other legal practitioners who might be expected to come into frequent contact with Aboriginal people. The ODPP, the Legal Aid Office (Qld) and Aboriginal Legal Services should therefore ensure that regular training is provided to their legal staff.

A substantial amount of legal aid services are performed by private legal practitioners who are assigned grants of aid or who are briefed by the Legal Aid Office or by Aboriginal Legal Services (CJC 1995c, pp. 55, 64–66). A limited number of prosecutions are also conducted by private practitioners on behalf of the ODPP (CJC 1995c, p. 79). There is no reason to distinguish between the skills required of in-house staff of those agencies and private practitioners who perform services on the agencies' behalf. Private practitioners should be invited to join cross-cultural awareness courses conducted for in-house staff. Attendance at such training should be a factor to be taken into account by those agencies when deciding who should be funded to conduct cases involving Aboriginal witnesses.

The development of training should involve proper consultation with Aboriginal people, including the involvement of the Aboriginal Justice Advisory Committee. Since the number of staff in the ODPP, the Legal Aid Office and Aboriginal Legal Services is relatively small, it may prove cost-effective to organise joint training courses, perhaps in conjunction with the Queensland Law Society, so that other private legal practitioners may be encouraged to attend.

3.4 Recommendation – Cross-cultural Awareness Training for Lawyers

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.

POLICE PROSECUTORS

As noted above, over 90 per cent of all criminal matters are finalised in Magistrates Courts. In those courts police prosecutors conduct all prosecutions, with the exception of some committals for trial[19], and a small number of other matters, for example, charges against police.

Police officers throughout Queensland have attended general cross-cultural awareness workshops conducted by the Mobile Cross-cultural Training Unit of the Bureau of Ethnic Affairs. Modules on Aborigines and Torres Strait Islanders in Australian Society have also been developed as part of the Queensland Police Service (QPS) Competency Acquisition Program. However, there appears to be no specific training for police prosecutors on dealing with Aboriginal witnesses, such as appropriate methods of questioning.

Given that the bulk of criminal matters involving Aboriginal people will be prosecuted by police prosecutors, additional training which addresses the issues faced by Aboriginal witnesses in court as outlined above would be beneficial. The agencies which organise and conduct the training recommended in Recommendation 3.4 should ensure that police prosecutors are invited to participate. The QPS should ensure that police prosecutors are able to do so.

3.5 Recommendation – Police Prosecutors

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.

EXPERT EVIDENCE

Improved cross-cultural awareness on the part of lawyers and judicial officers may go some way toward informing the courts of cultural and linguistic issues affecting Aboriginal witnesses, but it is not the only way to achieve that end. Another way is through the introduction of expert evidence.

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[19] The ODPP conducts committals in the Brisbane Central Committals Project and the Ipswich Committals Project.

This section considers the extent to which the prosecution or defence may call an expert linguist or anthropologist to explain aspects of the language and culture of an Aboriginal witness whose evidence might otherwise be misunderstood. The section looks at the present law and some possible barriers to calling expert evidence in this area.

The law relating to expert evidence in Queensland is governed by the common law. The general rule is that evidence of an opinion is inadmissible, but there are a number of exceptions to that rule. One is that a properly qualified expert may give an opinion about matters that are 'likely to be outside the experience and knowledge of a judge or jury' (*R v. Turner* [1975] 1 QB 834). That exception is itself subject to the principle that the "province" or function of the jury to decide matters should not be usurped by expert witnesses.

In order to admit expert testimony about a person's language or culture, or those of his or her community, a number of matters have to be established. First, the court must be satisfied that the area of the proposed witness's knowledge is a fit subject for expert evidence. It is a matter for the judge or magistrate to decide whether the particular field of knowledge is one which displays 'sufficient integrity and reliability to provide greater assistance than that which ordinary experience and common sense can apply' (Forbes 1992, p. 62).

Unless the court determines that language and cultural matters are so unusual that they would fall outside the "normal" range of experience, evidence about them cannot be allowed. The rule is illustrated in the Queensland case of *R v. Watson* [1987] 1 Qd R 440; 69 ALR 145, although the case is not concerned with understanding of witnesses' evidence. The accused, who was charged with the murder of a woman with whom he had been in a relationship, had sought to introduce evidence from a sociologist about violence as a 'process of domestic discipline' in Aboriginal society on Palm Island. The purpose of the proposed evidence was to support the accused's claim that he did not intend to do more than cut the victim. In upholding the trial judge's decision to exclude the evidence, Dowsett J said (at 461–462) that the proposed evidence 'was evidence as to human behaviour' which would make it 'a matter peculiarly within the province of a jury'. However Dowsett J also said (at 465–466):

> There can be no doubt that in an appropriate case, evidence of the peculiarities of a particular community or a particular person may be admissible . . . However, it will always be necessary to decide whether or not the alleged peculiarities are sufficiently different from the norm (whatever that may be) to justify expert evidence being led, keeping in mind the observations in the cases that so-called expert evidence may often confuse and mislead a jury, particularly when it relates to those areas which are properly within the province of the jury.

Where the evidence sought to be led relates to a matter of common knowledge within the community, such evidence has often been excluded. The ALRC, in its extensive review of evidence law, pointed out the difficulties in defining the boundaries of the concept of common knowledge (ALRC 1985, vol. 1, p. 411). On some occasions it will be clear that the matter about which the expert is to testify is obvious and known to all and to allow such evidence to be given would waste the court's time. However there will be cases where, although the general population may know something about the subject, an expert may still be of assistance to the court by virtue of the "special" skill and knowledge the expert possesses. This could often be the case when the subject matter is the language or culture of an Aboriginal community.

The exclusion of evidence, simply because the general population has *some* knowledge of it, was described by the ALRC as 'entirely fallacious and ought not be part of the evidence law' (ALRC 1985, vol. 1, p. 411). Accordingly the ALRC recommended the abolition of the common knowledge requirement, relying on the general rules relating to relevance to ensure that the courts are not held up by the admission of unnecessary evidence. This recommendation has been adopted in the Commonwealth and New South Wales *Evidence Act 1995* (section 80).

Even if the subject matter of the evidence is accepted by the court, a second matter to be addressed is whether the proposed witness can give evidence as an "expert". Usually, formal qualifications are required (*Clark v. Ryan* (1960) 103 CLR 486 per Menzies J at 502), although some authorities suggest that experience may be a sufficient basis for the admission of an expert opinion (*R v. Yildiz* (1983) 11 A Crim R 115; ALRC 1985, vol. 1, p. 411). Many Aboriginal groups consulted commented that, because "expertise" in terms of formal qualifications is out of reach of many Aboriginal people, individuals with valuable specialised knowledge of language and culture may be prevented from offering their assistance to the court. The ALRC's view was that '[n]ot to include special experience as a qualification would keep valuable evidence from the courts' (ALRC 1985, vol. 1, p. 411). Several other more general issues concerning the use of expert evidence were also raised by the ALRC in its extensive review of evidence law.

The use of expert evidence on Aboriginal language and/or cultural issues was raised in a number of recent Queensland cases[20], often in the context of the admissibility of a confessional statement. However, the cases have not directly raised for decision or exposed to practical testing the use of expert evidence to explain language and cultural characteristics of witnesses.

On the basis of the information gathered for this report, the CJC is not in a position to recommend any changes to the law and practice concerning expert evidence of language and cultural issues. The CJC hopes that, in line with its earlier recommendations, there will be improved awareness of those language and cultural issues amongst legal practitioners and judicial officers. To some extent this may encourage the more frequent use of expert evidence as lawyers make more effective use of the existing law. However, it is also likely that in probing the limits of the current law concerning expert evidence, particularly in the context suggested above, the problems identified in the ALRC review of Commonwealth law will cause some difficulty in Queensland. The CJC therefore recommends 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.

3.6 Recommendation – Expert Evidence

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.

INFORMATION FOR THE COURT

This section addresses two practical concerns. The first is that cross-cultural awareness mechanisms for judicial officers and lawyers may take some time to have an effect on the way cases are presented and assessed. The second practical problem was noted by Fitzgerald P in *R v. A*[21] (at 16):

> [I]f (as I believe) there are cultural problems associated with the reliability of confessional statements made by Aborigines who are interrogated by white persons in positions of authority, a recurring necessity to produce evidence of those cultural factors is quite impractical. There is increasing acceptance of the need for greater cultural awareness in the legal system, but problems such as cultural disability would be better addressed legislatively, after proper consultation and debate directed by a body such as the Law Reform Commission. A most useful start has been made in [Eades (1992)].

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20 See *R v. A* (CA 294/94; Court of Appeal Queensland (Fitzgerald P, Davies & McPherson JJA), 28 April 1995, unreported); compare *R v. Condren* (1987) 28 A Crim R 261 at 264–270, 273–275, 296–298 with *R v. Condren, ex parte Attorney-General* [1991] 1 Qd R 574, at 587, and note the description of the evidence admitted in *R v. Kina* (CA 221/93, Court of Appeal, 29 November 1993, unreported).

21 See above.

Justice Mildren of the Northern Territory Supreme Court has proposed that, in appropriate cases involving Aboriginal witnesses, information as to language and cultural differences be given to juries, in the form of a *pro forma* direction before the Crown case is opened (Mildren 1996, pp. 11–12, 28–29)[22]. Justice Mildren's form of "direction" draws attention to a number of the issues in cross-cultural communication that have been identified in Chapter 2, such as the use of Aboriginal English, the use of silence, the avoidance of eye contact, and gratuitous concurrence. In a jury context, "direction" has an unfortunate connotation of compulsion; perhaps "information" better expresses the substance of the suggestion.

This proposal received support in consultations: for example, the Bar Association of Queensland submitted that it 'respectfully agrees with his Honour's [Mildren's] observations'. A number of interviewees also supported the concept. A former judge was of the opinion that, in a jury trial, the solution to the misinterpretation of Aboriginal witnesses' evidence lay with the judge who, when summing up, should give the jury sensible advice as to how to interpret the evidence. As in the case of non-Aboriginal witnesses, the jury should be told to look for objective corroboration of a witness's evidence. In the absence of that corroboration, the jury must weigh up the credibility of the witness. Jurors should be told that, in doing so, they should note that lack of eye contact, for example, is not necessarily a sign of lying.

The advantages of Justice Mildren's suggested measure are that it:

- is a relatively efficient and effective way of imparting information to jurors that may be necessary for the proper discharge of their function as arbiters of fact
- avoids the cost, in time and money, of calling expert evidence
- preserves the jury's role as the arbiter of fact
- would place most juries in a better position than they are at present to assess Aboriginal witnesses, even if there is some risk of oversimplifying the issues.

Given the different circumstances of each case, the occasion for use, and the form, of any direction must be within the discretion of the trial judge (see also Mildren 1996, p. 14). Since Aboriginal populations are not homogeneous, no standard form would be suitable in every case.

Because Justice Mildren's suggested form was specific to the Northern Territory experience, the CJC engaged Dr Diana Eades, a linguist with knowledge of the language and culture of Aboriginal people in Queensland, to review the proposed directions in consultation with Justice Mildren and Mr Michael Cooke, a linguist with experience in the Northern Territory. The CJC also engaged Ms Helen Harper, a linguist with experience in the Torres Strait and the northern part of Cape York Peninsula, to modify the directions for use with speakers of Torres Strait Creole. The forms developed by Eades and Harper appear in Appendix 4.

The CJC does not suggest that the proposed direction must be used, or used in the same way, in all cases. It may be that Aboriginal witnesses in a particular case are sufficiently biculturally competent and fluent in Standard English not to be at a disadvantage in giving evidence. Any comment to the jury in such cases would needlessly prolong proceedings, possibly confuse the jury and might be demeaning to some witnesses. However, as Justice Mildren suggests, these problems can be avoided if judges prepare for

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22 During consultations several people suggested that more Aboriginal people should serve as jurors in cases involving Aboriginal people. Essentially the arguments were that Aboriginal jurors would understand the testimony of Aboriginal witnesses better than Anglo-Australian jurors, and Aboriginal witnesses would feel more comfortable in a court with other Aboriginal people present. The way the jury system operates in relation to Aboriginal people has been considered on several occasions by courts (*R v. Williams* (1976) 14 SASR 1), by writers (Mildren 1996, pp. 21–22; Zariski 1996, p. 27) and by the ALRC (1986,vol. 1, pp. 435–440). Because the composition of juries raises broader issues than can be dealt with in this report, the CJC does not address those issues, although it notes that they may warrant further investigation.

cases involving Aboriginal witnesses, for example, by examining the depositions from the committal hearing for indications of cultural and language difficulties amongst witnesses. On some occasions it may only be necessary to advise the jury that some witnesses in the case are Aboriginal and that, if jurors have any trouble understanding a witness, the foreman can bring the problem to the judge's attention. If potential problems are not apparent from the depositions but arise during the witness's evidence, the judge may draw counsel's attention to them,[23] or comment on them to the jury in the summing up (although by then it may be too late to draw the jury's attention to some matters).

One of the concerns about using a standard direction is that it might have the unintended effect of becoming a substitute for proper preparation by legal representatives. A judge's direction certainly should not take the place of properly presented expert evidence in cases where detailed information on cultural and language issues is required. However, if the legal representatives are not sensitive to relevant matters either in adducing their evidence or in closing addresses, the matters canvassed in the suggested directions may form the subject of useful comment by the judge to the jury.

The CJC believes that the information contained in Appendix 4 should not be restricted to juries, but could also form part of the cross-cultural awareness resource kit suggested in Recommendation 3.1 above. The convenient form of the information lends itself to being used by judges sitting alone and by magistrates (or by other courts and tribunals) to inform themselves in a summary way about issues of language and culture that may affect Aboriginal witnesses giving evidence before them.

3.7 Recommendation – Information for the Court

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.

PREPARATION TIME FOR LAWYERS

For reasons outlined in Chapter 2, it may often be necessary for lawyers to spend more time with Aboriginal clients and witnesses than they might with most other clients in order to take meaningful instructions or statements. This is particularly the case where the lawyer is unknown to the Aboriginal person. Adequate preparation time is needed to ensure that a relationship of trust develops between lawyer and client, so that the witness is able to be forthcoming about all relevant issues. The relationship of trust is particularly important in cases of a sensitive nature such as sexual assault or those involving a history of abuse (see Chapter 7).

The issue of allowing adequate preparation time is most directly relevant for Aboriginal defendants, but it is often also necessary for lawyers and prosecutors to take statements from other Aboriginal witnesses. This may be difficult where the witness either does not see the relevance of legal proceedings or, worse, wants to avoid involvement in them because of kinship or family issues. Other family members may need

[23] A ruling, such as that made by Mildren J in *R v. Kenny Charlie* (discussed in the section on leading questions in Chapter 4), may even be made. The question of judicial control of proceedings in general is addressed in Chapter 4.

to be interviewed in order to piece together the circumstances of a particularly sensitive case which a complainant may not wish to discuss, or about which he or she may not have the right to speak in Aboriginal culture. As was indicated in Chapter 2, it is also a recognised Aboriginal style of communication to allow time for speakers to be silent and to think before responding: this may also necessitate extra time.

The issue of adequate preparation time was raised repeatedly in consultations. One lawyer who has called Aboriginal witnesses on many occasions referred to her practice of spending a lot of time with them 'talking about things that are mutually intelligible . . . and talking about people they know,' in order to build up a relationship of trust which will enable full instructions or statements to be both given and understood. Another lawyer with considerable experience in a regional area talked about the proper taking of instructions from Aboriginal people:

> You have to establish a relationship by sitting around and talking about anything but the real issue. Then you get around to the real issue, but you only raise it. You have to stimulate their memory and it is best to get down to the nitty gritty the next day after they have thought about it over night.

Unfortunately, it appears Aboriginal Legal Service solicitors often have insufficient time to spend on individual matters because of high case loads and (particularly in remote communities) lack of time in which to take instructions and prepare matters for court.

RCIADIC Recommendation 106 called for funding authorities to recognise the complex situations in which Aboriginal Legal Services may be required to act (RCIADIC 1991, vol. 3, p. 91). Recommendation 108 also stated:

> That it be recognized by Aboriginal Legal Services, funding authorities and courts that lawyers cannot adequately represent clients unless they have adequate time to take instructions and prepare cases, and that this is a special problem in communities without access to lawyers other than at the time of court hearings (RCIADIC 1991, vol. 3, p. 91).

The Queensland Government has expressed support for this recommendation, but has claimed that the Commonwealth Government is responsible for funding Aboriginal Legal Services. As to the role of the courts identified in the recommendation, the Queensland Government has said '[h]owever, courts have a general discretion to adjourn matters where it is in the interests of justice to do so' (*Response by Governments*, pp. 394–395; see also Queensland Government 1992, p. 76; *Progress Report 1993*, vol. 3, pp. 117–118). In its latest progress report, the Government made no reference to Recommendation 108 (*Progress Report 1994*, p. 286). Queensland's inaction on Recommendation 108 did, however, attract criticism from the House of Representatives Committee set up to examine governments' implementation of the RCIADIC recommendations (HRSCATSIA 1994, pp. 235–238).

Most legal services are still unable to provide a bare minimum "duty lawyer" standard of service, let alone the role envisaged by the Royal Commission. In the proceedings of the Cape York Peninsula Magistrates Courts observed by officers of the CJC, the problems which RCIADIC sought to address with Recommendation 108 appeared not to have been addressed.

Proceedings in the Kowanyama Magistrates Court on 28 November 1995 furnish an unfortunate example. The Aboriginal Legal Service solicitor and field officer arrived in Kowanyama by air at about the same time that morning as the magistrate and the police prosecutor. Only one day had been scheduled for proceedings in Kowanyama that month. The resulting pressure to get matters dealt with meant that the (non-legally qualified) field officer was taking instructions and giving advice to clients while the solicitor appeared in court or took instructions from other clients. Even so, proceedings were repeatedly interrupted to allow the solicitor to take instructions from those waiting clients whom the field officer was unable to process.

Legal service staff with whom the CJC discussed the issue were very conscious of the shortcomings of the service provided. The account above does not imply any criticism of the individuals involved, but highlights the grossly unsatisfactory administration of justice to citizens of remote Cape York communities. Consultations with practitioners in Cairns with experience in those courts confirm that those observations are a fair reflection of the proceedings of the Cape York courts over some time.

The CJC accepts that the remoteness of many of the Cape York communities makes it more difficult to deliver adequate services, but a person should not be required to accept a substantially lower standard of justice because the person lives further away from urban centres than the majority.

The CJC has raised this problem with ATSIC, the funding body for Aboriginal Legal Services, but it is unclear whether the situation will be resolved in the foreseeable future. The Aboriginal and Torres Strait Islander Social Justice Commissioner has suggested in correspondence to the CJC that the State Government should accept some responsibility. The Commissioner pointed out that, in urban areas, a considerable number of Aboriginal people obtain legal services from agencies other than the Aboriginal Legal Services, principally the Legal Aid Office (Qld). By contrast, in areas such as Cape York Peninsula, almost every Aboriginal person appearing before the courts is represented by the Aboriginal Legal Service. The Commissioner's point is that, while the State Government through the Legal Aid Commission is funding a very substantial proportion of legal services to Aboriginal people in urban areas, the State Government does not make (and expressly disclaims) any responsibility for legal services to Aboriginal people in remote areas served only by an Aboriginal Legal Service.

The CJC notes that the financial affairs of several Aboriginal Legal Services, including the Tharpuntoo Legal Service, are currently under investigation by the Commonwealth. For that reason it may be necessary to defer decisions about additional funding, pending the outcome of that investigation. However, the fact remains that proper legal services remain out of the reach of many Aboriginal people, especially residents of remote areas. It is not a sufficient response to this problem that Aboriginal people may receive State Government assistance in urban areas through the Legal Aid Office.

The CJC believes that the Queensland Government has a responsibility to ensure that proper legal services are provided to Aboriginal people throughout the State and that RCIADIC Recommendation 108 is properly implemented. If funding of Aboriginal Legal Services is shown to be insufficient in particular regions, the Queensland Government should take steps to ensure that additional funding is made available so that those services may provide an adequate level of service. Steps which the Government might take could involve either negotiation with the Commonwealth to increase Commonwealth funding to Aboriginal Legal Services or the provision of additional State funding to supplement the Commonwealth's contribution.

3.8 Recommendation – State Funding for Aboriginal Legal Services

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).

OTHER ISSUES

Many other suggestions were made to the CJC for improving understanding between Aboriginal people and those involved in court proceedings. Two of the more significant sets of proposals related to:

- means of providing assistance by Aboriginal people to the court
- Aboriginal community input to the criminal justice process.

ABORIGINAL ASSISTANCE TO THE COURT

Some submissions proposed the employment of an Aboriginal person to assist the court when dealing with cases involving Aboriginal witnesses. Suggested ways in which this assistance might be given included:

- a "witness assistant" who would have the right to speak to clarify uncertainty when a witness is giving evidence
- an Aboriginal assistant to the court, or Aboriginal assessors.

The Anti-Discrimination Commission, and the Legal Aid Office (Qld), in written submissions, supported the idea of a witness assistant whose role would be somewhere between that of an interpreter and that of a support person under section 21A of the *Evidence Act 1977* (Qld) (see Chapter 6). Several people interviewed by CJC officers also supported this idea. Under the proposal, the witness assistant would sit with the witness so that he or she could provide emotional support if necessary; the assistant would also have the right to intervene in order to clarify uncertainties, or to request the appropriate rephrasing of questions.

The CJC sees some merit in this proposal. However, if other recommendations made in this report are implemented, particularly relating to the role of interpreters (Chapter 5) and an increased use of support persons under section 21A of the *Evidence Act 1977* (Qld) (see Chapter 6), the engagement of a separately designated witness assistant may not be necessary or the role significantly reduced.

Another suggestion was to appoint Aboriginal assistants to the courts. Fraser (1992) has previously called for an Aboriginal person to occupy a position in court like that of the judge's Associate or Clerk, but playing an active role in advising the judge on Aboriginal issues arising in court. Judge McGuire, President of the Childrens Court of Queensland, has long advocated for Aboriginal assistants to the court (Queensland Childrens Court 1994, pp. 159, 164–169). A related concept is to have members of the Aboriginal community sitting with the magistrate or judge to determine cases involving Aboriginal people. For example, Judge Skoien, Senior Judge of the District Court, reported to the CJC on his observations of the operation of assessors in the Magistrates Courts and Regional Courts of South Africa in 1995. In those courts two members of the local community may sit with the magistrate:

> When a case is assigned to a magistrate he/she *may* request the assistance of one or two assessors. As in the Supreme Court an assessor has a say in reaching the factual decision but the magistrate is the sole arbiter of the law. It seems to be quite rare that the ultimate decision of a court in which assessors sit with a judge or magistrate is other than unanimous; disagreements tend to be talked out.

However, as Judge Skoien pointed out, all South African courts operate with assessors, juries having been abolished in 1969, and assessors would not be easily accommodated in jury trials. Thus, while this proposal may have merit, it would not fit easily within the existing adversarial model.

COMMUNITY INPUT INTO THE CRIMINAL JUSTICE PROCESS

Another suggestion made frequently in consultations was that greater use should be made of mechanisms which allow for input by local Aboriginal communities into the criminal justice process.

The Department of Families, Youth and Community Care has recently developed a Local Justice Initiatives Program which has the potential to increase Aboriginal community input to the criminal justice system in a number of ways. The program, which has $1.8m funding, aims to help Aboriginal and Torres Strait Islander communities develop strategies for dealing with justice issues and for decreasing their people's contact with the criminal justice system. Activities which will be eligible for funding include establishing community justice groups; creating diversionary programs such as mediation; improving liaison with police, courts and corrections about cultural matters; and consulting with magistrates and judges about rehabilitative sentencing options which are considered appropriate by the community.

There are also several ways in which local Aboriginal communities may have input into sentencing decisions (see ALRC 1986; RCIADIC [1991, vol. 3, pp. 83–85]). Officers of the CJC observed one case in which a community member approached the bench before sentence was imposed to give some background explanation of the defendant's behaviour in terms of the prevailing attitudes of the community to relevant matters. In the Pitjantjatjara Lands of South Australia elders may be invited to sit with the magistrate when sentences are passed, particularly in relation to juveniles. In those courts there has also been a practice where a lawyer representing the Pitjantjatjara Council may make submissions on sentencing concerning the community's view on a particular type of offence or an individual offender.

Although issues relating to the sentencing process are beyond the scope of this report, the CJC is supportive of initiatives to promote greater involvement by Aboriginal people in the court process.

CONCLUSION

This chapter has considered a number of ways in which mutual understanding between those involved in the court system and Aboriginal witnesses or defendants can be improved. The measures are important because the adversarial legal system assumes that the best evidence comes from the direct questioning of witnesses in court. The evidence of witnesses should not be misunderstood because the culture and language of these witnesses differ from those of the personnel involved in the court process, whether they be on the bench, on the jury or presenting legal argument.

The initiatives which the CJC believes must be taken include:

- providing more in-depth cross-cultural awareness training for lawyers, judges and magistrates
- giving courts more information about cultural and language issues
- ensuring that Aboriginal people receive a proper standard of legal representation, principally by way of ensuring that proper levels of funding are provided to Aboriginal Legal Services to allow adequate time to prepare cases.

CHAPTER 4
GIVING EVIDENCE

INTRODUCTION

This chapter focuses on the rules and practices which govern the giving of evidence in court and proposes ways of improving how the evidence of Aboriginal witnesses is taken and understood. Issues considered are:

- whether it should be possible for evidence-in-chief to be given in narrative form
- whether there should be any limits on the use of leading questions in cross-examination
- the extent to which the presiding judge or magistrate should exercise control over court proceedings
- whether videotaping of evidence-in-chief should be permitted.

A description of the present legal framework and of the way in which evidence is taken is included in Chapter 2.

GIVING EVIDENCE-IN-CHIEF IN NARRATIVE FORM

As outlined in Chapter 2, the question-and-answer style of communication is the standard method for eliciting evidence from witnesses in court. However, this method has been criticised because of its potential to distort a witness's testimony (see Re & Smith 1982, p. 86). The question-and-answer style may be particularly inappropriate for Aboriginal people, many of whom are not accustomed to this method of communication (see Chapter 2).

An alternative to the question-and-answer format is for the witness to give evidence in narrative form, that is, 'without being tied to answering particular questions' (Attorney-General's Department 1995a, p. 34). According to *Cross on Evidence*, 'the evidence of witnesses in chief is elicited by means of questions and answers, not by the delivery of a speech' (Byrne & Heydon 1991, p. 17,043). The authorities cited in *Cross on Evidence* suggest that the use of narrative is not a characteristic of British-derived legal systems, but, according to lawyers consulted by the CJC, evidence may already be given in narrative form in Queensland courts. The lawyers considered that skilful counsel are able to elicit narrative from their witness in a natural and compelling way, but at the same time steer the witness away from inadmissible matters (such as hearsay or prejudicial material). This controlled form of questioning is referred to as "guided narrative".

A number of persons consulted by the CJC were in favour of the courts making greater use of the narrative method as a way of eliciting the evidence-in-chief of Aboriginal witnesses. For example, the Legal Aid Office (Qld) submitted that:

> The credit of a witness can also be damaged by the tendency to talk around a subject rather than directly answering questions or going straight to the heart of the matter. Whilst with a non-Aboriginal witness the failure to answer direct questions may draw comment that a witness is trying to avoid answering, the Aboriginal witness may simply be unaccustomed to or uncomfortable with approaching the story in that way. The use of questioning which invites a narrative answer may therefore produce a better quality of evidence.

The narrative method has also been suggested by Eades (1992, p. 83) as one way of overcoming the barriers to communication.

One example from Western Australia of how narrative evidence can be used to good effect under existing law is given by Cooke (forthcoming), who acted as linguistic adviser and interpreter in a 1995 case in which an Aboriginal woman was charged with wilful murder of her partner (see Chapter 2). The defendant's lawyer, when conducting the examination-in-chief, allowed her to give much longer and more complete answers to questions than she had been able to do in the police interview. As a result, the woman was able to present the full nature and extent of the violent abuse her partner had inflicted on her from the time she met him, and to explain her terror of her partner and her state of mind at the time she stabbed him. Cooke noted:

> The narrative which formed the defence case lasted an hour. It did not so much contradict much of what [the defendant] had said to the police in terms of the facts, but it put everything that she had said in another perspective; and so it put the whole case into another perspective. (p. 6)

As noted in Chapter 2, after the defendant had given evidence, the prosecution dropped the charge of wilful murder and substituted the less serious charge of manslaughter. The potentially serious consequences of cross-cultural misunderstanding in this case illustrates the importance of getting the witness's account as accurately as possible.

Possible disadvantages of the narrative method are that it might waste court time, and that the witness might include information which is prejudicial, or not relevant in the legal sense. However, competent lawyers should be able to use the guided narrative method to deal with those potential difficulties. In addition, the court has a discretionary power to control proceedings before it, so that a judicial officer may intervene if time is being wasted.

The main issue for consideration is whether there would be benefit in spelling out in legislation that courts have the power to direct that evidence may be given wholly or partly in narrative form. This approach was recommended by the ALRC in its interim and final reports on evidence, on the grounds that such a provision would enable courts to encourage the giving of evidence in narrative form (ALRC 1985, vol. 1, pp. 338–339; 1987, pp. 61–62). Based on the ALRC's recommendations, the *Evidence Act 1995* (Cwlth and NSW) was enacted. However, section 29 of the Act provides that a witness may give evidence wholly or partly in narrative form if the court so directs. That represents a change from the present law in that a direction from the court is now necessary. The provision does not affect the right to cross-examine (s. 27). There is nothing in the Minister's Second Reading Speech,[24] the Second Reading debate,[25] the Explanatory Memorandum, the reports of the Senate Committee or the commentary on the Commonwealth Act (Attorney-General's Department 1995a, p. 34) to explain why a direction by the court should be required.

The CJC's concern with a provision like section 29 of the Commonwealth *Evidence Act 1995* is that it introduces a procedural step (that is, raising and determination of the issue of whether the court should exercise its discretion) which is not in place under the common law of Queensland, and the need for which has not been established. The CJC's preferred alternative is a provision which allows narrative evidence to be given with or without a direction by the court, as proposed by the ALRC (1985, vol. 2, p. 27; 1987, p. 156). Such a provision could be useful in encouraging counsel to make greater use of this form of evidence and encouraging the court to allow greater use of narrative evidence in appropriate cases. Other rules of evidence, the skill of counsel and the court's discretionary power to control proceedings before it should be adequate to control inadmissible and prejudicial material.

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24 Australia, House of Representatives 1993, Debates no. 13, pp. 4,087–4,090.

25 Australia, House of Representatives 1994, Debates no. 15, pp. 2,411–2,429.

4.1 Recommendation – Evidence in Narrative Form

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.

LEADING QUESTIONS IN CROSS-EXAMINATION

A leading question suggests the desired answer, or assumes the existence of disputed facts before the witness has given evidence about them (Byrne & Heydon 1991, p. 17,043; Re & Smith 1982, p. 137). An example of the first might be 'Did you see a car coming very fast from the opposite direction?' An example of the second type would be to ask 'What did you do after he hit you?', before a witness has given evidence that he or she was hit.

A party who calls a witness may not ask leading questions of that witness except in very limited circumstances, such as where the questions relate only to formal introductory matters or the identification of an item in court, or where the witness proves "hostile" (that is, unwilling to tell the truth when questioned by the party that called the witness).[26] On the other hand, leading questions may be asked in cross-examination, subject to the judge having an over-riding discretion to curtail the use of such questions where the witness is highly suggestible or there is some other factor which renders the answers worthless as evidence (see the decision of Barry J in *Mooney v James* [1949] VLR 22 at 27–28; ALRC 1985, vol. 2, pp. 116, 121; Byrne & Heydon 1991, p. 17,053).

The main issue for consideration is whether courts should exercise greater control over the use of leading questions in cross-examination of Aboriginal witnesses. According to Barry J in *Mooney v. James* (at 28):

> 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 protect him against suggestibility.

This assumption has less validity in the case of many Aboriginal witnesses because:

- It cannot be assumed that Aboriginal prosecution witnesses will be partisan to the prosecution.
- Even where the person is a witness for the defence, he or she may not perceive the evidence as being "for" one party and "against" another.
- The witness may not be conscious that he or she is being questioned by an adversary.
- Questions designed to attack a witness's credibility can lead to obvious problems if the witness is inclined to gratuitous concurrence, that is, the tendency to agree with any propositions put to the person by the questioner (see Chapter 2). This tendency may be even greater where the questioner is seen not as an adversary, but as an authority figure.

If a witness is suggestible, this will obviously diminish the probative value of the answers which he or she gives when cross-examined. Conversely, there is an increased risk that judicial officers, lawyers and particularly jurors will misconstrue the significance of the answers given by the witness.

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[26] This rule is not always strictly applied in practice. Several practitioners indicated to the CJC that leading questions are sometimes used in examination-in-chief of Aboriginal witnesses with the acquiescence of the other party, as a way of "unfreezing" witnesses who are very shy and/or overwhelmed by the proceedings.

As indicated, under the common law the court has a discretion to disallow leading questions where the witness has proven to be – or is likely to be – highly suggestible. For instance, in *Mooney v. James* (at 28) Barry J held that:

> . . . if the Judge is satisfied there is no ground for the assumption [of non-suggestibility] . . . 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 approach was taken in the recent Northern Territory case, *R v Kenny Charlie*,[27] where Mildren J ruled out leading questions in cross-examination on the basis that:

> On reading the transcript of the committal, it is fairly obvious that all of the Aboriginal witnesses are very susceptible to leading questions in cross-examination. It is therefore my view that they ought not to be led in cross-examination, unless it is necessary to do so in order to put the instructions which you have on behalf of your client and every other effort to get the particular witness to concede those matters has failed. (Transcript, p. 210)

However, it was evident from the CJC's consultations that objection to leading questions in cross-examination is rarely made by opposing counsel in Queensland courts, regardless of whether the witness is Aboriginal or not. As a result, the discretion to disallow the use of leading questions is rarely exercised by the courts.

Some of the practitioners who spoke to the CJC expressed concern about not being permitted to ask leading questions, arguing that opposing counsel cannot effectively cross-examine witnesses unless counsel has some means of testing their evidence. But as Justice Mildren's ruling in *R v. Kenny Charlie* implies, and as his Honour has shown elsewhere (Mildren 1996, pp. 17–19), other fairer (and more effective) methods are available in cases where characteristics of the witness impair the usefulness and fairness of the more usual methods. Justice Mildren gives the hypothetical example of the leading question, 'You hit Fred with that nulla nulla first, didn't you?' He suggests the following alternatives:

- 'Who hit Fred with that nulla nulla the first time?'
- 'I need to know who hit Fred with that nulla nulla the first time?'

If the cross-examiner needs to continue:

- 'I'm thinking maybe it wasn't Matthew who hit Fred that first time, hey?'
- 'Who hit Fred that first time?'
- 'I think maybe someone else hit Fred that first time, eh? I need to know who hit Fred that first time?'
- 'I think maybe you hit Fred that first time is a true story, hey?' (1996, pp. 18–19)

[27] Northern Territory Supreme Court (Mildren J), 28 September 1995, unreported.

Justice Mildren comments:

> 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. (p. 19)

The CJC anticipates that, if its recommendations in relation to cross-cultural training of lawyers and judicial officers are implemented, lawyers and the courts should become more sensitive to signs of suggestibility on the part of Aboriginal witnesses. But increased awareness will not necessarily make courts more willing to prevent or curtail the use of leading questions in cross-examination. There also needs to be some legislative affirmation of the power of the court to intervene in appropriate cases.

In its interim report on evidence, the ALRC argued that, if there was any uncertainty about the court's overriding discretion to curtail the use of leading questions in cross-examination, legislation should be passed to make clear that the court has such power (ALRC 1985, vol. 1, p. 151). That proposal has now been enacted by section 42 of the *Evidence Act 1995* (Cwlth and NSW). This section provides that a party may put a leading question to a witness in cross-examination unless the court disallows the question. In deciding that point, the court is to take into account the extent to which:

- the witness's evidence-in-chief is unfavourable to the party who called the witness
- the witness has an interest consistent with an interest of the cross-examiner
- the witness is sympathetic to the cross-examiner
- the witness's age, or any mental, intellectual or physical disability to which the witness is subject, may affect the witness's answers.

The court must disallow the question if the court is satisfied that the facts would be better ascertained if leading questions were not used.

The CJC considers that similar legislation should be enacted in Queensland, subject to the expansion of the list of relevant factors to include the extent to which the witness's cultural or linguistic background may affect his or her answers. As indicated, such a provision would clarify the power of courts to intervene in cases involving Aboriginal and other witnesses where, on the facts of the case, suggestibility appears to be an issue. Moreover, the proposed provision would have a useful educative effect, by alerting judicial officers and lawyers to the potential relevance of cultural and linguistic factors.

4.2 Recommendation – Leading Questions in Cross-examination

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.

JUDICIAL CONTROL OF COURT PROCEEDINGS

It was suggested to the CJC that many of the problems which arise when Aboriginal witnesses are questioned in court could be avoided if judges and magistrates made greater use of their powers to regulate court proceedings and, in particular, cross-examination.

Justice Mildren has argued strongly for the court playing a more active role in proceedings involving Aboriginal witnesses:

> My experience is that, in cases involving Aboriginal witnesses and/or accused persons, the trial judge must be fully prepared for the trial and ready, if necessary, to intervene more frequently than would be necessary in ordinary trials. I have found that it is essential to read the committal proceedings, first, because cross-examination on issues of credit is bound to occur, and the prosecutor may not object even where he plainly should; secondly, to decide whether or not to give the suggested direction; thirdly to see if it is necessary to warn counsel for the accused about the need for leave before putting leading questions in cross-examination. There is a greater danger of inadmissible evidence being introduced if the witnesses do not know what is expected of them, and counsel may, if inexperienced with Aboriginal people, not realise that a witness is repeating what is common knowledge or 'shared' knowledge, contrary to the hearsay rule, for example. Adequate preparation by the Judge can often avoid problems from occurring. The Judge should raise with counsel possible areas of concern which appear to him to arise from the committal in the absence of the jury before the witness is called. The trial judge must also be ready to suggest to counsel ways of overcoming problems, such as what to do when a witness lapses into silence, and so on. Judges need to be ready to exert their authority on the parties to secure interpreters whenever they are plainly needed. (1996, p. 27)

Support for this approach was expressed by some judicial officers and lawyers who were consulted for this report. For example, one of the judges who was interviewed emphasised that judges have a wide discretion to ensure that a trial does not miscarry. The judge believed that it was necessary to go past the point of simply having cultural awareness; in his view, there needed to be an understanding that courts have a discretion as to how to deal with Aboriginal witnesses. A magistrate similarly emphasised that controlling the questions counsel asked is important in court. Some other legal practitioners were also in favour of the bench playing a more active role in cases involving Aboriginal witnesses. For example, one prosecutor said that he did not think judges intervened enough where witnesses are being intimidated or "tripped up".

In contrast, several of the judicial officers and practitioners who were interviewed were resistant to the idea that it was necessary, or appropriate, for the court to play the more active role envisaged by Justice Mildren. For example, one judge said that 'you don't want the bench taking over the prosecution or defence cases' (although the judge acknowledged that he had interrupted counsel on occasion to get them to rephrase a question to a witness). Some defence counsel appeared to be particularly uncomfortable with the idea that courts should exercise more control over the questioning of Aboriginal witnesses. These concerns mirrored those expressed by defence counsel in *R v. Kenny Charlie* before Justice Mildren:

> DEFENCE COUNSEL: Sir, if I may say, what you're compelling the defence to do, as it were, is to be fair to the witness---
>
> HIS HONOUR: Yes.
>
> DEFENCE COUNSEL: ---in the extreme sense.
>
> HIS HONOUR: What's wrong with that?
>
> DEFENCE COUNSEL: But, sir, my job isn't to look after the witness; my job---
>
> HIS HONOUR: No, but that's my job.
>
> DEFENCE COUNSEL: ---is to look after my client.
>
> HIS HONOUR: And I'm telling you, and I'm going to require you, to be fair to the witness. (Transcript, p. 210)

However, the case law makes it clear that, even in an adversarial system, where much of the conduct of proceedings is in the hands of the parties, ultimate control resides with the presiding judicial officer. The duty of the judicial officer is to regulate proceedings in a way that is fair not only to the parties but also to the witnesses. Moreover, the judicial officer has quite broad discretions to enable that duty to be fulfilled. For example, in *Mooney v. James* (at 28), Barry J stated that:

> 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 the 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. The circumstance that the proceeding is one between adversaries each contending for the decision imposes limits . . . upon the effectiveness with which the Judge can perform this duty. Within these limits, however, the existence of this duty clothes the Judge with all the discretionary powers necessary for the discharge of the duty, and he may therefore control and regulate the manner in which the evidence is presented or elicited.

The courts have emphasised that, because of the adversarial nature of the process, a judge must not intervene excessively, and must be careful not to curtail lines of questioning which later may prove to be relevant (*R v. Jones and Kelly* (1985) 20 A Crim R 142; *Wakeley v. The Queen* (1990) 93 ALR 79; *R v. Aldridge* (1990) 20 NSWLR 737 (Hunt J at 741-742); *R v. Kranz* (1991) 53 A Crim R 331 (Ryan J at 339–341); *R v. Dib* (1991) 52 A Crim R 64 (Hunt J at 71); and Mildren (1996, pp. 25–26)). But, as the High Court in *Wakeley* acknowledged (at 86):

> [T]here may come a stage when it is clear that the discretion [to cross-examine] 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.

The expectation that judges should take an increasingly active role in the conduct of proceedings before them has gained recognition in recent years.[28] Concern has been expressed about the 'modern tendency, particularly in criminal cases, for cross-examination to assume an unduly lengthy and repetitive character' (Byrne & Heydon 1991, p. 17,146). Justice Ipp refers to changed community expectations 'that judges will intervene in order to achieve justice' (Ipp 1995, p. 366; see also Mason 1993). Such judicial intervention may be necessary not only in the case of unrepresented defendants, but 'where ineptitude on the part of counsel may lead to unfairness in the trial' (Ipp 1995, p. 371).

In addition to the general duty to control proceedings, sections 20 and 21 of the *Evidence Act 1977* (Qld) give specific powers to presiding officers in relation to the questioning of witnesses:

- Section 20 provides that the court has a general discretion to disallow any question in cross-examination that seeks only to impeach the witness's credit 'by injuring the character of the witness,' if the court believes the matter is so remote in time or is of such a kind that to admit its truth would not materially affect the witness's credibility. There is also a limited power at common law to disallow such questions (see *R v. His Honour Judge Noud; ex parte MacNamara* [1991] 2 Qd R 86 at 94–96 (FC)).

- Section 21(1) provides that a court may disallow a question which in its opinion is 'indecent or scandalous' unless the question relates to a fact in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

- Section 21(2) provides that a court may disallow a question which in its opinion 'is intended only to insult or annoy or is needlessly offensive in form'.

[28] For example, the recent Litigation Reform Commission Conference 'Civil Justice Reform: Streamlining the Process', Brisbane, 6–8 March 1996, which included a session on 'Lessons for the Criminal Justice System'.

In the CJC's assessment, the problem does not lie with the law as such, but with how it is presently applied. Although courts have quite extensive power to regulate cross-examination, it is evident that many judicial officers are very cautious about invoking these powers and, equally, that lawyers (especially prosecutors) are often reluctant to seek the intervention of the court. For example, very few of the lawyers consulted could recall occasions on which questions had been disallowed on the basis of the *Evidence Act* provisions. A prosecutor involved in one case involving Aboriginal witnesses said that, while he believed he had grounds for objections under both sections 20 and 21 of the *Evidence Act*, he did not make the objections because to do so would give rise to the perception, both by the witness and the court, that the witness was vulnerable. Another said 'although I have objected on many occasions, it is important to remain credible with the magistrate so you don't want to take it too far.'

If the CJC's recommendations concerning cross-cultural awareness training of judicial officers and lawyers are adopted, courts should, over time, become more active in regulating proceedings involving Aboriginal witnesses, as those involved will be more alive to the particular language and cultural differences of such witnesses. However, additional measures are also required.

First, the ODPP could encourage prosecutors to object if they consider that questioning of an Aboriginal witness is inappropriate having regard to the witness's linguistic and cultural background. The Commissioner of the QPS could take the same step for police prosecutors.

Second, although the present law is basically adequate, there would be some advantage in amending section 21 of the *Evidence Act* to provide that, a court should take account of the witness's cultural background when considering whether a question is indecent, scandalous, insulting, annoying or offensive. One lawyer consulted expressed the view that section 21 in its present form should be read that way, but no one who was consulted for this study could recall the section being used for this purpose.

Section 41 of the *Evidence Act 1995* (Cwlth and NSW) provides a useful starting point for redrafting section 21. The provision contains a non-exhaustive list of factors which the court may take into account in determining whether a question is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive including 'any relevant condition or characteristic of the witness, including age, personality and education', and any mental, intellectual or physical disability. The provision is based on the ALRC's draft clause (ALRC 1987, p. 158). Arguably 'any relevant . . . characteristic' could include cultural background, but as indicated, in order to avoid any confusion this should be made explicit in the legislation.[29]

4.3 Recommendation – Instructions to Prosecutors about Control of Questioning

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*.

[29] A similar provision in the Northern Territory which is limited to child witnesses gives the court power to disallow a question that is 'confusing, misleading or phrased in inappropriate language' (*Evidence Act 1939*, s. 21B). Under section 21B(2), one of the factors to be taken into account in deciding whether to disallow a question is the child's culture. Arguably section 21B adds nothing to the court's common law discretion to control proceedings; it merely makes specific provision in relation to one group of witnesses.

4.4 Recommendation – Control of Questioning

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.

VIDEOTAPING OF EVIDENCE-IN-CHIEF

Under section 93A of the *Evidence Act 1977* (Qld), a child witness under the age of 12 may give his or her evidence-in-chief via a videotape recording made soon after the events in question. The advantage of this procedure is that it enables the evidence to be given when the events are fresh in the child's mind, and preserved on tape until the trial. The witness must still, however, submit to cross-examination at the trial.

The Legal Aid Office (Qld), in its submission, called for a similar provision for Aboriginal witnesses:

> The advantage of video taping statements would be that it could occur in an atmosphere which was more relaxed and less intimidating for the witness. It could be taken soon after the event and at a time when events were still very fresh in the witness's mind. The problems that occur with the lapse of time would be effectively eliminated and the witness . . . would be more likely to give cogent evidence when confronted soon afterwards in a less formal atmosphere. It would also allow for the narrative style of evidence rather than the normal questioning that is offered in court.

The disadvantage of this measure (as the Legal Aid Office and others have pointed out) is that the witness would still be required to undergo cross-examination, without the benefit of having been "warmed up" in court by giving evidence-in-chief in the usual way.

The CJC accepts that the facility of videotaped evidence may assist some Aboriginal witnesses, by allowing them to give evidence soon after the event, in a familiar and unthreatening environment. However, this measure is unlikely to overcome the difficulties experienced by Aboriginal witnesses in the court process. In the CJC's view other measures, such as improved cross-cultural awareness amongst lawyers and judicial officers (as recommended in Chapter 3), the increased use of narrative evidence and improved regulation of questioning, will be of more benefit. Nor is the CJC satisfied that one of the primary justifications for section 93A, that young children often suffer long term memory loss (Sturgess 1985, p. 91), necessarily applies to adult Aboriginal people. Accordingly the CJC does not recommend the introduction of videotaping of evidence-in-chief for Aboriginal witnesses.

CONCLUSION

This chapter has proposed several changes to improve the way in which the evidence of Aboriginal witnesses is taken and understood. These changes entail:

- encouraging the giving of evidence-in-chief in narrative form
- restricting the use of leading questions in cross-examination
- encouraging prosecutors to call for greater use of the court's power to control cross-examination
- clarifying that objections to certain questions under section 21 of the *Evidence Act 1977* (Qld) are to be judged having regard to the witness's cultural background.

CHAPTER 5
INTERPRETERS

INTRODUCTION

Most Aboriginal people in Queensland speak a form of English as their first language (see Chapter 2) but, for the small proportion who speak traditional Aboriginal languages, availability of interpreters is a significant issue. There are also questions relating to the interpretation of Aboriginal English that need to be addressed.

The current position in Queensland is that:

- the law does not recognise a positive right to an interpreter for witnesses
- in practice, interpreters for Aboriginal people (whether witnesses or defendants) are rarely called.

The principal question addressed in this chapter is whether there should be a legislated right to an interpreter for witnesses. More specific issues considered are:

- how should the need for an interpreter be assessed?
- who should provide the interpreter?
- what training and qualifications should be required of the interpreter?
- what role should the interpreter have in court?
- should Aboriginal English be interpreted and, if so, how?

Issues about interpreters in the legal system are not new, and much has been written about these matters.[30] For this reason, parts of this chapter refer to previous work rather than dealing with the issues at length.

WHY SHOULD INTERPRETERS BE USED?

There are two important reasons for using interpreters:

- participants in justice systems have the basic right to understand and be understood in judicial proceedings
- courts should ensure that they have the best possible understanding of the evidence in the case before them (Crouch 1985, p. 688).

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30 Crouch 1985; ALRC 1985, vol. 1, pp. 144–146, 339–340; ALRC 1986, vol. 1, pp. 441–444; ALRC 1987, p. 62; *Interpreters Report* 1991; Law Reform Commission of Canada 1991, pp. 31–34; RCIADIC 1991, vol. 3, pp. 77–79; ALRC 1992, pp. 41–54; Laster & Taylor 1994; HRSCATSIA 1993, pp. 11–20; HRSCATSIA 1994, pp. 208–213, 240; ATJAC 1994, pp. 40–42, 46–47, 51–56; Commonwealth Attorney-General's Department 1995b, pp. 70–72.

The party or witness in legal proceedings, particularly in criminal proceedings, who cannot both speak and understand the language of the courts is:

> at a disadvantage compared to his or her English-speaking counterparts. Justice can only be done if the evidence and arguments are fully and clearly understood by all concerned. (*Interpreters Report* 1991, p. 2)

NAATI submitted to the CJC that:

> [i]n practice, [legal proceedings are] an area where cultural differences, lack of language skills and differing legal expectations and values can cause much misunderstanding. This is obvious where the lack of understanding of the language is total, but the detriment may be equally great where a party or witness has an imperfect knowledge of English.

As indicated in Chapter 2:

- Some Aboriginal people in Queensland, especially in the remote north and north-west, speak a traditional Aboriginal language or Torres Strait Creole as their first language.
- Although a variety of English (Aboriginal English) is the first language of many Aboriginal people, that language may be more closely aligned to the non-English languages from which it has developed and thus be quite different from Standard Australian English in grammar, pronunciation and meaning.
- Several varieties of Aboriginal English are spoken throughout Australia. It is considered to be often impossible to distinguish between a person who is speaking a heavy variety of Aboriginal English and a person who is speaking Torres Strait Creole.

The availability of interpreters is crucial for speakers of traditional Aboriginal languages and Torres Strait Creole, because those languages (unlike Aboriginal English) are not mutually intelligible[31] with the language of the courts (Standard English). A complicating factor is that those languages are most widely spoken in remote and under-resourced areas which often escape the attention of Government service providers. Although some varieties of Aboriginal English are mutually intelligible with Standard English, communication difficulties may still arise which may require an interpreter.

THE CURRENT POSITION

GENERAL

In Queensland there is no statutory entitlement for an accused person or a witness in a criminal trial to have the services of an interpreter. Accordingly, it is necessary to look to the common law.

In criminal proceedings, different approaches are taken depending on whether it is the accused or a witness who is not competent in the English language. For reasons stated in Chapter 1, this report focuses on witnesses, which includes an accused person only where he or she chooses to give evidence. The accused

31 "Mutual intelligibility" is the ability of speakers to understand each other. It is sometimes used as a test to distinguish dialects (which are mutually intelligible) from separate languages (which are not), although many linguists consider this to be an over-simplification.

person's more general entitlement to understand and be understood in proceedings against him or her is not considered in detail in this report.[32] However, the practical problems associated with assessing the need for, and providing, an interpreter for a defendant are closely related to those concerning witnesses.

The English decision in *R v. Lee Kun* [1916] 1 KB 337 (CCA) is generally regarded as the leading authority on interpreters in relation to accused persons and has been implicitly approved in Queensland by the Court of Criminal Appeal in *R v. Johnson* (1987) 25 A Crim R 433. The general rule[33] is that in a criminal trial, the proceedings should be interpreted to a defendant unless the judge is satisfied that the defendant substantially understands the evidence and the case against him sufficiently to enable him or her to answer it.

Witnesses do not have the same right at common law. The High Court in *Dairy Farmers Co-operative Milk Co Ltd v. Acquilina* (1963) 109 CLR 458 (the *Dairy Farmers Case*) held that there was no rule that a witness is entitled as of right to give evidence in his or her "native tongue" and that the decision to allow an interpreter for a witness is a matter for the discretion of the trial judge (at 464, per McTiernan, Kitto, Menzies, Windeyer and Owen JJ). Whether an interpreter is allowed is to be determined by reference to the defendant's right to a fair trial (*R v. Johnson*). According to criminal law practitioners consulted by the CJC, no formal test is administered by trial judges or magistrates, the discretion being exercised solely on the basis of the judge's observations (see also ALRC 1992, pp. 46–47).

The party calling the witness carries the onus of establishing the need for an interpreter (*R v. Johnson*). However, there is a dearth of case law in Queensland on the principles to be applied by a court when considering whether or not an interpreter should be provided for a witness. In *R v. Johnson* (at 440) Williams J (with whom Shepherdson and Derrington JJ agreed) said the research of counsel and of his own had not disclosed any relevant decision on appropriate principles to be applied:

> That is perhaps not surprising because in practice it will generally be obvious whether or not the assistance of an interpreter is required. Clearly if a witness cannot be effectively examined and cross-examined because of a communication or language problem the services of an interpreter will be called for. Ultimately the decision whether or not a witness should have an interpreter will be answered in the light of the fundamental proposition that the accused must have a fair trial. Where the ethnic background of a witness is such that some communication problems emerge during cross-examination, it will ultimately be for the trial judge, in the exercise of his discretion, to decide whether or not an interpreter is called for. The mere fact that on occasions a question had to be repeated, perhaps using different words, will not necessarily mean that an interpreter is required.

The exercise of the trial judge's discretion will rarely be successfully challenged, because of the recognition by appeal courts that the trial judge is, generally, in a better position than the appeal court to observe the demeanour of the witness and any difficulties in communication. The judge's decision 'should

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32 The CJC does not wish, however, to imply that the language barriers facing accused persons are less important than those confronting witnesses, particularly in light of Australia's international human rights obligations (see *International Covenant on Civil and Political Rights* (1966) articles 14(1) and 14(3)(a) and (f); *Convention on the Elimination of All Forms of Racial Discrimination* (1965) article 5(a); see also *Indigenous and Tribal Peoples Convention 1989* (ILO Convention 169) article 12). RCIADIC Recommendation 99 also provides:

> That legislation in all jurisdictions should provide that where an Aboriginal defendant appears before a court and there is doubt as to whether the person has the ability to fully understand proceedings in the English language and is fully able to express himself or herself in the English language, the court be obliged to satisfy itself that the person has that ability. Where there is doubt or reservations as to these matters proceedings should not continue until a competent interpreter is provided to the person without cost to that person (1991, vol. 3, p. 79).

A review of RCIADIC recommendations by a House of Representatives Committee noted that Recommendation 99 had not been implemented in Queensland and called for its full implementation (HRSCATSIA 1994, pp. 236, 240).

33 *R v. Lee Kun*, at 342–344. See also the *Interpreters Report* (1991, p. 41) for a summary of the propositions said to emanate from that decision.

not be interfered with on appeal except for extremely cogent reasons' (the *Dairy Farmers Case* at 464, per McTiernan, Kitto, Menzies, Windeyer and Owen JJ).

ATTITUDES TO THE USE OF INTERPRETERS

There is resistance on the part of many lawyers and courts to using interpreters. The ALRC refers to:

> a prevailing attitude in courts that if a witness with some knowledge of English is allowed to use an interpreter, he or she will obtain an unfair advantage in cross-examination by pretending ignorance and gaining time. (1992, p. 46)

A reluctance to use interpreters was confirmed by some of the lawyers and prosecutors interviewed for this project. A member of a Land Tribunal said:

> Lawyers in an adversarial system tend to be suspicious of the other side's interpreters. Lengthy explanations of a question (or an answer) may be required in situations where there are no direct equivalent concepts or words, but these may be seen as a ruse by the witness to buy time, and so defeat the 'credit testing' nature of cross-examination.

Cooke has written of his experience in the 1990 Elcho Island coronial inquiry in the Northern Territory:

> . . . the presence of an interpreter was often, from the cross-examiner's viewpoint, proving an irritation or even a thorn in the side. This is because the interposition of an interpreter serves to weaken or neutralize some of the standard tactical weapons in the cross-examiner's armoury and because Aboriginal witnesses are generally far more compliant and malleable when they take the stand alone. Thus the interpreter, particularly if he or she is articulate and confident, can pose an obstacle to a lawyer, who will, through tactical means, seek to have it removed, broken down, passed over, or got around. (1995b, p. 100)

Transcripts of the inquiry demonstrate the depth of opposition from counsel to the provision of an interpreter.

> COUNSEL: Your Worship, in cross-examination, particularly on a point where the witness has been demonstrably contradictory and unreliable, as he has here, particularly when he's been answering all the questions up to that stage by himself, in my submission he should be required to answer the final question . . . by himself, unaided, with [sic] the support of an interpreter to try and dream up some explanation for it . . .
>
> CORONER: It's utterly impertinent to suggest that the interpreter is going to help him dream up an explanation.
>
> COUNSEL: . . . well, I'll withdraw that Your Worship. (p. 107)

Some judicial officers and lawyers also expressed concern that the use of an interpreter makes the process of giving evidence more cumbersome.

Laster and Taylor's (1995) study shows that both defence counsel and prosecutors were sensitive to the supposed effect that interpreted evidence can have on the judge and/or jury's impression of a witness. The courts place much emphasis on a witness's demeanour as an indicator of his or her honesty and reliability. A person who has seen a witness's demeanour in giving evidence is said to have an advantage in assessing the witness's credibility over someone who has not (ALRC 1992, p. 215), although demeanour is not the only factor to be taken into account in assessing reliability.

Where a witness has some, but limited, language skills, many trial judges prefer to hear the evidence first hand from the witness without using an interpreter. For example, in *R v. Johnson* Williams J said

'[e]xperience has generally shown that the tribunal of fact can make a better assessment of a witness if there is no interpreter transposed between it and the witness' (at 440). Derrington J said that 'the intervention of an interpreter tends to render it more difficult to ascertain the truth' (at 442).

Such attitudes, according to the *Interpreters Report*, rest on the proposition that 'even badly spoken and ill understood English makes for more effective communication than proper and competent interpretation from one language to another' (1991, pp. 46–47).

However, a review of psychological research conducted by the ALRC for its evidence inquiry concluded that as little reliance as possible should be placed on demeanour. Contrary to popular legal belief, demeanour is not a good indicator of the honesty of the witness or of the value of his or her evidence (Re & Smith 1982, p. 61). As for the proposition that a witness giving evidence through an interpreter has an advantage, the ALRC asserts that the true position is as follows:

> In fact, a person giving evidence through an interpreter is more likely to be at a considerable disadvantage – because of the loss of impact of evidence mediated in this way, the lack of skilled and experienced court interpreters, the nature of the adversarial system and the fact that neither courts nor those practising in them are properly equipped to work with interpreters. (1992, p. 46)

WHEN ARE INTERPRETERS FOR ABORIGINAL WITNESSES USED?

In consultations undertaken for this project, people who had been involved in, or were aware of, cases involving Aboriginal people were asked about the use of interpreters in criminal proceedings. Only a handful of cases were identified where an interpreter was called. These all related to isolated cases of speakers of traditional languages (and in one case, a Torres Strait Creole speaker) in the remote northern areas of Queensland. In the cases observed by CJC staff in Cape York Magistrates Courts, no interpreter was available to any Aboriginal English-speaking defendant or witness, nor was one sought.

One judge consulted told the CJC that he had never observed a circumstance in court which warranted an interpreter, although he acknowledged that some of the vocabulary used by Aboriginal people was akin to pidgin or creole. A retired judge said that he had never seen an Aboriginal interpreter being used in court, although he recognised the need for interpreters where a person has been charged and his or her liberty is in jeopardy.

Some of those interviewed acknowledged that Aboriginal people's need for interpreters was not being met:

> Although interpreters are desperately needed in FNQ [Far North Queensland], they are rarely, if ever, used as people speak some Cape York [Torres Strait] Creole and the court often sees this as sufficient command of the English language. Of course it is not. FNQ has similar concentrations of people whose first language is traditional as the Northern Territory, but FNQ is way behind the Northern Territory in acknowledging the need for interpreters and developing appropriate services. (Solicitor)

> A large part of the need is in North Queensland. ODPP staff, and the courts, are not sensitive to Aboriginal people's needs. For example, often where interpreters should be had, they are not. (Lawyer)

> It seemed ironical to me that while courts provided interpretive services for foreigners, we didn't provide any for our indigenous people. (Judge)

The apparent similarities between Standard English on one hand and Aboriginal English (or even Torres Strait Creole) on the other have no doubt led some professionals into believing that the risk of misunderstanding is minimal. However, that risk is real, and the consequences may be serious.

AVAILABILITY OF ABORIGINAL LANGUAGE INTERPRETERS

The shortage of interpreters with the appropriate skills may partly explain why interpreters of Aboriginal languages are called only infrequently.

In its report on Aboriginal customary laws, the ALRC acknowledged the problems with requiring professionally qualified interpreters for Aboriginal languages (1986, vol. 1, pp. 443–444). The ALRC referred to the urgent need for training and accreditation of Aboriginal interpreters.

In 1992 the Commonwealth HRSCATSIA reported an almost complete lack of Aboriginal and Torres Strait Islander interpreter services (HRSCATSIA 1992, pp. 56–57). In January 1995, NAATI testing was available in only three Aboriginal languages (Eastern Arrernte, Pitjantjatjara and Warlpiri), all from Central Australia (Law Society of New South Wales 1995, p. 26). According to Cooke, six Northern Territory languages (including Kriol) have 32 NAATI accredited interpreters; the remaining 15 have none.

Most interpreting services are focused in metropolitan areas, and are provided through the Translating and Interpreting Service within the Commonwealth Department of Immigration and Ethnic Affairs (*Interpreters Report* 1991, p. 25). The CJC understands that the Translating and Interpreting Service has no indigenous language interpreters in Queensland. The service refers requests for indigenous language interpreters to ATSIC, although ATSIC has no interpreter service.

At present, there are no legally set standards for the qualification of interpreters in legal proceedings. Where available, those accredited as NAATI Interpreter (previously NAATI Level 3) are sometimes preferred, although often anyone claiming or appearing to have the ability to communicate with a witness may be accepted. In many cases there is no alternative to accepting interpreters who do not have the requisite skills.

The result, as Justice Mildren has noted, is that the standard of interpreters presently available in the court system 'ranges from excellent to rather poor, with many Aboriginal interpreters at the lower end of the scale' (1996, p. 23). The situation is exacerbated by the fact that the majority of traditional Aboriginal languages are spoken by only small populations in remote areas (in some cases by only two or three hundred people).

In such cases, it is practically impossible to insist on any formal standards whatsoever. Problems arise even in the case of a language like Wik Mungkan which is still relatively strong by comparison with so many other indigenous languages (Schmidt 1990, pp. 3–4). Officers of the CJC were told of the case of an accused person from Aurukun being tried in Cairns where an interpreter was required. A request from the prosecution in Cairns was made to the officer in charge of Aurukun police who then had to select an interpreter from the community who had sufficient language competence and knowledge of the legal system (both measured extremely informally).

In Queensland, the ongoing Court House Interpreter Project (CHIP) is an attempt to ascertain levels of usage of, and demand, for interpreters in Queensland courts. The Bureau of Ethnic Affairs and the Courts Division of the Department of Justice have been working jointly on CHIP since October 1995.[34] This is a six-month pilot project at the Inala and Southport courts designed to identify the interpreting needs of individuals dealing with, and matters heard before, the courts. This project focuses not just on defendants and witnesses in court, but also on those people dealing with registry staff.

Final data from CHIP were not available at the time of writing, but initial indications are that the demand for qualified interpreters of indigenous languages 'far outstrips supply'.

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[34] Based on information supplied by the Courts Division of the Department of Justice.

SHOULD A WITNESS HAVE A LEGISLATED RIGHT TO AN INTERPRETER?

As indicated, there is no common law or statutory right in Queensland for a witness to have an interpreter. Several persons interviewed for the project drew attention to this fact and expressed the view that interpreters should be more widely used. Similar arguments were advanced in several written submissions.

Kirby P (as he then was), of the New South Wales Court of Appeal, has suggested that the principles expressed in the *Dairy Farmers Case* should be liberalised in light of the multicultural nature of Australian society: for example, by giving persons from a non-English speaking background a right to an interpreter (*Adamopoulos v. Olympic Airways SA* (1991) 25 NSWLR 75 at 77–78; see also *Gradidge v. Grace Bros Pty Ltd* (1988) 93 FLR 414 at 420–422; and *Cucu v. District Court of New South Wales* (1994) 73 A Crim R 240 at 243–244).[35]

The ALRC considered that under the existing common law rules there was a reluctance to allow interpreters which 'adversely affects the fact-finding process and is unfair to the parties and witnesses' (ALRC 1985, vol. 1, p. 339). For that reason the ALRC recommended that a witness should have a statutory right to an interpreter unless the court orders otherwise.[36]

There have been many other recommendations that an entitlement to an interpreter should be legislated, either for defendants or more generally for witnesses.[37] Legislation has been passed in Victoria, South Australia, the Australian Capital Territory, New South Wales and the Commonwealth.[38] The provisions of those jurisdictions are compared in Appendix 5.

Section 30 of the *Evidence Act 1995* (Cwlth) and the *Evidence Act 1995* (NSW), which are based on recommendations of the ALRC (1987), permit a witness to 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.

The effect of this provision is to reverse the common law presumption that a witness is not entitled to an interpreter unless the need is established (ALRC 1992, p. 46). The wording of section 30 also allows for flexibility for witnesses with a limited command of English, as the entitlement refers not to the witness's evidence in its entirety, but only to evidence about a particular fact (Attorney-General's Department 1995a, p. 35). The judge or magistrate retains control in that he or she can intervene at any time to stop the use of the interpreter if concerned that a witness is abusing the entitlement (ALRC 1987, p. 339).

These legislative provisions are relatively new, but the CJC is not aware of any evidence that they have caused any difficulties in practice.

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35 However, Samuels JA (at 426) and Clarke JA (at 427) in *Gradidge v. Grace Bros Pty Ltd* and Sheller JA in *Cucu v. District Court of New South Wales* (at 250) were at pains not to call into question the authority of the *Dairy Farmers Case*.

36 See ALRC 1985, vol. 1, pp. 146, 339; vol. 2, p. 27; 1987, p. 62; 1992, p. 48.

37 *Interpreters Report 1991*, pp. 64–66; Law Reform Commission of Canada 1991, pp. 32–33; RCIADIC 1991, vol. 3, p. 79; HRSCATSIA 1994, pp. 21, 240; ATJAC 1994, pp. 53, 56.

38 The legislation in Victoria and South Australia has been criticised by the *Interpreters Report* (1991, p. 65) and by Laster and Taylor (1994, pp. 88, 96–99) on the basis that the onus remains on the witness, in effect, to show that he or she does not have a sufficient knowledge of the English language to understand, or participate in, the proceedings. The Australian Capital Territory provision is similarly restricted. In addition, the Victorian legislation only applies to defendants or parties, rather than to all witnesses.

In view of the difficulties experienced by speakers of Aboriginal English, and the general attitude towards interpreters, the CJC considers that a provision similar to the *Evidence Act 1995* (Cwlth) section 30 should be adopted in Queensland.

The CJC believes that the arguments in relation to Aboriginal witnesses apply with equal force in cases of non-Aboriginal witnesses who have some competence in English, the level of which is inadequate in the courtroom setting. Accordingly, Recommendations 5.1 and 5.2 are framed in general terms.

What role should be played by the interpreter, how the need for an interpreter should be assessed and the issue of who should pay are considered later in this chapter.

5.1 Recommendation – Witness's Right to an Interpreter to Have Statutory Recognition

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

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.

THE ROLE OF THE INTERPRETER

CONDUIT VERSUS FACILITATOR

The role of interpreters has been the subject of considerable legal and linguistic debate (Brennan 1979, pp. 22–25; Cooke 1995b and 1996; Crouch 1985, pp. 690–691; Goldflam 1995, pp. 43–49; Laster & Taylor 1994, pp. 111–130, 1995; Mildren 1996, p. 24; Roberts-Smith 1989). This debate has focused on whether the interpreter should act as a mere "conduit", faithfully translating word by word and no more, or as a "communication facilitator".

The conduit analogy for the role of the interpreter in Australia has its origins in the judgments of members of the High Court in *Gaio v. The Queen* (1960) 104 CLR 419.[39]

The opposing view is that the interpreter should not, and cannot, be seen as a mere conduit (see McTiernan J (dissenting) in *Gaio v. The Queen* at 422), but that the interpreter is a facilitator of communication. This necessarily implies a wider role than the conduit analogy allows. Goldflam (1995, pp. 43–44) exemplifies the "facilitator" view:

[39] Per Fullagar J at 428–429, Kitto J at 430–431 and Menzies J at 432–433.

> [One] set of linguistic issues concerns the language of the legal system, and the difficulties faced by Aboriginal interpreters in faithfully and intelligibly rendering it for their Aboriginal clients . . . But in addition to these challenges Aboriginal interpreters are faced with another, more fundamental difficulty. Not only are the words used in court unusual and strange but virtually all the concepts they express – and indeed the entire legal setting – are alien to traditional Aboriginal society, and therefore extremely difficult to express in its languages.
>
> Interpreters are caught in an unenviable position here: if they try to explain the meaning of a particular key concept such as "indictable offence" or even such a seemingly innocent term as "intend", they will disrupt the flow of proceedings and quite possibly be suspected by the court or police of indulging in unauthorised conversation with the client. If, on the other hand, they gloss the concept with a "shorthand" interpretation, there is a very real risk that the client will not have understood what was meant at all.

Laster and Taylor (1994, pp. 117–118) note:

> Accepting the proposition that language cannot be divorced from its cultural context does not mean that clear, accurate legal interpreting is not possible. Functional equivalents can be found for legal English and the non-legal lexicon used in legal settings . . . Even when legal interpreters appear to be (and are) competent, they do not interpret "literally", but continually make discretionary choices about which is the best, or closest, equivalent.

Cooke argues that lawyers who would confine interpreters to a literal interpretation of the spoken word reveal 'a disappointing, but nevertheless typical, naive and facile understanding of the nature of interpreting' (1995b, p. 108).

WHAT ROLE FOR INTERPRETERS OF ABORIGINAL ENGLISH?

As discussed earlier, the majority of Aboriginal people in Queensland are speakers of Aboriginal English. There is a continuum of varieties of Aboriginal English, ranging from light to heavy (Eades 1992, p. 21; compare Cooke 1995c, pp. 12–13). Many of the grammatical differences which distinguish Aboriginal English from Standard English (and often lead to misunderstanding) are either lost on the monolingual Standard English speaker, or are mistakenly attributed to inferior language knowledge. This is why Aboriginal English poses, in many ways, greater difficulties for judicial officers and lawyers in distinguishing speakers of Aboriginal English, or in recognising the potential for misunderstanding. As Dr Eades pointed out in an interview for this project, the real difficulty appears when people in apparently mutually intelligible conversation unknowingly misunderstand each other.

Cooke has made a case study of the 1990 Elcho Island coronial inquest in the Northern Territory (see Chapter 2) to illustrate a number of points about cross-cultural communication in the courtroom (see Cooke 1991, 1993, 1995a, 1995b, 1995d and 1996). Cooke acted as interpreter for a number of witnesses and also explained the general nature of proceedings to the community. Most of the witnesses were competent to some degree in English.

In analysing the transcripts of the proceedings, Cooke demonstrates the potential for misunderstanding if the interpreter is confined to the conduit model of interpreting. In one instance a witness was confused by grammatical differences between the witness's native language, Djambarrpuyngu, and English:

> COUNSEL: So, at the time when that man was shot, that is after he was shot, were you then worried that maybe that spirit might attach itself to you?---Yes.
>
> And was it important that you not go too close to that dead man after he was shot because that spirit might get stronger onto you?---

> INTERPRETER: I think you should make it clear whether you are talking about before he died or after he died, because he's shot and then there's a period where he was still alive.
>
> COUNSEL: Yes, I am talking about after he was shot, but before he passed away. In that time?---Yeah, after when he passed away . . .
>
> No, before he passed away?---
>
> INTERPRETER: He got shot. He lied there. He is still alive. That time.---At that time, I was still hoping and praying for his life. (Cooke 1993, pp. 3–4)

The excerpt shows that the interpreter was aware of the potential for the witness to misunderstand the question as shooting can mean killing as well as wounding. The interpreter was also aware that the witness would be confused by the barrister's question because the phrase 'at that time' did not specifically refer to the time prior to the death of the deceased. Although the barrister clarified with the clause, 'but before he passed away', the interpreter was aware that this phrase matched a word pattern which had the opposite meaning in the witness's own language. To deal with the ambiguity Cooke used the Djambarrpuyngu method of specifying time by following the sequence of events. The entire exchange was conducted in English and shows the interpreter successfully assisting the barrister and witness in a way that is outside the strictly literal mode of interpretation.

Several people interviewed for this project indicated that this kind of language facilitation does not take place at present in Queensland, and argued for similar flexibility in conceptions of the role of the legal interpreter:

> Interpreting has to be understood as a "whole-of-culture" exercise, one cannot merely translate the words. For this reason, dealing with cultures like Aboriginal ones, where the cultural differences are so great, one cannot expect a one-word answer in English to translate as one word. (Land Tribunal member)
>
> If interpreters were to be provided in the court they would have to interpret both language and culture and there would have to be male and female interpreters available to take into account the gender of the person appearing in court. It would also be useful to have a community elder from the community the defendant or witnesses are from to assist. (Academics, James Cook University)

The Legal Aid Office, in its submission, said:

> It is submitted that it would be useful if interpreters could be used in court when Aboriginal witnesses are called to give their evidence. This would really require a change in the way that interpreters are used by the court. What is needed it is submitted, are not interpreters in the traditional sense but intermediaries who are there to help the Aboriginal witness understand the question by breaking it down in a way which is more easily understood by them.
>
> The intermediary would then be able to interpret the answers which may involve explaining to a jury why a comment like, 'I robbed him gammin' in fact means that I didn't rob him.

A barrister with significant experience in dealing with Aboriginal witnesses in various forums said that he had encountered many Aboriginal witnesses and defendants who have a sufficiently developed English language competence to understand what is being said, but miss many of the nuances of Standard English. An example he gave to illustrate this point was:

> How long were you at the shop?---Ran in there, bought two smokes, talked to Grandma and ran off.
>
> How long were you in the shop then?---Oh, you know, about two minutes.

The barrister indicated that this meant to an Aboriginal listener that the witness went (not necessarily at speed) into the shop, looked around a while, selected some cigarettes, saw his grandmother and (knowing it to be very rude not to speak to one's grandmother wherever met for at least ten minutes), chatted to her for some time, paid for the cigarettes, went outside, jumped in the back of the ute and drove off (again not necessarily at speed). Without that explanation a non-Aboriginal tribunal of fact may wrongly infer (a.) that the witness was in a hurry (throughout or at least on departure) and (b.) that only 120 seconds elapsed between the witness's arrival and departure.

The CJC's research has not located any cases in Queensland where Aboriginal English was raised in court as a language or dialect requiring an interpreter. But it is clear that serious misunderstanding may result if the explanations and clarifications that an interpreter could provide are not available. As Eades has pointed out (1995b, p. 1):

> the interpreting needs which are relevant to communication between speakers of Aboriginal English and speakers of other kinds of English do not have the same overwhelming urgency as in situations in which the Aboriginal and non-Aboriginal parties involved have no shared language . . . But when we turn our attention to Aboriginal English speakers, it is clear that there are a number of ways in which their right to natural justice is denied because of the kinds of misunderstandings which occur between many speakers of Aboriginal English and many non-Aborigines involved in the legal system.

There are heavier varieties of Aboriginal English whose speakers may require almost continuous interpreting to understand and be understood in proceedings. In addition, there are (probably many more) cases in which speakers of Aboriginal English can understand and be understood without continuous interpreting, but where the occasional assistance of an interpreter may be necessary to avoid misunderstanding.

Where an Aboriginal witness is giving evidence in a variety of English that is, on the whole, intelligible to speakers of Standard English, the interpreter should be present and available to speak when asked for assistance by the court, counsel or the witness, or when the interpreter detects a misunderstanding between participants. The workability of this kind of role for an interpreter is exemplified by Michael Cooke in the Elcho Island coronial inquest. An interpreter acting in this way, rather than in the accustomed continuous way, would be far less intrusive in proceedings.

An important component of communication is non-verbal behaviour (Laster & Taylor 1994, p. 115). As discussed in Chapter 2, an Aboriginal witness's use of silence or avoidance of eye contact may be misunderstood by those involved in the court process. There is disagreement amongst commentators about whether an interpreter should draw those broader issues to the court's attention, where he or she becomes aware that there is otherwise a danger of misinterpretation of a witness's evidence. For example, the *Interpreters Report* refers to a suggestion that it should be the interpreter's job to 'act as cultural expert, acquainting the court with cultural practices of conventions of non-verbal communication of the witness's country of origin' (1991, p. 88).

The authors of the *Interpreters Report* doubted that approach and expressed the view that the interpreter's role should not be extended to providing information about particular practices, since '[s]etting up interpreters as cultural experts, interpreting behaviour as well as words can lead to stereotyping as well as inaccuracy' (1991, p. 88). Laster and Taylor (1994, pp. 122–123) note that it is unrealistic to expect that judges and lawyers would have access to authoritative advice from an independent expert about cultural norms in the witness's community, particularly in summary proceedings. Laster and Taylor argue that if some cultural information is required 'it would be more honest to acknowledge that the request will be made of an interpreter, and where the interpreter accedes to this, to swear him or her as [an] expert witness' (p. 123). Alternatively, Eades suggests that when Aboriginal English-speaking witnesses are involved, a 'cross-cultural advisor to the court' may be more effective than an interpreter (1995b, p. 12).

The CJC does not recommend statutory specification of the role which interpreters should play. It is clear that confinement to a conduit model of interpreting is often unduly restrictive, given the kinds of misunderstandings which can occur when speakers of Aboriginal English are giving evidence. However, courts and legal personnel should recognise that the interpreter's role is to ensure full understanding of the matter at issue, as outlined above. That role may include clarification of questions put to a witness and explanations that go beyond literal translation. The broader conception of an interpreter's role is also relevant to speakers of English as a second language who come from outside Australia.

Measures to improve cross-cultural awareness amongst lawyers and judicial officers, as recommended in Chapter 3, and training in the use of interpreters, as discussed below, will assist the courts to identify situations which warrant a more flexible role for interpreters.

HOW SHOULD THE NEED FOR AN INTERPRETER BE ASSESSED?

As noted above, courts have little guidance in assessing the need for an interpreter for a witness. This section considers whether there is a more appropriate method of assessing that need.

Dr John Gibbons, an academic linguist, wrote in his submission to the review for the *Interpreters Report* (1991, p. 49):

> People who have obtained the basic skills level may be fluent and it is often assumed that they have a native like command of the language. It is most unlikely that a person not trained in language assessment could determine whether the English of a non-native speaker is adequate for legal uses. Both comprehension and adequate expression are necessary. Whilst most non-native speakers may approximate the meaning they wish to express, this is obviously inadequate for legal purposes. Without an interpreter they are deprived of the opportunity to communicate their evidence with exactness, and to adequately put their side of a case.

The danger of superficial assessments was recognised in *Jabarula v. Svikart* (1984) 11 A Crim R 131 at 137 where Muirhead J said, in reference to a police caution:

> There is a tendency in all of us to assume that as we may understand a person who is talking in his second language in a simple conversation in English, his understanding of our conversation is reciprocal. That is not so when the conversation involves rights or principles which are pretty confusing, such as an explanation of a right to silence followed by questioning of an offence and references to telling it all to a judge. It involves competing pressures and odd logic to the mind of many an Aboriginal person in custody – hence the very real need of painstaking care to ensure each phrase of the caution is truly comprehended. And it is for this reason that the use of an interpreter may be so essential.

In its submission to the CJC, NAATI recommended measures to ensure:

> identification by the court of situations in which it is appropriate to engage the services of an interpreter, i.e. when there is any real risk of a lack of full understanding by either the court or the witness. This risk is often greatest when the witness can speak some English. The tendency, inevitably, is to assume a greater degree of understanding than actually exists. Much will also depend on the circumstances, the nature of the occasion and the significance of the particular matter. In cases of doubt it is always advisable to use a competent and accredited interpreter.

The Australian Second Language Proficiency Rating scale may provide some assistance for courts in this regard. The scale, which comes in a number of forms, has been devised to assess a person's English language proficiency (Wylie & Ingram 1995a). The most rudimentary version is intended for use by people with little experience in language proficiency assessment and includes a variety of self-assessment forms (Wylie & Ingram 1995b). The scale has been used a great deal to assess Aboriginal English

speakers' proficiency in Standard English, particularly in the Northern Territory, although it has not been validated by research for people whose first language is a dialect of English rather than a distinct language.

One of the scale's authors, Professor Ingram, advised the CJC that checklist-style guidelines could be developed for use by judicial officers in everyday cases. These guidelines would be most effective if accompanied by training.

The CJC is conscious that busy judicial officers cannot be expected to develop a high degree of expertise in determining a witness's English language proficiency. However some improvement could be brought about by means of the measures recommended in Chapter 3 and that discussed above.[40] The proposed judicial cross-cultural awareness resource kit, and training for lawyers, could include components relating to the use of interpreters in general, and to language competence assessment in particular. This material would be best prepared by an organisation like the Centre for Applied Linguistics and Languages (which has expertise in language proficiency assessment) and the Bureau of Ethnic Affairs (which has expertise in working with interpreters in court).

5.3 Recommendation – Information about Assessment of Language Needs

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.

WHO SHOULD PAY FOR THE INTERPRETER?

The CJC is aware that its various recommendations in relation to interpreters may have significant resource implications.

In practice, in criminal trials in Queensland the prosecution pays for the costs of interpreters for witnesses, although the defence may arrange an interpreter for defence witnesses. The ODPP has expressed concern about the present arrangement because, where the interpreter is for the defendant or a defence witness, there is a potential conflict for the interpreter between interest (in getting paid by the ODPP) and duty (faithfully to interpret the evidence no matter how favourably to the defendant). According to the ODPP, the issue has been debated between the Office and the courts, but the latter simply have no budgetary allocation for interpreters' fees.

In the CJC's assessment, the Government should pay for the cost of interpreters for prosecution and defence witnesses, and defendants, in criminal proceedings. A person's entitlement to an interpreter should not depend on his or her ability to pay. To avoid putting interpreters in a position of possible conflict of interest and duty, the payment should be made through the Department of Justice (but not the ODPP), or alternatively through the Sheriff's Office.

The CJC considered the possibility of limiting the scope of these recommendations to apply only in the Supreme and District Courts. However, the right to an interpreter is fundamental, and should be implemented in all

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[40] Another initiative that may assist in the assessment of whether a person needs the assistance of an interpreter is the "Interpreter Card", which can be used in dealings with all government agencies. The card notifies monolingual English service providers of the bearer's need for an interpreter. The card is distributed mostly through community support groups, but also from some government agencies (but not courthouses) and is targeted at migrant groups and indigenous communities.

courts. Most Aboriginal people who come into contact with the court system appear in the Magistrates Courts, whose jurisdiction is quite extensive. The matters determined in those courts are sufficiently important to require that a defendant or witness understand and be understood in any court proceeding.

5.4 Recommendation – Cost of Interpreter

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.

TRAINING AND QUALIFICATIONS

An entitlement to an interpreter will be of no assistance to a witness or the court unless the interpreter is able to interpret competently. Historically, the strategies aimed at achieving a satisfactory standard of interpreting have concentrated on training and qualifications (which have been a matter for courts in individual cases) and schemes of accreditation and registration. Neither strategy has enjoyed any sustained support from governments. The result is that the interpreting profession is underdeveloped in Australia, and the use of interpreters in courts also lacks uniformity. Consequently, skilled practitioners often end up seeking employment in more rewarding fields such as commerce (Laster & Taylor 1994, p. 22).

The *Interpreters Report* contains a list of attributes of an effective interpreter (1991, p. 82). Additionally, Laster and Taylor (1994, pp. 26–27) list various requirements for interpreting in legal contexts. Three of those requirements are of particular importance, and are complementary to those required for interpreting in an every day situation. They are: a comprehensive knowledge about the legal system and features of civil and criminal law; command of legal terminology and its functional equivalent in the target languages; and a thorough understanding of the roles of lawyers, judicial officers and prosecutors.

The ALRC, in its report on evidence, encouraged the concept of training schemes and accreditation systems for interpreters, but indicated that it preferred flexibility in the choice of interpreter and that formal qualifications of interpreters should not be required (1987, p. 62). The report noted that it would be enormously difficult to provide interpreters for Aboriginal people if formal requirements had to be satisfied. Laster and Taylor (1994, p. 37) also point out that insistence on high standards does little to ensure equitable provision of interpreter services. In the case of Aboriginal languages (including Aboriginal English) rigid requirements may mean no interpreter at all.

These concerns were confirmed by many people who spoke to the CJC. Some Aboriginal groups expressed the view that the criteria for professional interpreters represent a white person's view of language competence, and that the disadvantages that Aboriginal people suffer in relation to access to educational opportunities excluded competent language speakers from becoming interpreters.

The CJC understands those arguments. On the other hand, it is highly desirable that an interpreter in legal proceedings has not only a knowledge of the witness's language and culture, but also of the functions, language and culture of the legal system.

As a matter of practicality, however, it would be unrealistic to insist on qualified interpreters in all cases (at least until more Aboriginal interpreters are trained). The following recommendation therefore sets a high benchmark, but allows for situations where that standard cannot practically be met. Where a qualified interpreter is not available, the local Aboriginal community should be aware of individuals who are best able to interpret, and of individuals who may, because of customary law considerations, be unable to act as interpreters. The court or legal representatives should therefore approach Aboriginal community representatives in these situations. For example, in remote communities, the local community council or community justice group should be able to assist.

5.5 Recommendation – Qualification of Interpreters

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.

TRAINING

If the ideal of professionally trained interpreters is to be realised, there will need to be a major increase in training efforts.

NAATI has informed the CJC that, within Queensland, there are 13 persons accredited at Paraprofessional level (former Level 2). Nine of these are qualified in Kala Lagaw Ya (Western Torres Strait language), one in Wik Mungkan, and two in Torres Strait Creole. The latter two were trained by the Southbank Institute of TAFE in Brisbane in a one-off course in 1994. However, it appears that neither of those persons has since been able to obtain employment as an interpreter. This illustrates the need for a coordinated approach by government to the training and employment of interpreters, whether in the legal system or elsewhere.

RCIADIC Recommendation 100 called for governments to 'take more positive steps to recruit and train Aboriginal people' as interpreters in areas where significant numbers of Aboriginal people appear in court (1991, vol. 3, p. 80). The CJC believes that the Queensland Government should increase the resources available for the training of interpreters of Aboriginal languages (including Aboriginal English and Torres Strait Creole). In doing so, the Government should rely not only on the expertise of established agencies such as the Bureau of Ethnic Affairs and the CHIP working party, but should also negotiate with Aboriginal organisations such as the Aboriginal Justice Advisory Committee in the development of training programs. Such programs will only work if Aboriginal people support and participate in them.

Even these measures will take time to have an effect. According to Michael Cooke of Batchelor College in the Northern Territory, Aboriginal people who already have the basic prerequisites for interpreting (biculturally competent and bilingual) usually have another job or some other obligation, and are reluctant to attend a 12 month interpreter training course. Cooke expressed the view that, in the short term, condensed courses of about two weeks' duration on the ethics of interpreting and criminal law and practice are a good way of encouraging bilingual people to train as interpreters of indigenous languages. These short courses would enable such people to continue their existing employment, and to be qualified to interpret on a freelance basis. Cooke has developed a pilot course on this basis to be run in the Northern Territory later in 1996. Such courses should also be instituted on a trial basis in Queensland.

5.6 Recommendation – Training of Interpreters

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.

TRAINING OF LAWYERS IN WORKING WITH INTERPRETERS

A number of submissions pointed to a lack of understanding on the part of lawyers of the role of an interpreter and how to work with an interpreter correctly. If the work of interpreters is to be encouraged and extended as suggested elsewhere in this chapter, the negative attitudes of many lawyers towards interpreters also need to change.

Justice Mildren (1996, p. 24) has addressed the special difficulties of interpreting Aboriginal languages and the need for training of lawyers:

> Lawyers are familiar with the experience of seeing an interpreter having a conversation with the witness before providing an interpretation of the witness's answer. Not infrequently this results in the interpreter being asked to "interpret" *everything* the witness says, and not just some part of it. Lawyers need to be aware that interpreters are not mere translators, and somehow the interpreter must convey not only the words spoken but the meaning intended. With Aboriginal languages this can cause special difficulties, because there may be inherent difficulties in conveying into an Aboriginal language the idea of the question being put, as well as the answer into English . . . Inexperienced lawyers (and judges) often do not appreciate the difficulties and respond inappropriately when they are kept in the dark. There is a need for more training by members of the legal profession in the problems of interpreters. [original emphasis]

The Law Society of New South Wales, after consultation with relevant community groups, has developed a 'Guide to Best Practice' for lawyers and interpreters working in a legal environment. The stated aims of this guide include assisting lawyers to obtain accurate instructions and enabling them to maximise the assistance they could provide to courts and tribunals (1995, p. 3). Much of the material in that document is of general application and could be used in Queensland.

Issues involving the use of interpreters have not, to date, been addressed in the continuing legal education activities of the Queensland Law Society[41] and the Bar Association of Queensland: the professional bodies representing, respectively, solicitors and barristers in Queensland. The CJC believes that those bodies should encourage an awareness of the issues discussed in this chapter by providing material (possibly based on the Law Society of New South Wales' publication) to members whose work is likely to bring them into contact with Aboriginal people or to other interested members.

In addition, there are some general training courses on working with interpreters which are available in Brisbane through the Bureau of Ethnic Affairs. In order to develop a focus on indigenous issues, the Bureau could draw on the expertise of community agencies such as the Aboriginal Justice Advisory Committee and the Language Services Forum's indigenous languages sub-group.

It was reported that some lawyers (including some from the Legal Aid Office) have attended the Bureau's regular free half-day workshops. In addition, the Bureau made a presentation at the 1995 Magistrates' Conference about working with interpreters. A training package that covers working with interpreters has also been developed by the South Brisbane Immigration and Community Legal Service.

Lawyers who will be working with Aboriginal people who may require interpreters in court should participate in the Bureau of Ethnic Affairs training workshop, or similar training. Those lawyers should include officers of the ODPP, the Legal Aid Office and Aboriginal Legal Services, together with any private practitioners engaged by those agencies for cases involving Aboriginal witnesses.

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[41] The CJC acknowledges the contribution which the publication by the Queensland Law Society's Continuing Legal Education Department of Eades' work (1992) has made to improving lawyers' understanding of Aboriginal language and culture.

5.7 Recommendation – Material about Working with Interpreters

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.

5.8 Recommendation – Content of Training about Working with Interpreters

The CJC recommends that the training workshops for lawyers about working with interpreters conducted by the Bureau of Ethnic Affairs should:

(a) particularly address ways of identifying individuals who may require the assistance of an interpreter, 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

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.

CONCLUSION

This chapter has examined a number of questions surrounding the need for interpreters in court to assist Aboriginal witnesses to understand questions put to them and to assist the court in intrepreting the witnesses' answers. Availability of an interpreter is crucial for Aboriginal people who speak a traditional language or Torres Strait Creole as their first language. There may also be a need for an interpreter where a witness speaks Aboriginal English.

Proposed initiatives include:

- A legislated right to an interpreter for witnesses specifying that an interpreter should be provided 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 a fact. The courts should recognise that in cases where full continuous interpretation is not necessary, witnesses may nevertheless need the assistance of an interpreter to understand questions or communicate their answers properly, and that the proper discharge of the duty of an interpreter may require the interpreter to give explanations that go beyond literal interpretation.

- Provision of information and training to lawyers and judicial officers about language assessment and working with interpreters.

- Payment by the State of the cost of interpreters for prosecution and defence witnesses, and defendants, in criminal proceedings.

- A set standard for interpreters in legal proceedings (NAATI Interpreter level) with recognition that, for the time being, where no qualified interpreter is available to assist a person who is entitled to an interpreter in court, a member of the witness's community may provide some interpreting assistance.

- Increased training of interpreters of Aboriginal languages (including Aboriginal English and Torres Strait Creole) in legal proceedings, and provision of a condensed short course designed for people who already have bicultural competence and are bilingual, and who may be interested in interpreting in court, to give them particular skills as legal interpreters.

CHAPTER 6
THE COURT ENVIRONMENT

INTRODUCTION

Previous chapters have addressed ways in which the evidence of Aboriginal people can be better received and understood in court. This chapter focuses on the physical and procedural environment of the court, and proposes ways of making the court process less intimidating for Aboriginal witnesses.

Many people consulted for this report indicated that feelings of intimidation, isolation, fear and disorientation are common among Aboriginal people who give evidence in our courts. Those feelings are not restricted to Aboriginal people, nor are they experienced by all Aboriginal people. However, the CJC is satisfied that feelings of alienation are sufficiently widespread among Aboriginal people to justify measures to make courts more familiar and less intimidating. Such measures are required in order that Aboriginal witnesses may be on as equal a footing as possible with other witnesses.

This chapter looks at ways of addressing Aboriginal people's feelings of alienation in court, both in terms of physical surroundings and general familiarisation with court procedure. Issues considered are:

- should the physical environment of the courtroom be made less formal?
- what other measures should be taken to ensure that Aboriginal witnesses are better familiarised with the court environment and its procedures before the event?
- can special witnesses legislation be used, and should it be amended?

SHOULD COURT SURROUNDINGS BE MADE LESS FORMAL?

Many people consulted considered that Aboriginal witnesses feel intimidated in formal court proceedings:

> When a Murri goes to court, they are faced with taking an oath from a white bailiff, the court reporter is white, the Judge is white, there are twelve white faces staring at the witness, defence and prosecutors are white. (Aboriginal councillor)

> The Aboriginal community felt very uncomfortable at the CJC Yock Inquiry and they asked Lew Wyvill to take evidence at Musgrave Park or Murri Mura . . . If it was under a gum tree, so be it. (Department of Family and Community Services workers)

Some barristers expressed the view that the whole idea of the adversarial system is to make people uncomfortable. They believed that courts should be attended with "pomp and ceremony", so as to remind participants of the solemnity of proceedings and the importance of telling the truth. According to this argument, if the witness's story holds up in the intimidating atmosphere of the courtroom, then it is more likely to be true. A lawyer gave the example of a case where he believed the trappings of proceedings had brought out the truth in a witness:

> A young Aborigine was accused of rape and the evidence was "line-ball". His mother's evidence was crucial. She gave a reasonably cogent statement (to the defence). Her evidence-in-chief was 180 degrees different. It was not as though she was "bamboozled". What if the "bleeding hearts" had their way and the statement had gone in as evidence-in-chief under section 93[A]? This proves the point made earlier: she was lying to the defence solicitor, but the pomp and ceremony just brought out the truth. It illustrates that when we spend time making them comfortable, these problems still emerge.

It is open to question whether the pomp and ceremony of the courtroom was the reason for the witness's change of evidence in that case. However, the example illustrates that perceptions about the positive effect of courtroom ceremony exist in some quarters.

The CJC accepts that some cultures may find ceremony and ritual appropriate in legal proceedings. One person who was consulted argued from his experience on Thursday Island that, in Torres Strait Island culture, ceremony and ritual are important elements, and that Islanders therefore relate well to these aspects of the Anglo-Australian legal system. Another judge who served in a Pacific Island nation said that when he first inquired whether he should remove his wig and gown, he was specifically asked not to, for the same reason. The more pervasive effects of Christian missions in Torres Strait culture perhaps may have resulted in aspects of Anglo-Australian culture being more relevant there than in Aboriginal cultures (Harper, forthcoming, pp. 1, 4, 10–11). What must be borne in mind, however, is that the ceremony and ritual that attend Anglo-Australian legal proceedings are a product of a particular culture, and may not be appropriate or meaningful to all cultures. Similarly the assumption that a particular type of courtroom environment will bring out the truth may not hold for witnesses from other cultures.

Several people consulted believed that the way to lessen the sense of intimidation experienced by many Aboriginal people was to make the proceedings and the surroundings of the court less formal. Suggestions included that:

- trial courts in regional centres should travel on circuit to remote communities
- courts should not be located in or near the police station, especially on remote communities
- courts should consider moving to venues where particular witnesses would feel more comfortable
- courtroom architecture should be made more "user-friendly"
- judicial officers and barristers should not wear wigs and robes.

These various proposals are examined in more detail below.

TRIAL COURT CIRCUITS TO REMOTE COMMUNITIES

A large majority of discrete Aboriginal communities are within the Court Districts of Cairns and Mt Isa. The Aboriginal Co-ordinating Council is the peak body for discrete Aboriginal communities. It has 14 members and eight affiliates (Aboriginal Co-ordination Council 1995, pp. 7–9). Eleven of the 14 members, and all of the affiliates, represent areas in the Cairns and Mt Isa Supreme Court districts (and the Cairns, Mt Isa and Cloncurry District Court districts). However, of those areas, only Yarrabah is within 100 km by road of the relevant court centre. Most of the areas are accessible to court centres only by air or (in the dry season) by a very long and inconvenient road journey. Travel for defendants and witnesses from those communities to trial court centres can be very arduous and expensive. For those who rarely leave their home community, an appearance in court in a distant and unfamiliar city can be even more intimidating than the usual court experience.

Many people interviewed believed that there would be benefits if District Courts, which presently sit in large regional centres like Mt Isa and Cairns, travelled on circuit to remote Aboriginal communities. It was argued that jury trials in remote Aboriginal communities also would enable defendants to be judged (and witnesses to be assessed) in their own communities.

A circuit to one or two communities, to which members of other communities could travel, is a possibility. District Court judges from Cairns already travel to Weipa and Thursday Island from time to time for sentences and mentions. The President of the Childrens Court, Judge McGuire, has also sat in that capacity at Aurukun (Queensland Childrens Court 1994, pp. 156–159). Many submissions and interviewees referred to these visits favourably and suggested that they could be expanded for jury trial purposes. In fact, one judge forecast that jury trials at Thursday Island are inevitable.

However there are problems with the proposal that regular circuits be undertaken: economically, the court could not justify very frequent visits having regard to the numbers of cases arising. This would mean delays for at least some defendants. Tharpuntoo Legal Service (which effectively has exclusive coverage of all Cape York Peninsula Aboriginal communities) told the CJC that there were only 18 jury trials involving its clients during 1995. The community from which the greatest number came accounted for seven trials. Clearly the cost of attending each community for such low numbers would be difficult to justify, although this cost must be weighed against the cost of transporting witnesses to regional centres for trial.

Other interviewees mentioned the problem of witnesses having to go to other Aboriginal communities for court cases. Travel in remote areas is also expensive and inconvenient. In Cape York Peninsula, most travel arrangements are centred around Cairns, so that it is often easier and more economical to travel to Cairns than to another community that is physically closer.

Given these various practical difficulties, and the fact that the participants in the system in relevant parts of the State are very much aware of the issues, the CJC does not consider it appropriate to make a recommendation in relation to this matter.

LOCATION OF COURTS

The Magistrates Courts on Cape York Peninsula which were observed by officers of the CJC mostly sat in rooms designated for the purpose within the community police station. Two courts sat in rooms in educational institutions. Certainly any of these venues would be more familiar to Aboriginal defendants and witnesses than the Cairns District Court. However, for many people in the community, the police station is approached only when one is in trouble (either as a defendant or complainant). The police station may be extremely intimidating and the court's location there affects the court's appearance of impartiality (HREOC 1995, p. 4). More importantly, in many remote areas, the police station is also the location of the watchhouse, where Aboriginal people have died.

The CJC considers that, particularly in remote communities, courts should consider sitting in more neutral locations. Such measures would communicate the independence of the courts from executive government (and the police in particular) and would assist those required to appear as witnesses to feel more comfortable. More neutral venues would also encourage community observation and understanding of court proceedings. In selecting appropriate alternative locations the views of the community should be taken into account. This could be done by consulting with appropriate groups such as community councils or (where they exist) community justice groups.

Against those considerations is the fact that, from an administrative point of view, the officer in charge of police on most communities is *ex officio* the Clerk of the Court, so court records are stored at the police station. However, there is no reason why such a simple matter as the storage and management of court files could not be worked out between police and community representatives.

The CJC also queries the appropriateness of including purpose built courtrooms in new police stations (as at Aurukun and Mornington Island). It is difficult to justify expenditure on a self-contained courtroom that may be used less than one day every two months. As an alternative, courts could use general community

facilities: a measure that might also improve the court and the community's understanding of and accessibility to each other. If present court facilities are inadequate, any available funding would arguably be better used on improved community facilities than on constructing a purpose built courtroom.

6.1 Recommendation – Location of Courts in Aboriginal Communities

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.

"MOVING" COURTS

One suggestion was that courts move in order to take evidence from certain witnesses. For example, the Legal Aid Office's submission argued that:

> . . . the courts could also consider moving to receive evidence from Aboriginal witnesses in more familiar surroundings. The decision to do so would have to be in the discretion of the court, however, a temporary court could be set up within the community of the witness in much the same way that the court is empowered to adjourn its proceedings to view the scene of a crime.

This idea is not new. For instance, in the Murray Islands land rights litigation, the High Court remitted the finding of facts to the Supreme Court of Queensland. In hearing the matter, Justice Moynihan sat not only in Brisbane, but also in Mer (one of the Murray Islands) and Thursday Island (*Mabo v. Queensland* [1992] 1 Qd R 78 at 82). However, courts exercising everyday criminal jurisdiction could not practically use the methods exemplified in *Mabo* because of the logistical implications. Where unusual cases like *Mabo* do require it, the necessary measures are available.

Some persons interviewed suggested, as a variation, that evidence could be taken from witnesses in remote communities by means of video link, particularly by jury courts sitting in centres such as Cairns. The video link proposal has now been adopted in subordinate legislation. Order 6B, rule 1 of the *Criminal Practice Rules 1900* (inserted in 1995) provides that, in a criminal proceeding, the court, judge or magistrate may decide to receive evidence or submissions by telephone, video link or other means. No criminal case in which this provision has been used has come to the CJC's attention.[42] This may be because of a lack of necessary facilities. However, the giving of evidence by video link may be appropriate in cases involving Aboriginal witnesses from remote communities and warrants further investigation.

COURTROOM ACOUSTICS

Because Aboriginal people are often softly spoken or hearing impaired, courtroom acoustics affect the way their evidence is appreciated.

The CJC believes that the extraordinary prevalence of hearing impairment in Aboriginal people (see Chapter 2) must be taken into account, not just by criminal justice professionals in the court, but also by Government planning and construction agencies in considering the design of new court facilities. The new Cairns court is a good example of a building with high quality acoustics.

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[42] Expert evidence has been given by video link in civil proceedings under other rules of court (Harris 1996, p. 6). The *Courts (Video Link) Amendment Act 1996* also provides for the use of video link facilities by defendants in custody at correctional centres.

6.2 Recommendation – Design of Court Buildings

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.

WIGS AND ROBES

According to many of the Aboriginal people consulted for this project, the wigs and robes worn by judicial officers and barristers contribute to feelings of alienation on the part of Aboriginal witnesses. Many Aboriginal people regard the English legal system and its trappings as foreign and oppressive.

In many Magistrates Courts, magistrates wear a black robe, although in some courts, including those on Cape York Peninsula, magistrates do not robe. Wigs and robes are worn by judges in District Courts and the Trial Division of the Supreme Court. In the Court of Appeal, judges wear robes but not wigs. Barristers appearing in Magistrates Courts do not wear wigs and robes, but do so in the District Court and the Supreme Court. There is a practice on the part of some judges to remove their wigs at times, in which case counsel may also remove their wigs.

The ATJAC, in its wide ranging review of justice issues, considered the use by judges and advocates of wigs and robes in federal courts (ATJAC 1994, pp. 437–442). The Committee discussed a range of arguments for and against the use of special court dress. These were that wigs and gowns:

- are part of court tradition and ceremony
- alert participants to the serious nature of court business (although there is no evidence that they meet that object)
- identify the key players in the court process
- allow advocates and judges to maintain an impersonal façade that 'contribute[s] to a public perception that the law is objective, depersonalised and unbiased' (p. 439), and also contribute to greater security for judges (although security does not appear to be impaired in courts where judicial officers do not wear wigs, such as Magistrates Courts)
- 'symbolise a legal system out of touch with and unsympathetic to the needs of ordinary people' (p. 439).

The Committee considered those arguments at length, and concluded that:

- If the use of wigs and gowns by barristers and judicial officers 'fosters a perception that lawyers (barristers) and judges are remote from the community, parties and witnesses may feel less comfortable in court and less confident that the system will respond to their needs and concerns' (p. 437).
- The use of wigs and gowns by barristers contributes to the perception that advocates who are solicitors, and accordingly their clients, would be treated less favourably by the courts.
- The identity of the various "players" in court is obvious from where they sit and the roles they play. An explanation for witnesses and parties beforehand will clarify the roles of participants better than the dress of advocates.
- It is not 'necessary for the dignity of the court or the acceptance of its decisions that advocates should wear gowns' (p. 441).

The Committee made the following recommendations:

> **19.1** The Commonwealth should take the necessary steps, after appropriate consultation with the judges, to discontinue the wearing of wigs by judges of the Federal Court and the Family Court. Judges in these courts would continue to be robed. The wearing of court dress (if the judges so wish) on ceremonial occasions would continue. (p. 441)
>
> **19.2** The Commonwealth should take the necessary action to discontinue the wearing of wigs and gowns by advocates in federal courts. Whether or not this recommendation is accepted, the dress requirements for advocates should be the same regardless of whether the advocate is a solicitor or barrister. (p. 442)

The CJC has considerable sympathy with the Committee's recommendations and considers that implementation of these recommendations at State level would help lessen the feelings of alienation and intimidation experienced by many Aboriginal witnesses. While some ceremony in court proceedings may be necessary, it is more important that all citizens have access to the courts and are able to understand proceedings in which they are involved. However, the recommendations are broader in their application than the scope of this report and further consultation on this issue may be desired. The CJC therefore recommends only that judicial officers consider not wearing a wig and/or robe when dealing with cases which involve Aboriginal witnesses. Since barristers do not robe in Magistrates Courts, the matter of robing in those courts will be applicable only to the presiding magistrate. In the District and Supreme Courts, the issue of appropriate court dress could be decided by the judge after discussion with counsel prior to proceedings, taking into account the nature of the case, the location of the court and circumstances of the witnesses, such as their level of familiarity with Anglo-Australian culture.

6.3 Recommendation – Judges' and Barristers' Wigs and Robes

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.

FAMILIARISATION WITH THE COURT SETTING AND PROCESS

As indicated earlier, many interviewees reported observing an overwhelming sense of alienation and bewilderment on the part of Aboriginal people appearing in court:

> They tend to be "overawed" by the system. (Magistrate)
>
> The court system is foreign. Aboriginal people in it have to straddle two cultures . . . the adversarial system is a different cultural concept. (Aboriginal Legal Services solicitor)
>
> I was a witness once. The procedures were so restrictive. For example, calling the judge 'Your Honour', standing, people feeling frightened. (Aboriginal council worker)

Suggestions for overcoming these problems included that:

- Aboriginal court liaison officers should be appointed
- lawyers should familiarise their clients' witnesses with the court before proceedings take place
- more Aboriginal people should be employed on the court staff
- Aboriginal community awareness of the courts and their processes should be improved.

COURT LIAISON OFFICERS

A prominent proposal was that the courts employ Aboriginal people in positions of court liaison officer. For example, the Legal Aid Office supported having an Aboriginal officer in the court system to liaise with Aboriginal witnesses who are about to appear in court. The Legal Aid Office stressed the importance of full training so that such officers could properly explain, in terms that the witness can understand, how the system works and what may be expected when they are questioned. The Legal Aid Office argued that this function should not be left to the prosecution as the needs of defence witnesses are as great as those of Crown witnesses.

An Aboriginal group in Logan City made a similar proposal. The group referred to the Aboriginal Police Liaison Officers scheme. The responsibilities of these officers include attendance at the Magistrates Court, where practicable and relevant, when Aboriginal or Torres Strait Islanders are involved as complainants, witnesses or defendants (QPS 1995, p. 3). However, members of the group in Logan City pointed out that Police Liaison Officers' duties usually prevent them from being in court on a regular basis. The group's concern was that Aboriginal people "get lost" between various, apparently disjointed, elements of the criminal justice system. Ironically, some elements (such as police and community corrections) sometimes have liaison officers, but they are unable to liaise in relation to other elements. The group's idea was that Aboriginal liaison officers should work throughout the system, from police to courts, prosecutions, community corrections and prisons.

One model that focuses on court-based functions was the New South Wales court liaison officer pilot project operating at Casino and Lismore.

THE CASINO-LISMORE SCHEME

As part of the research for this project, officers of the CJC visited Casino and Lismore in northern New South Wales where a 12-month pilot program for Aboriginal court liaison officers at the Local Courts (equivalent to Queensland's Magistrates Courts) was established. The main aim of this project was to improve the Aboriginal community's understanding of court processes, and the courts' understanding of Aboriginal people appearing before them. The liaison officers' positions were partly funded by the Commonwealth through the Department of Employment, Education and Training.

Casino and Lismore have significant Aboriginal populations. One liaison officer was appointed in each town. The functions of the officers were to:

- liaise with the local Aboriginal communities
- be a point of contact for Aboriginal people in the court system, whether as witnesses, defendants or more generally
- liaise with, and assist, the Aboriginal Legal Service regarding individual defendants
- liaise with other criminal justice agencies such as the Probation and Parole Service.

Those involved in other criminal justice agencies in Lismore spoke highly of the scheme. In particular, it was seen as the final link in the criminal justice system in terms of having an Aboriginal contact officer at each stage of the process. The value of having a blend of different perspectives and skills was emphasised by several of the people interviewed: one of the liaison officers was a young male who has worked in the legal system and the other was an Aboriginal woman elder with strong local knowledge and community links.

However, there have been some implementation problems. The program appeared to have suffered from duties of the liaison officer not being clearly established prior to the commencement of duties. There was some frustration amongst court staff about the duties of the position and some problems with supervision. It was also suggested that more formal training, for example, in administrative tasks, would be beneficial for liaison officers.

The liaison officers did not appear to have an active role inside the courtroom, although one officer expressed some interest in the possibility of extending the role to provide advice to the court on cultural issues in particular cases. Informal discussions on general cultural issues had been held between the liaison officers and the local magistrate. At the time of writing, it was anticipated that the pilot program, which had been extended for three months pending evaluation, would be expanded to other areas of New South Wales.

Numerous people interviewed for this project commented on the key features of the Casino-Lismore scheme. Most thought the idea had merit, although some expressed reservations about the role (if any) of the liaison officer in court, and about how and in what way the officer might give relevant information to the court.

The arguments in favour of adopting a court liaison officer scheme in Queensland include that:

- it would promote efficiency, as different agencies in the criminal justice system would not have to provide separate services for Aboriginal witnesses

- the independence of the position would be protected, as the liaison officers would be employed by the court, not by parties or agencies with an interest in the outcome of proceedings.

The CJC believes that a scheme similar to that in place in Lismore and Casino should be tried in Queensland. The CJC's proposal is that the trial take the form of a pilot project under the auspices of the Department of Justice. The detail of the proposal should be negotiated between the Department and local Aboriginal communities, but the general aims of the program should be to improve the way in which Aboriginal people understand and use the justice system.

Two courts in areas of large Aboriginal populations should be selected: one urban, the other non-urban. In each court, a fresh position should be created equivalent to one full-time position.

The CJC envisages the following as core functions of the liaison officers:

- liaison 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

- liaison with those Aboriginal people to familiarise them with the court environment and process, including an explanation of the positions and roles of the various people in court

- improvement of Aboriginal community awareness about the criminal justice system's structures and processes.

The liaison officer could also possibly play a role in the regional symposia proposed in Recommendation 3.3.

The Department of Justice should negotiate more detailed project aims and role descriptions, as well as venues for the pilot and selection of individual liaison officers, with a working party comprising representatives of the Aboriginal Justice Advisory Committee and the local Aboriginal community (for example, the Aboriginal Legal Service, the community council or the Aboriginal Co-ordinating Council). The working party should carefully consider the role, if any, that a court liaison officer might play in

court, and should bear in mind the gender issues raised in Chapter 7. For example, in order to provide a service which meets the needs of all members of the community, it may be necessary for the position to be filled by two part-time officers, one male and one female.

The CJC does not consider that the proposed role can be performed by Police Liaison Officers. As indicated above, they are often not able to focus much attention on court matters and, in any case, they are, and are seen as, partisan players. The proper discharge of the functions of court liaison officers requires as much actual and perceived independence from the police as possible.

The final aspect of the proposal is the need to monitor and review the pilot project. At the conclusion of the pilot program, a public report should be made on the effectiveness of the program, and recommendations made to the Attorney-General and Minister for Justice as to the viability of such programs generally or in specific communities. The CJC would be willing to assist in the evaluation process in conjunction with the respective working parties.

The CJC is conscious of the resource implications of the proposal. For this reason, it is proposed that, at this stage, the scheme be implemented on a trial basis only and subjected to evaluation. However, the potential benefits of such a scheme could be considerable, such as better understanding by Aboriginal people of the court process, less alienation from the process and a lower rate of non-appearance of witnesses and possibly defendants.

The proposal reflects the interests of remote communities as well as urban areas. On remote Aboriginal communities, court liaison officers could perhaps be employed by the local Aboriginal Council under the Community Development Employment Program. This should not be seen as a denigration of the importance of the position, but would enable the flexibility required in centres where courts visit only monthly or less often. The officers could perhaps also assist in reducing high rates of failures to appear, where the Aboriginal Legal Service field officers, who often do not reside in the communities, have been unable to do so.

6.4 Recommendation - Aboriginal Court Liaison Officer Scheme

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.

FAMILIARISATION OF WITNESSES

A number of interviewees believed that alienation and intimidation could be reduced by legal representatives familiarising Aboriginal witnesses with both the court environment and procedure before they are required to appear. For example, the Legal Aid Office in its submission pointed out the recent work of the ODPP in addressing the needs of Crown prosecution witnesses. This has included an increased emphasis on continuing liaison between prosecutors and witnesses for some time before the trial, and greater focus on providing information to witnesses about what the courtroom will be like, what will be expected of the witness and what the outcome of the case is or might be. The ODPP's Violence Against Women Unit has particularly developed these initiatives in relation to victims of domestic violence and sexual assault. There has also been considerable attention paid to the needs of child witnesses for some years, although a common theme among prosecutors interviewed for this research was that a lack of resources in the ODPP has prevented this approach being taken with all witnesses.

Measures of this sort can help to make the court experience less harrowing for witnesses and are therefore more likely to produce reliable and effective evidence. The CJC considers that lawyers should, as the ODPP does to some extent at present, familiarise prospective witnesses with courts as regards the physical environment of the court, the nature of the process, the roles of the various individuals, the fact that an oath or affirmation will be administered and the kinds of questions that will be asked.

6.5 Recommendation – Familiarisation of Witnesses

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.

OTHER ABORIGINAL STAFF IN THE COURTS

The RCIADIC recommended that in areas where significant numbers of Aboriginal people appear in court, governments should take more positive steps to recruit and train Aboriginal people as court staff (1991, vol. 3, p. 80, Recommendation 100). Such an initiative has an important role in making the environment less intimidating for Aboriginal people and in helping to provide more culturally appropriate services for them. Having an Aboriginal person in a position of authority within the justice system also has important symbolic value. This idea received consistent support in consultations:

> It would be more relaxing for the Aboriginal witness to have more Murris in the court. (Aboriginal councillor)
>
> There are no Murris working for us, apart from a . . . project officer. You need them in the mainstream [of ODPP work] though, so there's contact in trials . . . Instructing clerks would be better, so you'd have a black face in court for the witness to relate to. (Crown prosecutor)
>
> What they need is a bit more support in court . . . and more black faces in court. There is a court support service in [this town], but they are staffed by white volunteers. (Aboriginal court worker)
>
> More indigenous [court] staff are needed . . . It makes a difference to see one of their own in court. (Aboriginal public servant)

Jurisdictions around Australia have implemented RCIADIC Recommendation 100 to varying degrees. In Lismore, for example, funding was made available for a six-month placement for an Aboriginal person as court officer. In Western Australia the Law Society appointed an Aboriginal employment coordinator and developed a comprehensive employment strategy which aims to increase the number of Aboriginal people at all levels of the legal system. Following consultation with Aboriginal communities, the Family Court has created four positions for Aboriginal Family Consultants in pilot programs in Darwin and Alice Springs (Nicholson 1996, pp. 35–36). Four more consultants are to be employed in north Queensland and the Torres Strait. Those consultants will have an educative role with the court and Aboriginal communities, as well as assisting Family Court counsellors in cases involving Aboriginal people.

In Queensland, the Department of Justice implemented an Aboriginal and Torres Strait Islander Employment Strategy that includes court staff. According to information provided to the CJC by the Department, the objectives of the strategy are to:

- induct and train Aboriginal people and Torres Strait Islanders in a variety of jobs and skills
- provide trainee support and monitoring assistance
- link training to ongoing employment opportunities.

As at 31 December 1995, there were 43 Aboriginal people and Torres Strait Islanders in the total Magistrates Courts Branch establishment of 545, representing 7.8 per cent of staff. At the same date, 28 Aboriginal people and Torres Strait Islanders had completed traineeships, of whom 17 have remained with the Branch in permanent, temporary or part-time employment. The CJC understands that these officers have little "client-contact", and certainly none of them work in the courtroom itself. Nevertheless, according to information given to the CJC by the Department, the employment strategy is fostering a positive relationship between local communities and the courts.

In time, greater levels of employment of Aboriginal people within the court system will have a beneficial effect on Aboriginal people's perceptions of the court system. However it would be more advantageous for witnesses and defendants appearing in court if the visibility of those employees was improved. The CJC therefore recommends that the Department take steps to move as many of those employees as possible into client-contact positions, such as registry counter service positions, or (preferably) into positions in the courtroom, such as depositions clerks. Any such measures should take account of any kinship, gender or other customary law issues affecting the employee's ability to be present in particular matters before the court, especially where the staff member comes from the local area.

6.6 Recommendation – Aboriginal Employment Strategy

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.

TRAINING OF OTHER COURT STAFF

The RCIADIC observed that 'all court staff can play a role in removing the sense of injustice and racism which can permeate the court process' and urged that court staff whose duties bring them into contact with Aboriginal people be encouraged to participate in Aboriginal cross-cultural awareness training and development programs (1991, vol. 3, pp. 78–79, Recommendation 96). In March 1992 the Queensland

Government stated that 'it is intended that court staff will also receive cross-cultural awareness training' (*Progress Report 1993*, vol. 3, p. 107). It appears from the CJC's consultations that there has been as yet no specific training for Magistrates Court staff in Queensland, although a core training package has now been finalised for Government employees.

The slow implementation of this recommendation is in stark contrast with Western Australia where the Ministry of Justice has employed two full-time Aboriginal trainers to conduct cross-cultural awareness training for all Ministry staff (including court staff, corrections officers and prosecution staff) throughout the State. One of the trainers who was interviewed by the CJC estimated that between 1,600 and 1,700 people had been trained, and said that they had found a 'big difference' in staff attitudes after doing the course in that staff 'see things differently'. The vast majority of staff had indicated that they had got much from the course.

The CJC urges the Department of Justice to implement similar training as a matter of priority, particularly in areas of significant Aboriginal populations, and to ensure that such training is carried out regularly for new staff.

6.7 Recommendation – Cross-cultural Awareness Training for Court Staff

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.

SHOULD THE SPECIAL WITNESS LEGISLATION BE CHANGED?

In Queensland, as in some other jurisdictions, there are provisions which allow for special measures to be taken by the court in recognition of the particular difficulties of certain witnesses. This section considers the applicability and usefulness of those provisions in overcoming the barriers to Aboriginal people giving evidence in court.

CURRENT LAW

Special witness provisions are generally used for victims of sexual assault, particularly children, but in some jurisdictions, including Queensland, there is potential for them to be used more widely.

Section 21A of the *Evidence Act 1977* (Qld) provides for orders to be made in respect of special witnesses. A special witness is a witness who would, in the court's opinion:

- be likely to suffer severe emotional trauma
- be likely to be so intimidated as to be disadvantaged as a witness, or
- as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness [s. 21A(1)].

Section 21A provides for orders to be made in respect of special witnesses. The court may make various orders including:

- obscuring the defendant from the view of the witness
- excluding others from the courtroom while the witness is giving evidence

- allowing an approved person to be present to provide emotional support while the witness is giving evidence or is required to be in court
- allowing the witness to give evidence in another room
- allowing a videotape recording of the witness rather than direct testimony [s. 21A(2)].

The section contains safeguards to ensure a fair trial in criminal proceedings. For example, the court cannot make an order if it appears to the court that the order would unfairly prejudice the defendant or the prosecution [s. 21A(3)]. The defendant is not to be excluded from the room where the special witness is giving evidence unless provision is made for that person to see and hear the witness (for example, by video) while the evidence is being given [s. 21A(4)]. If evidence is given by video, a person entitled to cross-examine may view the videotape [s. 21A(5A)].

So far as the CJC is aware, section 21A has been the subject of only one reported decision, in *R v. West* [1992] 1 Qd R 227. The case did not concern an Aboriginal witness. The defendant, who was convicted of rape, challenged the trial judge's declaration that the distressed 19 year old complainant was a special witness, and the judge's order (on the prosecution's request) that a screen be placed between her and the accused while she was cross-examined. The Court of Criminal Appeal held that even at common law there was power to direct that an accused be obscured from the view of a witness who was likely to be intimidated by his presence. Thomas J (with whom Moynihan J and Ambrose J agreed) said (at 231):

> It seems to me that if the trial judge discerns that the witness is "prima facie" so adversely affected by the presence of the accused as to find difficulty in giving her evidence, it may be appropriate to make a screening arrangement, provided that appropriate directions to the jury avoid unfair prejudice to the accused . . . The subsection [21A(3)] does not require the total elimination of all prejudice, and the scheme of section 21A is to entrust to the court a balancing exercise between disadvantage to a witness and prejudice to an accused.

APPLICABILITY TO ABORIGINAL WITNESSES

A number of people consulted raised the possibility of using measures under section 21A to make the courtroom experience less traumatic for Aboriginal witnesses, particularly where a witness has been subjected to violence (see Chapter 7). For example, the use of a screen, or a support person for the witness, could assist a complainant giving evidence.

Section 21A could assist in other situations. A number of Aboriginal people who were consulted said that the presence of uniformed police officers in the courtroom was very intimidating for many Aboriginal people. During the CJC's inquiry into the complaints of Kelvin Ronald Condren and others, several uniformed police officers were present in the hearing room. That may have had an intimidating effect on some of the Aboriginal witnesses involved. In the CJC's later inquiry into the death of Daniel Alfred Yock, the presiding officer directed that uniformed police officers not be present in the hearing room (transcript 26 November 1993, pp. 23,994–23,995). The CJC was also told that a number of police officers were present in the courtroom during the *Pinkenba Case*. If the presence of those officers had an intimidating effect on the witnesses, an order could have been made under section 21A(2) excluding those persons, or uniformed police officers other than those performing duties, from the court.

Despite the clear applicability of the provisions to Aboriginal witnesses, they are hardly ever used other than in sexual assault cases. Most Crown prosecutors, police prosecutors and others said they had never seen orders made, or applied for, on the "cultural differences" ground. Tharpuntoo Legal Service lawyers

had never seen the provisions used for Aboriginal people on cultural grounds. This was echoed by the staff of a number of other Aboriginal legal services. One exception was a police prosecutor in a regional centre who said that he had used section 21A for six Aboriginal adults and 20–30 juveniles, but only in some of those cases did he rely primarily on the cultural differences ground.

It may be that some lawyers are simply unaware of the legislation or do not consider asking the court to use it. One prosecutor said he believed that most prosecutors only consider section 21A as relevant to child witnesses.

The provisions may also be infrequently used because, as several persons interviewed noted, section 21A does not affect the underlying nature of the adversarial process. Even if orders are made under the section, cross-examination must be allowed in the usual way. As one District Court Judge (echoing a number of other interviewees) said, 'I can't stop cross-examination'. Thomas J in *R v. West* [1992] 1 Qd R 227 at 230 said, '[t]he re-arrangement of the positions of the witness and the accused person within the court was not a particularly radical step'.

Perhaps with those limitations on the effectiveness of section 21A in mind, one barrister submitted:

> On my experience, this section has been used almost exclusively to assist the taking of evidence from children under the age of 12 years. In my submission, the court could issue Rules or directions under section 21A(8)[43] which might lead to the use of this section more frequently to assist Aboriginal witnesses adjudged to be at a cultural disadvantage.
>
> In my submission, section 21A should be considered in detail in order to determine whether the measures open to the court under sub-section (2) should be expanded in order to more satisfactorily embrace the cultural difficulties experienced by Aboriginal witnesses.

However, one group of lawyers called for the repeal of section 21A. The use of a screen was attacked by one member of this group as 'absurd', on the grounds that the complainant knows the defendant is there. The attitude of that group was that witnesses should be in court where everyone can see them.

Most other people consulted supported the retention or extension of section 21A. Some referred to the difficulty in remote areas of using mechanisms like closed circuit television, videotaped evidence and the like. For this and other reasons, the value of having a support person in court to make the process of giving evidence less intimidating for Aboriginal people was emphasised.

Some of those consulted proposed alterations to section 21A to limit the scope or nature of cross-examination. Those proposals have some appeal, but, within the broad confines of the adversarial system, there is no way, apart from cross-examination, of testing a witness's evidence. The CJC believes that the measures presently available under section 21A need not be expanded upon, at least until their applicability in cases of Aboriginal witnesses has been tested more extensively.

INFORMATION FOR LAWYERS

As indicated above, one possible reason for why section 21A is rarely used is that lawyers are not aware of its potential applicability in cases involving Aboriginal witnesses, or of the aspects of Aboriginal cultures that could make section 21A measures useful.

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[43] Subsections (8) and (9) have been repealed since this submission was made, although the courts clearly retain the powers contained in these provisions.

Information about these matters could be included in the cross-cultural awareness training proposed in Recommendation 3.4. Section 21A is a prime example of how cross-cultural awareness could lead to existing legal mechanisms being used to overcome cross-cultural communication barriers. A useful model for such material, based on the Western Australian equivalent legislation, is described in an article by Dixon (1995).

The CJC also considers that prosecutors should take the lead in using innovative measures such as orders under section 21A. This has happened in relation to vulnerable child witnesses, but the potential of the section has not been realised in relation to witnesses at a disadvantage because of cultural differences. Prosecution authorities should disseminate information to prosecutors, and encourage them, in cases involving Aboriginal witnesses, to consider the applicability of this section.

6.8 Recommendation - Information for Lawyers about Special Witnesses

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

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.

WHEN SHOULD THE DECISION BE MADE?

A possible shortcoming or uncertainty in section 21A was identified by one magistrate consulted for this project. This problem was also adverted to in *R v. West* referred to above. The ambiguity concerns the way in which the court is to form its opinion under section 21A(1) that a witness is a special witness. The magistrate and some police prosecutors told the CJC that special witnesses had been declared before starting to give evidence. However, in *R v. West* the judge did not declare the complainant to be a special witness until she had given all her evidence-in-chief and had been cross-examined for some time. The magistrate who spoke to the CJC interpreted the reasons of the Court of Appeal in *R v. West* as requiring that the witness should begin to give evidence in the usual way before being declared a special witness.

The difficulty with that course, as the magistrate and some prosecutors submitted, is that 'the damage will have been done' (particularly if some cross-examination has taken place) and any special measures will be too late to have their intended effect. Staff at a community legal centre called for a 'reversal of the onus', so that the witness could begin giving evidence under special measures and, if the judge formed the view that the measures were unnecessary, order their removal. A possible incentive not to abuse such a reverse onus would lie in the risk (real or perceived) of the jury giving less weight to the evidence by reason of the special measures taken.

One judge suggested that a preliminary inquiry in the nature of a "voir dire" could be held to determine whether a witness was a special witness. Justice Mildren (1996, p. 20) has made the same suggestion in relation to the Northern Territory's equivalent legislation. Such an approach would enable a "trial run"

to be had without the risk of any damage to the witness's credibility in the jury's eyes, although there would still be the possibility that any damage done on the voir dire would affect the later evidence before the jury.

The CJC is concerned at the uncertainty in section 21A, and believes it should be clarified to allow orders to be made before the witness starts to give evidence. However the CJC does not believe that any reversal of onus is justified. If lawyers have prepared their case, they will be in a position to make the appropriate submissions to the court. The court would still have to be satisfied of the relevant ground for declaring a person to be a special witness. For that purpose, relevant expert evidence would, if necessary, be admissible.

6.10 Recommendation – Special Witnesses Legislation

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.

CONCLUSION

This chapter has considered ways in which the court environment can be modified in order to overcome intimidation, alienation and disorientation of Aboriginal witnesses. Recommendations have included:

- location of courtrooms in Aboriginal communities at suitable venues other than the police station
- consideration of the high incidence of hearing impairment among Aboriginal people in the design of future court facilities
- consideration in appropriate cases of whether wigs and robes should be worn by judges and barristers
- establishment of an Aboriginal court liaison officer pilot program as a means of improving the way in which Aboriginal people understand and use the justice system
- familiarisation of witnesses with courtrooms and court procedures by lawyers and prosecutors
- expansion of the Department of Justice's Aboriginal Employment Strategy to place Aboriginal staff in courts in client-contact positions
- implementation by the Department of Justice of cross-cultural training on indigenous issues for court staff whose duties bring them into contact with Aboriginal people
- distribution of material to Crown prosecutors and police prosecutors about special witnesses legislation and procedure
- amendment of section 21A of the *Evidence Act 1977* (Qld) to clarify that an order under the section may be made at any time, whether before or after the witness has begun to give evidence.

CHAPTER 7
ABORIGINAL WOMEN

INTRODUCTION

In addition to the cultural and language differences (outlined in Chapter 2) which potentially affect all Aboriginal witnesses, Aboriginal women face the following difficulties when dealing with the criminal justice system:

- many have been subjected to domestic violence and sexual assault
- they must deal with a legal system in which the personnel are predominantly male
- they often face community pressure not to take action against another Aboriginal person
- they have a history of poor relationships with the police
- more generally, many distrust the legal system.

In the courtroom, Aboriginal women face further barriers:

- many legal practitioners appear to be unaware of the issues facing Aboriginal women
- evidence presented in court about Aboriginal cultural traditions often does not reflect women's perspectives
- existing legal and support services do not meet the needs of Aboriginal women
- support persons are not used as widely for Aboriginal women as they might be.

Because of these substantial barriers many Aboriginal women find it very difficult to use the legal system to pursue their rights. Moreover, Aboriginal women are frequently subject to significant pressures to withdraw part way through the legal process. The ALRC concluded in the course of its report on the equality of women that, because of the interplay of cultural and gender factors, indigenous women were largely excluded from access to the benefits of the legal system (ALRC 1994a, p. 119).

This chapter describes how the various factors outlined above impact on Aboriginal women witnesses and proposes a number of strategies for ameliorating the effect of these factors.

SOCIO-CULTURAL FACTORS

Until recently there has been very little research about the particular experiences of Aboriginal women in the criminal justice system. This has led to criticism of such inquiries as the RCIADIC for not addressing the particular needs of Aboriginal women, and to calls for further research into these issues (Atkinson 1990, p. 6; Cunneen & Kerley 1995, p. 71). Nevertheless, submissions to the CJC echoed the concerns expressed by a number of writers. It is clear that Aboriginal women who give evidence in court face particular difficulties because of the interplay of cultural and gender factors to which the legal system is often insensitive.

VIOLENCE AGAINST ABORIGINAL WOMEN

In most criminal proceedings, whether Aboriginal women appear as prosecution witnesses or defendants, it is usually in the context of their having been victims of domestic violence and sexual assault. In the Cape York communities, for example, CJC staff observed that a very large proportion of charges before the Magistrate's Court involved allegations of violence by Aboriginal men against their female partners.

Consultations by the CJC and by several other bodies have pointed to high levels of violence against Aboriginal women (Queensland Domestic Violence Task Force 1988, pp. 256–257; ALRC 1994a, p. 119). A broad indicator of the high incidence of violence is the rate of homicide. In 1990–91 the rate of homicide of Aboriginal women was 10 times that of non-Aboriginal women (Strang 1992, p. 25). There were 20 Aboriginal deaths in custody in Queensland from 1981 to May 1989; in the same period 23 Aboriginal women died as a result of violence in only three communities (O'Donaghue 1992, p. 19). In a 1994 national survey, nearly half of the Aboriginal and Torres Strait Islander women who were consulted reported that family violence was a common problem in their local area (ABS 1995a, pp. 58–59). In more remote communities the proportion was even higher: for example, in the Cooktown ATSIC region (which includes the communities in Cape York) and in the Mt Isa ATSIC region, over three-quarters of male and female respondents said that family violence was a common problem in their local area (ABS 1995b).

The disempowering effects of long-term violence on women, including feelings of fear, shame and low self-esteem, have been commented on widely (see ALRC 1994a; National Committee on Violence Against Women 1992; Queensland Domestic Violence Task Force 1988). For Aboriginal women the effects of violence are compounded by various cultural factors outlined below.

WOMEN'S BUSINESS

A number of submissions noted that the discussion of sensitive matters such as sexual assault with or in the presence of male police officers, prosecutors and those in court is particularly difficult for Aboriginal women because sexual matters are not usually discussed with members of the opposite sex (see also Eades 1992, p. 92). The tradition of women dealing with "women's business" remains very strong amongst indigenous people, not only in remote communities but also in urban centres. A clear illustration was given in a 1995 case before the Anti-Discrimination Tribunal in Brisbane. A Torres Strait Islander witness gave evidence that she felt strongly that allegations of sexual harassment should have been raised by the female complainants with female members of the employing agency's board of management, so that those senior women could have dealt with the matter on the complainants' behalf:

> Is there any particular custom in the Aboriginal community as to designating what should be raised with women and what should be raised with men?---There is a big custom, yes.
>
> And what is that custom?---Well, female issues should be discussed by females – no female in the Aboriginal – I am a Torres Strait Islander.
>
> I apologise?---That's all right. And I am sure the same laws of Aboriginal women, like we do for my people. If I have a problem, I do not go to a man. I would go to a female first, and utmost. If that female cannot help me, then we have council of elders who are women and men, but I would still have the ladies separated from the men.

COMMUNITY PRESSURE

Many Aboriginal women are deterred from pursuing complaints about matters such as sexual assault because they are concerned about bringing shame to themselves and their families. A number of lawyers, service providers and others who were consulted in the course of the project also referred to the possibility of Aboriginal women being subjected to significant pressure from the community not to proceed with a complaint against another Aboriginal person, particularly where that community is small and close-knit. The system of family retribution through verbal and physical confrontation can be very intimidating. Where the hearing of a matter is delayed, a complainant may have "lost her nerve" by the time the case comes to court, particularly if the likely outcome is that her Aboriginal partner or ex-partner may end up in jail.

A submission from the Queensland Anti-Discrimination Commissioner stressed the need for adequate pre-trial preparation of a complainant to ensure that she believes it is the defendant's actions, rather than her own evidence, which are responsible for the outcome if the defendant is found guilty and sentenced to imprisonment.

POOR RELATIONS WITH POLICE

One writer quoted a report to the Office of Aboriginal Women (in the former Commonwealth Department of Aboriginal Affairs) by a Queensland staff member as saying:

> Most [Aboriginal] women are terrified of the police "interrogation" where anything from a woman's sexual history to whether she is a fit mother or not is brought out into the open. Reporting an assault sometimes seems to be just as traumatic as the actual assault. (Atkinson 1990, p. 7)

In 1995 the ODPP set up a pilot project to consider the issues affecting indigenous women who had been subjected to violence. Many of the indigenous women who were interviewed for that project indicated that police attitudes were a source of particular concern to them. Many commented that when police are asked to investigate complaints of violence they appear 'uncaring and unsympathetic' and seem to believe that violence is 'the Aboriginal way' (see also HREOC 1993b, p. 28). The women believed that this may be due to police frustration at women deciding either not to press charges for assault, or to withdraw them at a later stage.

Other Aboriginal women interviewed in the course of the ODPP project spoke of a general reluctance to approach police for help on any matters because of fear of being harassed or embarrassed. Over the years, there have been complaints of verbal abuse, threats of sexual assault and actual assaults against indigenous women and girls by police officers in different areas of Queensland (see, for example, complaints to the National Inquiry into Racist Violence, HREOC 1991, pp. 88–89). In addition, Aboriginal women are detained in police custody for minor offences of public disorder at a far higher rate than other groups (Cunneen & Kerley 1995, p. 78). Stories of those matters are passed down from generation to generation and compound women's mistrust, making it more difficult for them to pursue their complaints through the legal system.

MISTRUST OF THE CRIMINAL LEGAL SYSTEM

More generally, many Aboriginal women lack faith in and feel alienated from the criminal justice system. Aboriginal women who commit criminal offences, whether those acts are linked to public drunkenness, poverty or as a response to long-term abuse, are often treated very harshly by the criminal justice system (Cunneen & Kerley 1995, pp. 80–85). There is a very high over-representation of Aboriginal women in

the prison system compared with other women. For example, in the 1992 prison census indigenous women comprised 26.3 per cent of the Queensland female prison population and were 19.8 times more likely to be in prison than other women. The rate of over-representation exceeded that of indigenous men, who comprised 18 per cent of the male prison population in Queensland and were 12.9 times more likely than other men to be in prison (Walker 1993, p. 23).[44]

Several Aboriginal women interviewed for this project also noted that the lack of appropriate support services for Aboriginal women who have been subjected to violence (see below), and the publicity given to cases in which judicial officers have made inappropriate remarks about women, have compounded their mistrust of the law as an avenue of help.

One manifestation of Aboriginal women's lack of faith in the criminal justice system is the finding that most serious crimes of violence against indigenous women are not reported (Atkinson 1990, pp. 6–7; ALRC 1994a, p. 120; Barber, Punt & Albers 1988, p. 96). Anecdotal evidence gathered by the ODPP in its recent consultations with Aboriginal and Torres Strait Islander women suggests that when subjected to violence:

> indigenous women tend to take their chances with surviving the attack and utilising the traditional family "payback" process than getting justice from within the current system. As one particular respondent put it, 'I would rather put up with the abuse and rely on my family to repay the shame than trust the whiteman's law to give him what he deserves'.[45]

BARRIERS TO GIVING EVIDENCE

Aboriginal women who resolve to tell their story in court despite these obstacles face further difficulties in the witness box. A number of submissions referred to the difficulties which many Aboriginal women experience in court. For example, the following comments were made during an interview with members of the Far North Queensland Defence Lawyers Association:

> As rape victims they do not put their story well. The concept of shame is a part of all that. The nature of the charge, the use of language, their shyness and family pressure are too. Their story is made to conflict, not because of dishonesty, but because of their use of language.

Several solicitors interviewed in the course of this project said they had seen female witnesses being intimidated not only by the courtroom environment, but also by the presence of the defendant or certain other Aboriginal people in the room. Sign language may be used by such persons in the courtroom to intimidate victims of violence while they are giving evidence, without the court being aware of this process (ALRC 1994a, p. 121). There was also some criticism during consultations of the lack of pre-trial preparation or orientation for witnesses, especially for those who are victims of sexual assault.

One of the most telling indications that the courtroom is an extremely intimidating environment for many Aboriginal women is the acknowledgement by a number of judicial officers, legal practitioners, and police and Crown prosecutors that Aboriginal female witnesses may "freeze up" and be unable to give evidence, particularly in sensitive matters such as sexual assault. One judge described proceedings before him which he had found 'absolutely appalling'. In the late 1980s two white men were charged with a 'particularly brutal rape' of a 15 year old Aboriginal girl. On the depositions, the case seemed strong. However, when the complainant was in the witness box she was so overwhelmed that she was unable to give evidence, and the case had to be dismissed. The judge commented that 'the whole environment seemed foreign' to the

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44 The position in New South Wales is similar; see Edwards 1995, p. 3.

45 Information provided by ODPP, 4 October 1995.

girl, noting in particular 'the all-white very traditional-looking jury'. He believed that the complainant would have fared better if there had been someone to help her through the process and to explain the trial procedure to her beforehand.

In our consultations several people suggested that the difficulties experienced by Aboriginal women giving evidence, particularly in cases of violence, were more likely to arouse sympathy from jurors than would be the case for male Aboriginal witnesses. It was also suggested that the women's difficulties would be taken into account by jurors when assessing the evidence. However, even if it is true that some individual women witnesses may attract the sympathy of jurors, it is clear that many others are unable to achieve a just result under the current system and that the outcome should not be left to chance.

LACK OF AWARENESS BY THE LEGAL PROFESSION

Aboriginal and Torres Strait Islander women interviewed by the ODPP commented that many legal practitioners appeared to lack awareness of the issues facing the women. The ALRC found 'a disturbing level of ignorance of Aboriginal and Torres Strait Islander cultures in the legal profession and in the courts' which had a specific impact on women (ALRC 1994a, p. 121). The ALRC noted that 'the legal system's lack of understanding of the division between women's and men's business . . . often compromises the administration of justice in cases of violence against [indigenous] women. Evidence of women's perspectives may simply fail to be brought before the court' (ALRC 1994a, p. 122).

A notable example of Aboriginal women's perspectives not being put to the court is the Queensland case of *R v. Kina*[46] in which the defendant was convicted of murder of her de facto husband and was sentenced to life imprisonment. During the three years before the killing, Kina had been subjected to frequent violent physical and sexual assaults by her partner. Prior to the killing her partner had threatened anal rape of her 14 year old niece. No evidence of these matters was presented in court and the defendant did not give evidence in the trial, which lasted less than a day. After Kina had spent five years in prison, the Court of Appeal set aside her conviction on the grounds that there had been a miscarriage of justice. Fitzgerald P and Davies JA specifically referred to the problems in communication between the defendant and her lawyers:

> In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:
>
> (i) her [A]boriginality;
>
> (ii) the battered woman syndrome; and
>
> (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased.
>
> These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice. (Transcript, p. 35)

The court also noted that none of the defendant's legal representatives in her trial had had any training in communicating with indigenous people (p. 17). The Public Defender's interviewing officer who had taken statements from the defendant prior to her trial acknowledged that 'with the benefit of hindsight, it was probably not a good idea to send a young white male to obtain such instructions as to the circumstances given the necessary references to their sex life, sexual abuse and related matters' (p. 21).

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[46] CA 221/93; Court of Appeal Queensland (Fitzgerald P, Davies and McPherson JJA), 29 November 1993, unreported.

These issues and the resulting failure to raise crucial matters in court point strongly to the need for cross-cultural awareness training for lawyers, as outlined in Chapter 3.

EVIDENCE ABOUT CULTURAL TRADITIONS

In traditional Aboriginal society women had a status which was comparable to that of men in many respects, with separate and highly valued roles (Bolger 1991, p. 50; O'Donaghue 1992, pp. 18–19; Payne 1990, p. 9). A number of Aboriginal women have argued that one of the effects of colonisation was to impose on Aboriginal society culturally alien perceptions about the lower status of women. The expert evidence about cultural traditions which has been presented in court has often reflected the values and views of male anthropologists and other male professionals. The result, in the words of one writer, has been one of 'disempowering Aboriginal women, downgrading their role in society and silencing their cultural voice' (Payne 1990, p. 9).

There is clearly a need to ensure that all those involved in the legal system are aware of both Aboriginal men's and Aboriginal women's perspectives on relevant cultural issues. Scutt cited a Northern Territory Supreme Court case in 1986 in which Justice Maurice was reported to have said:

> 'If we're going into this question of what's culturally acceptable behaviour, why shouldn't we hear from some female leaders of the female community of Port Keats? Why should it be men who are the arbiters of what's acceptable conduct according to the social and cultural values of Port Keats?'

Defence counsel was reported to have responded that they may not be able to get women to speak. The judge reportedly replied '[i]t's just that historically no-one ever asks them' (Scutt 1990, p. 5).

One of the particular concerns which Aboriginal women raised during consultations was the acceptance by many white male lawyers that violence by Aboriginal men against women is part of traditional culture and is therefore less deserving of punishment. (See also Bolger 1991, pp. 50–52; Lloyd & Rogers 1993, pp. 150–153, 155–156; Payne 1993, p. 71; Thomas & Selfe 1993, pp. 170–171.) Despite strong criticism by Aboriginal women in recent years, this view has been put on occasion by defence counsel without dispute by the prosecution and has been accepted by some courts (Atkinson 1990, p. 6; Lloyd & Rogers 1993, pp. 152–153; ALRC 1994a, p. 122). The ODPP project found that the reporting of such comments in the media and by word of mouth created significant concern amongst Aboriginal and Torres Strait Islander women that their own matters may not be conducted fairly and impartially.

One Queensland case where the issue of violence as custom or practice was raised by a defendant was *R v. Watson* [1987] 1 Qd R 440. The accused, a Palm Islander, was charged with the murder of a woman with whom he had had a relationship. He had sought to introduce evidence from a sociologist that the inflicting of knife wounds was widespread as a 'process of domestic discipline' on Palm Island, that a large section of the Aboriginal community believed that a male had a right to discipline the female in this way and that there were many unintentionally severe injuries as a result. The Court of Criminal Appeal upheld the decision to reject the evidence on several grounds, including that the matter was not properly the subject for expert evidence and that even if it could be construed that every woman on the island "consented" to this "discipline" the law did not recognise a victim's consent as excusing a criminal act. Only one judge directly criticised the evidence which had been tendered:

> The proposed evidence was to be very selective and its quality poor. The expert bases his views partly upon the retrospective expressions of intention made at some later time by other contrite men who have attacked their women with knives and inflicted only modest wounds. It is hardly credible to rely upon such self-serving expressions which may vary from lies to self-deceptive rationalisation. No doubt the admission of evidence of this nature would afford great comfort to a person who deliberately intended to kill his wife with a knife. (Derrington J at 449)

The danger of the court receiving only one perspective on cultural issues of such significance could be lessened by ensuring that lawyers and judicial officers are exposed to Aboriginal women's views on these matters. There are at least two ways in which this might happen: through ensuring that cultural awareness programs for legal practitioners and judicial officers include discussion of gender issues, and through the involvement of Aboriginal women as well as Aboriginal men in appropriate advisory groups or in positions such as court liaison officers (see Chapters 3 and 6).

The CJC notes that the Queensland Government in April 1996 announced that it would form a high-level advisory body of indigenous women to work with the heads of key Government Departments, including corrective services, police and justice, to improve the development and delivery of services to indigenous women. While this initiative is to be commended, it is also necessary to ensure that local consultation mechanisms include proper levels of representation by Aboriginal women.

7.1 Recommendation – Cross-cultural Awareness of Gender Issues

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

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.

SERVICES FOR ABORIGINAL WOMEN

Culturally appropriate legal and support services assist Aboriginal women greatly in dealing with the court process. However, those services are limited in Queensland.

SUPPORT SERVICES

The availability of culturally sensitive support services, such as domestic violence and rape crisis services, is crucial in assisting Aboriginal women to participate fully in the court process. Experience has shown that Aboriginal women are reluctant to use mainstream services. However, there are only a few specialist support services for Aboriginal and Torres Strait Islander victims of sexual assault and domestic violence in Queensland. The CJC was told that a small number of rape crisis or domestic violence services such as in Cairns have identified workers for indigenous clients. In some areas of the State, mostly in the northern region, there are safe houses for indigenous women (16 throughout Queensland), but in other areas, particularly in the more remote communities, there are no specialist services. One of the concerns raised by women interviewed for the ODPP project was that the crisis services in the nearest regional centre may not have knowledge of their local community.

There are several current projects which, in consultation with Aboriginal women, are seeking to address some of these issues. The Department of Families, Youth and Community Care is considering these matters in the development of the future directions of the Government's domestic violence strategy. The Department has also undertaken a project on the impact of domestic violence legislation on indigenous women. Both those projects should be completed by mid-1996, with appropriate proposals for reform.

As referred to earlier in this chapter, the ODPP has recognised the particular needs of indigenous women who are complainants and witnesses when they have been subjected to violence. In June 1995 a pilot project was set up to examine the issues affecting them. A Project Worker was appointed and consultations were held with individuals and groups throughout Queensland. A number of the concerns which Aboriginal women raised have already been referred to in this chapter. Other concerns expressed included that many indigenous women:

- are unaware of their legal rights or of the processes involved in reporting sexual assaults and abuse, other than reporting to the police
- may tend to accept violence as their "lot in life"
- lack confidence in asserting their rights
- do not know of the ODPP's programs and services.

At the time of writing, the ODPP was finalising the project report for consultation throughout Queensland. The report will include a series of recommendations aimed at improving liaison between criminal justice agencies and indigenous communities, increasing cultural awareness amongst participants in the criminal justice system and improving the delivery of services to indigenous women who have been subjected to violence.

LEGAL SERVICES

Although Aboriginal legal services developed in recognition of the particular needs of indigenous people, they have often failed to meet the needs of women (RCIADIC 1991, vol. 3, p. 88; ALRC 1994a, pp. 123–124). There are two main reasons for this: the priority given by those services to acting for defendants in criminal matters (the vast majority of whom are male), and the policy in many services of not acting in a "black on black" matter. In addition, if there are only male field officers and solicitors to consult, Aboriginal women will be far less likely to report crimes such as sexual assault because of the traditional division of "women's business" and "men's business" (see above).

ABORIGINAL WOMEN'S LEGAL SERVICES

The ALRC concluded in 1994 that there was an urgent need for legal services which were responsive to indigenous women's needs, and that a service where women 'could freely discuss women's business is likely to increase their use of and participation in the legal system' (1994a, pp. 126–127). The services were seen to have a number of valuable roles in:

- providing culturally appropriate information and referral
- increasing the likelihood that a woman's evidence was accurately recorded and properly presented to court, particularly where "women's business" was concerned
- community education and law reform.

The ALRC recommended the funding of such services where consultation with local women indicated a demand for them.

In 1995 the Commonwealth Government allocated funding to establish specialist legal services for indigenous women through existing or proposed women's legal services (Attorney-General's Department 1995b, p. 81). In Queensland funding was approved through two services: the existing Women's Legal Service in Brisbane, and a proposed women's legal service for north Queensland. A total of $100,000 has been allocated in 1995/96 for consultation with indigenous women in both regions and for the development of plans for expenditure of funds. Recurrent funding of $280,000 is to be provided to Queensland annually, of which it is anticipated the larger part will be allocated to the northern area because of factors such as the extra costs associated with distance. At the time of writing, preliminary consultations with indigenous women were under way in both regions. It was uncertain what models will be adopted, for example, in relation to the appointment of legal practitioners and other staff.

Those services will have the particular advantage of being seen by Aboriginal women as culturally appropriate to their needs, and of providing a safe place to discuss sensitive issues. While in criminal matters the role of legal services in providing legal representation will obviously be restricted to those women who are charged with a crime (since the prosecution will be responsible for women who are complainants), indigenous women's legal services will provide a very valuable role in terms of information and support, as well as promotion of indigenous women's rights.

Although welcoming the Commonwealth funding, some Aboriginal women have expressed concern that the funding for the indigenous women's services is to be tied to generalist women's legal services whose values and priorities may be different. However, this arrangement was decided by the Commonwealth Government on a national basis (Attorney-General's Department 1995b, p. 81).

Some women have also been concerned that the Commonwealth funding will not be adequate to cover all costs. The CJC believes that the Queensland Government has a responsibility to ensure that Aboriginal women are provided with proper legal representation. It would be appropriate for the Queensland Government to examine the funding of the indigenous women's legal services in Queensland within twelve months of their commencement and, if funding is found to be insufficient to meet identified needs, to provide additional funding to ensure that the services are adequately resourced.

7.3 Recommendation – Funding of Indigenous Women's Legal Services

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.

ADEQUATE PREPARATION TIME

As discussed in Chapter 3, it is crucial that lawyers allow for sufficient time to consult with their clients and with other Aboriginal people who may be involved as witnesses or who may give necessary information. There is a particularly strong need to build a relationship of trust between lawyer and client when Aboriginal women must discuss sensitive issues such as sexual assault or a history of violence, especially if an Aboriginal woman is to feel confident about giving evidence in court. One example of the need to allow for sufficient time to develop a relationship with the client, among other matters, was the case of *R v. Kina* referred to above.

Allowing sufficient preparation time is also crucial if lawyers are to gain a better understanding of Aboriginal women's experiences and to develop the issues which are relevant to the case. For example, the "battered woman syndrome" has been increasingly accepted in recent years to explain the actions of women who have been brutalised by their partners over a long period. However it has been criticised for failing to recognise the experiences of those women who do not conform to a white middle-class standard (Stubbs & Tolmie 1995). A submission from the Alternative Dispute Resolution Division of the Department of Justice and Attorney-General noted that:

> '[i]n the case of the Aboriginal "battered" woman, it is potentially more difficult to prepare a case for criminal trial in a way which maintains the integrity of the defendant and recognises cultural issues'.

The CJC believes that the complex issues surrounding the position of Aboriginal women must be recognised by prosecuting and legal aid bodies in allocating time for the preparation of cases. The CJC recognises that this may require extra funding to be allocated to legal services, a matter which was discussed in Chapter 3.

7.4 Recommendation – Lawyers' Preparation Time

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.

USE OF SUPPORT PERSONS

Nearly all persons consulted by the CJC on this issue agreed that the presence of support persons in court should be encouraged for Aboriginal women witnesses, particularly in the case of victims of sexual assault for whom shame may be an enormous barrier.

As was discussed in Chapter 5, there is no legal barrier to having support persons present under the existing provisions of section 21A of the *Evidence Act 1977* (Qld). However, it is clear that those provisions are not as widely used as they might be, partly because of the failure of lawyers to request their use (see Chapter 6). The provisions tend to be used most often in the case of child victims of sexual assault, although some submissions suggested that support persons are often allowed for women who are victims of sexual assault.

The CJC believes that the use of support persons would give Aboriginal women witnesses more confidence in dealing with an alienating system, particularly where a woman is a complainant in a case involving violence. To achieve this, steps need to be taken to bring this issue to the attention of legal practitioners, for example, by including discussion of the provisions of section 21A of the *Evidence Act 1977* (Qld) in education programs for prosecutors and other legal practitioners. Discussion could form part of the cross-cultural awareness training proposed in Chapter 3.

There are particular problems in cases involving Aboriginal women from remote communities who are required to travel to distant locations for court appearances. The Tharpuntoo Legal Service suggested that Aboriginal women witnesses from remote communities in the Cape should have their mother, auntie or other relative of their choice flown down to Cairns with them to support them during the trial. The capacity to do so may often be a function of available funding. Where a case involves violence against an Aboriginal woman witness from a remote community, adequate funding must be available so that a support person of her choosing may accompany her to trial. While some additional funding may be required, the CJC does not anticipate that the overall cost will be great given the small number of trials involving Aboriginal people or Torres Strait Islanders from remote areas.

This recommendation will primarily apply to Aboriginal women who are complainants. However, section 21A(1) specifically notes that a defendant may be a special witness. There may be occasions when it is appropriate to provide a support person for an Aboriginal woman who is charged with an offence arising out of a history of violence against her, for example, in circumstances such as those faced by the defendant in *R v. Kina* discussed above.

7.5 Recommendation - Use of Support Persons

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

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.

CONCLUSION

This chapter has addressed the particular difficulties encountered by Aboriginal women witnesses in the criminal justice system. These difficulties are the result of the complex interplay of cultural and gender factors, including:

- the high level of violence experienced by many Aboriginal women
- the traditional separation of "women's business" and "men's business"
- community pressure not to take action against another Aboriginal person
- poor relationships between Aboriginal women and police
- Aboriginal women's general mistrust of the legal system
- lack of awareness by many legal practitioners of the issues affecting Aboriginal women
- failure in many cases when presenting evidence of Aboriginal cultural traditions to reflect Aboriginal women's perspectives
- the failure of legal and support services to meet Aboriginal women's needs.

These recommendations are designed to ameliorate the impact of these factors by:

- including discussion of issues specific to Aboriginal women in cross-cultural awareness training for lawyers, prosecutors and judicial officers
- including representation by Aboriginal women in appropriate advisory or consultative groups

- ensuring that lawyers conducting cases involving Aboriginal women have sufficient preparation time to allow for sensitive issues to be fully canvassed

- providing for review by the Queensland Government of funding for indigenous women's legal services so as to ensure that Aboriginal women's needs are met

- ensuring that support persons are provided for Aboriginal women witnesses who have been subjected to violence.

CHAPTER 8
CONCLUSION

This report has documented aspects of Aboriginal culture and language which can cause significant misunderstanding when Aboriginal people give evidence in court. It has also described the feelings of alienation and intimidation that many Aboriginal people experience in the court system.

The recommendations put forward in the report have focused on five broad areas:

- improving understanding by judges, magistrates, prosecutors, defence counsel and jurors of relevant Aboriginal cultural and language issues
- improving the procedures for questioning Aboriginal witnesses both in examination-in-chief and cross-examination
- increasing the use of interpreters for Aboriginal witnesses whose first language is not Standard English
- making the court environment less intimidating to Aboriginal people, through such measures as establishment of a pilot Aboriginal court liaison officer scheme
- implementing measures to better address the particular needs of Aboriginal women witnesses, especially those who have been subjected to violence.

This final chapter deals with the legislative and resource implications of these proposals, and the implications for criminal justice agencies and court participants. In addition, there is a brief discussion of the importance of involving Aboriginal and Torres Strait Islander people and their representatives in the implementation of the recommendations arising from this report.

LEGISLATIVE IMPLICATIONS

Some of the CJC's recommendations require action by the legislature, most notably the proposals to amend the *Evidence Act 1977* (Qld) to:

- spell out 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
- clarify the court's power to disallow leading questions in cross-examination where appropriate, taking into account such factors as the witness's cultural background
- require a 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
- clarify that the special witness measures available under section 21A may be invoked at any stage of proceedings
- give witnesses a right to an interpreter when they are unable to speak English sufficiently to understand, and make an adequate reply to, questions.

Apart from the recommendation concerning a witness's right to an interpreter, the proposed amendments are largely aimed at clarifying, rather than significantly altering, the existing law. The main focus of the report has been on changing *how* the law is applied and, more particularly, on increasing awareness and understanding of Aboriginal cultural and language issues within the court system.

COST IMPLICATIONS

The CJC paid close regard to possible resource implications in formulating the various recommendations contained in this report. However, it has not been possible, given the nature of the project, to put forward a set of proposals which are cost-neutral. As documented at length in this report, Aboriginal witnesses suffer significant disadvantages in the court system. In order to redress this situation it is unavoidable that some additional funds will have to be expended.

The proposals which are likely to be most costly to implement are those relating to the witness's right to an interpreter. It is not possible, on the information available, to predict the resource implications of conferring such a right, but the increase in the number of cases where interpreters are used could be quite substantial (especially as the proposed provision will have general application, rather than being restricted to Aboriginal people). In addition, there will need to be more resources expended on the training of interpreters, particularly for the interpretation of traditional 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 CJC has recommended that the Government 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. It is unclear to what extent the proposed examination will highlight funding deficiencies, but, in order to ensure that there is equity in service delivery, it is essential that the exercise be undertaken. If funding is shown to be inadequate, the Government should either provide additional State funding or liaise with the Commonwealth Government to increase the Commonwealth's contribution.

Other proposals with resource implications are those relating to cross-cultural awareness training, the establishment of a pilot Aboriginal court liaison officer scheme and funding of support persons for Aboriginal women witnesses from remote communities. However, the additional outlays required to implement these recommendations should be fairly modest.

IMPLICATIONS FOR CRIMINAL JUSTICE AGENCIES AND COURT PARTICIPANTS

The bulk of the recommendations contained in this report are directed to the legal profession, the judiciary and magistracy, prosecuting authorities, legal aid bodies and court administrators. As indicated, most of the proposals do not require substantial additional resources, but they do necessitate an adjustment of priorities and an acknowledgement that the legal system has been insufficiently informed about, and sensitive to, Aboriginal cultural and language issues.

A fundamental problem identified during consultations was the failure on the part of many lawyers to take sufficient account of relevant cultural and language issues and to draw these matters to the court's attention. The adversarial system relies heavily on the skill of advocates in preparing and presenting their clients' cases in the best possible light. It is the responsibility of prosecutors and defence counsel to ensure that, as far as possible, witnesses are able to give the best evidence. This includes ensuring that witnesses

are familiarised with the nature of proceedings, that objection is made to unfair questioning and that any particular needs of a witness are met. For example, a witness may require the provision of an interpreter where his or her first language is not Standard English, or the assistance of a support person in court. Similarly, expert evidence may need to be called to explain Aboriginal cultural and linguistic matters which affect a witness's evidence.

For these reasons, priority should be given to cross-cultural awareness training of lawyers who are likely to come into contact with Aboriginal clients or witnesses. This will require agencies such as the ODPP, the QPS, the Legal Aid Office (Qld) and the various Aboriginal Legal Services to ensure that staff undergo training and that such training is provided on a regular basis for new staff. In addition, the Law Society and the Bar Association should consider assisting in the education of their members on these matters. With the growing participation by Aboriginal people in the legal system, for example, in determination of native title claims, awareness of relevant Aboriginal cultural and language issues will become increasingly important for lawyers throughout the justice system.

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 misinterpreted. The responsibilities of judicial officers include: exercising control over unfair or inappropriate questioning of witnesses; assessing a witness's need for an interpreter; and addressing the jury about factors to be taken into account when assessing a witness's evidence, for example, the witness's demeanour. The cross-cultural awareness seminars developed by the AIJA for judicial officers in 1995 were a valuable first step, but much more is needed to increase cross-cultural awareness and to improve communication between the courts and Aboriginal people. Participation by judicial officers in measures such as a regional symposium, which can focus on relevant local issues and on matters arising in court, will also help to increase understanding between both cultures.

Finally, it is important to increase the awareness of other personnel in the court system. Cross-cultural awareness training for court staff, recommended by the RCIADIC in 1991 but not yet implemented, should be undertaken as soon as possible. Efforts should also be made to increase the number of Aboriginal staff in client-contact positions in areas where there are significant numbers of Aboriginal people.

INVOLVEMENT OF ABORIGINAL PEOPLE

It has been stressed throughout this report that Aboriginal people and their representatives must be involved in, and consulted about, any initiatives to make the courts more responsive to the needs of Aboriginal witnesses. Consistent with this approach, it has been proposed that:

- The Aboriginal Justice Advisory Committee should be responsible for developing a resource kit on cross-cultural issues for judicial officers and for organising regional symposia for judicial officers, legal practitioners and other participants. The Committee should also be consulted in the development of cross-cultural awareness training for lawyers. This Committee has been established specifically for the purpose of advising the Government on Aboriginal perceptions of criminal justice matters. It is therefore appropriate that the Committee should serve as the primary point of liaison between the court system, criminal justice agencies and Aboriginal communities in Queensland.

- Local communities should be consulted in the implementation of various recommendations, including the proposed court liaison officer scheme and the nomination of persons who are suitable to act as interpreters. Proper consultation at the local level is very important as there are significant variations between Aboriginal communities throughout Queensland, not only in terms of culture and language but also in terms of needs and priorities.

- Aboriginal women should be represented on any Aboriginal advisory or consultative groups and issues specific to them must be included in cross-cultural awareness training. In the past there has been insufficient acknowledgement of the particular needs of Aboriginal women, including recognition of their cultural traditions.

Without the involvement of Aboriginal people and their representatives, there is a considerable danger that efforts to improve current processes and practices – however well-meaning – will be misdirected. Furthermore, Aboriginal people will be understandably reluctant to give support to initiatives which have been developed and implemented without their input.

CONSULTATION WITH THE TORRES STRAIT ISLANDER COMMUNITY

As discussed in the Introduction, this report has been primarily concerned with issues relating to Aboriginal witnesses, rather than Torres Strait Islanders, although some recommendations have broader applicability. In limiting the report in this way, the CJC has certainly not intended any disrespect to Torres Strait Islander people. Rather, one of the main reasons for focusing primarily on Aboriginal witnesses was the relatively small amount of anthropological and linguistic research on the language and culture of Torres Strait Islanders by comparison with research on Aboriginal people. This meant that the CJC did not feel confident in asserting that observations about matters such as, for example, avoidance of eye contact, or gratuitous concurrence, applied equally to Islanders.

In the CJC's view, the most appropriate way of addressing issues specific to Torres Strait Islanders is for the Attorney-General, through the Aboriginal Justice Advisory Committee, to consult with representatives of the Torres Strait Islander community about the applicability of the recommendations contained in this report.

8.1 Recommendation – Consultation with the Torres Strait Islander Community

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.

OTHER ISSUES

This report has identified various strategies, often quite simple and inexpensive, for modifying the existing criminal justice system and better informing participants about issues which are relevant to the way in which Aboriginal people give evidence in court. By these means, it is hoped, Aboriginal people's language and culture will no longer be barriers to understanding and the confidence of Aboriginal people in the court system will be enhanced.

It should be emphasised that the report has examined only some of the difficulties faced by Aboriginal people who come into contact with the criminal justice system. Other issues which would need to be considered in a more wide-ranging review include:

- the continuing over-representation of Aboriginal people in the criminal justice system in general and in the prison system in particular

- the specific, and very important, requirements of Aboriginal defendants

- the need to promote alternative justice mechanisms which can involve Aboriginal people in determining matters arising within their communities

- the state of police/Aboriginal relations.

The CJC decided to focus this report specifically on issues relating to Aboriginal witnesses; first, because cases such as the Pinkenba matter had highlighted this as an area of concern; and, secondly, because the position of witnesses has frequently been overlooked in previous research on the relationship between Aboriginal people and the criminal justice system. However, the other matters identified above must also be addressed by governments and criminal justice agencies if the criminal justice system is to be made fairer, more accessible and more relevant to Aboriginal people. The CJC will therefore continue to monitor developments in these areas and, if necessary, will initiate other research projects relevant to these issues.

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APPENDICES

APPENDIX 1
SUBMISSIONS RECEIVED

Written submissions were received from the following:

Alternative Dispute Resolution Division, Department of Justice and Attorney-General (now Department of Justice)

Aboriginal Justice Council, WA

Mr John Birch, Office of the Director of Public Prosecutions (NT), Darwin

Mr Michael Cooke, School of Community Studies, Batchelor College, Batchelor NT

Mr Ralph Devlin, barrister, Brisbane

Dr Diana Eades, Department of Linguistics, University of New England, Armidale NSW

Mr Peter Gillin, Law and Justice Section, ATSIC, Canberra

Mr Cliff Hartley-Holl, solicitor, Murgon

Legal Aid Office (Qld)

NAILSS

NAATI, Canberra

Mr Graeme Neate, Aboriginal Land Tribunal

Queensland Aboriginal and Islanders Legal Services Secretariat

Queensland Anti-Discrimination Commission

Dr Peter Sutton, consultant, Aldgate SA

Tharpuntoo Legal Service, Cairns

Dr John von Sturmer, consultant, Sydney

APPENDIX 2
PERSONS INTERVIEWED

The following individuals and groups spoke to CJC research staff by telephone or in person. Some of these interviewees requested that their comments be kept confidential.

Aboriginal and Torres Strait Islander community meeting, Bamaga (representatives of Injinoo, Umagico and New Mapoon Aboriginal communities, and Seisia and Bamaga Island communities)
Aboriginal and Torres Strait Islander community meeting, Logan
Aboriginal and Torres Strait Islander community meeting, Murri Mura, South Brisbane
Aboriginal and Torres Strait Islander community meeting, Yuddika Child Care Agency, Cairns
Aboriginal and Torres Strait Islander Deaths in Custody Inter-Departmental Committee
Aboriginal and Torres Strait Islander Deaths in Custody Overview Committee
Aboriginal Justice Advisory Committee
Aboriginal Legal Service, Brisbane (Mr Norm Brown Jnr, Mr Freddie Coolwell, Mr Paul Davney, Mr Ron Finney, Mr Karl Manning, Ms Cathy Muir and Ms Vicki Shiel)
Aboriginal Legal Service, Toowoomba (Mr Ross Finlayson, Mr Gary ('Sonny') Martin, Ms Lyn Speedy and Ms Marj Speedy)
Aboriginal Legal Service, Townsville (Mr Phillip Alley, Mr Roger Griffiths, Ms Harriet Hulthen, Ms Cathy McLennan and Mr David Smallwood)
Ms Margaret Ahkee, Yuddika Child Care Agency, Cairns
Mr David Allen, Human Rights and Equal Opportunity Commission, Sydney
Ms Roslyn Atkinson, President, Anti-Discrimination Tribunal
Aurukun Shire officers
Bama Ngappi Ngappi Centre, Yarrabah (Mr Ian Cush, Mr Errol Neal and Mr Colin Neal)
Ms Carolyn Barkell SM, Magistrates Court, Lismore
Mr T Black SM, Magistrates Court, Cairns
Ms Auriel Bloomfield, Indigenous Policy Issues Unit, Attorney-General's Department (Cwlth), Canberra
Mr Andrew Boe, solicitor, Brisbane
Mr Ken Bone and Mr Warren Collins, Cherbourg Aboriginal Council
Ms Cheryl Buchanan, Aboriginal Justice Advisory Committee
Cairns Community Legal Centre (Mr Rowan Silva and Ms Ruth Venables)
Ms Daisy Caltabiano, Aboriginal Co-ordinating Council, Cairns
Cape York Land Council, Cairns (Mr Michael Neal and Mr Archie Tanna)
The Honourable W J Carter QC
Centre for Aboriginal and Torres Strait Islander Participation and Development, James Cook University, Townsville (Mr Eric Barkmeyer, Dr Arthur Smith and Ms Leanora Spry)
Ms Anita Clarke, Tharpuntoo Legal Service, Cairns
Mr Ben Clarke, Tharpuntoo Legal Service, Cairns
Ms Suzette Coates, solicitor, Atherton
Mr Brad Collard, Aboriginal community liaison officer, Supreme Court (WA), Perth
Ms Jenny Cooke, Family Court of Australia, Sydney
Mr Michael Cooke, School of Community Studies, Batchelor College, Batchelor NT
Ms Suzan Cox, Legal Aid Commission (NT), Darwin
Mr A Cridland SM, Magistrates Court, Warwick
Criminal Justice Commission Aboriginal and Torres Strait Islander Advisory Committee
The Honourable Mr Justice K A Cullinane, Supreme Court, Townsville
His Honour Judge F Daly, District Court, Cairns
Mr J Darvall, barrister, Cairns
Mr S J Deer, Chief Stipendiary Magistrate
Department of Families, Youth and Community Care (formerly Family and Community Services)
—Ms Lesley Ahwang
—Ms Mary Denver, Bureau of Ethnic Affairs
—Mr Albert Dunn, Mr Jim Evans, Mr Merv Graham and Mr Michael Limerick
—Ms Trish Fewing, Ms Barbara Flynn and Mr Shane Sartour
—Ms Madeleine Longman, Ms Linda McBride, Ms Karen Pringle, Ms Diane Solomon, Ms Isabel Tarrago and Ms Jan Walker
—Mr Adrian Padmore
Department of Justice, Courts Division, Courts Strategy Research Branch
Mr Brian Devereaux, Aboriginal Legal Service of Western Australia, Perth
His Honour Judge Dodds, District Court, Maroochydore
Mr Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, Sydney
Dr Diana Eades, Department of Linguistics, University of New England, Armidale NSW
Ms Helen Eastburn, Legal Aid and Family Services Section, Attorney-General's Department (Cwlth), Canberra
Mr David Epworth, Cape York Land Council, Bamaga
Mr James Evans, Aboriginal Justice Advisory Committee (NSW)
Far North Queensland Defence Lawyers Association, Cairns
The Honourable Mr Justice G E Fitzgerald AC, President of the Court of Appeal
Mr Fitzsimons SM, Magistrates Court, Cairns
Mr Lionel Fraser, Aboriginal Legal Service, Ipswich
Mr Jim Gibney, Cairns Community Legal Service
Mr Russell Goldflam, Dittons Solicitors, Alice Springs
Mr Jim Gordon SM, Magistrates Court, Townsville

Mr Philip Hardcastle, barrister, Brisbane
Ms Jenny Hardy, Northern Australian Aboriginal Legal Aid Service, Darwin
Ms Helen Harper, School of Community Studies, Batchelor College, Batchelor NT
Mr Cliff Hartley-Holl, solicitor, Murgon
Mr Tom Hicks, Wakka Wakka Legal Service, Maroochydore
Mr Bill Hiscock, Kowanyama Aboriginal Council
Mr Gary Hiskey SM, Magistrates Court, Adelaide
Mr Ian Horrocks, Aboriginal Legal Service of Western Australia, Perth
Mr Bruce Horsburgh and Ms Vaille Anscombe, Office of the Director of Public Prosecutions (Vic), Melbourne
Professor David Ingram, Centre for Applied Linguistics and Languages, Griffith University, Brisbane
Mr Marshall Irwin, barrister, Brisbane
Mr Jim Jeffery, solicitor, Queanbeyan (NSW)
Mr Wayne Johns, Principal Registrar, Magistrates Court, Adelaide
Mr David Kent, barrister, Brisbane
Kowanyama Community Justice Group
Mr Gemunu Kumarisinghe, Aboriginal Legal Service, Lismore
Mr Robert Lachowicz, Faculty of Law, Griffith University, Brisbane
Ms Melanie Little, Aboriginal Legal Rights Movement, Adelaide
Ms Vikki Macallef and Mr Pat Coughlan, Probation Service (NSW), Lismore
Mr Steve Mam and Mr Bill Lowah, Iina Torres Strait Islander Corporation
Mr Bevan Manthey, Clerk of the Court, Toowoomba
Mr Tony McAvoy, Department of Aboriginal Affairs (NSW), Sydney
Mr Michael McGuigan, solicitor, Cairns
His Honour Judge F McGuire, District Court, Brisbane and President of the Childrens Court of Queensland
Mr Matt McLaughlin, Njiku Jowan Legal Service, Cairns
The Honourable Justice D Mildren, Supreme Court (NT), Darwin
Mr James Mitchell, Toowoomba
Mr Peter Muldoon, Clerk of the Court, Casino
Mr Ron Murray, Community Justice Panel Program, Victoria Police, Melbourne
National Aboriginal and Islanders Legal Services Secretariat (Mr Geoffrey Atkinson, Mr John Leslie and Mr Ian Pilgrim)
Mr Graeme Neate, Aboriginal Land Tribunal
His Honour Judge O'Brien, District Court, Townsville
Ms Anne O'Connell and Mr Brendan Thomas, Attorney-General's Department (NSW), Sydney
Office of the Director of Public Prosecutions
—Mr Royce Miller QC, Director of Public Prosecutions
—Mr Brendan Butler SC, Deputy Director of Public Prosecutions
—Mr Brendan Campbell, Maroochydore
—Mr Jim Henry, Townsville
—Ms Shirley Law, Cairns
—Mr Ross Martin and Mr David Meredith, Brisbane
—Ms Donna-Maree O'Connor, Violence Against Women Unit, Brisbane
—Ms Linda Petrusa, Cairns
—Ms Kath Tracey, Maroochydore
Mr Terry O'Gorman, Queensland Council for Civil Liberties
Mr Michael O'Keeffe and Mr John Thompson, Legal Aid Office (Qld), Townsville
Ms Pat O'Shane, Chief Magistrate (NSW), Sydney
Palm Island Community Justice Group and Queensland Corrective Services Commission, Palm Island (Mr Greg ('Bruno') Bryant, Mr Henry ('Nipper') Miller and Mr Algon Walsh)
Peter, Lockhart River
Mr T F Pollock SM, Magistrates Court, Cairns
Mr Andrew Preston, Native Title Practice Group, Crown Law Division, Department of Justice
Queensland Anti-Discrimination Commission, Cairns (Ms Rosemary Anderson and Mr Jim Gibney)
Queensland Police Service
—Sgt Trevor Crawford, Bamaga
—Sen Con Greg Cruise, Aurukun
—Insp Col Dillon, Cross-cultural Support Unit
—Far Northern Regional office (Sgt Joe Pennisi, A/Insp Bob Waters, PLO Wayne Mothe, Insp Steve Wardrobe and Sgt Kel Clarke)
—Sen Con Mark Hegenelst, Lockhart River
—Sgt Rob Hull, prosecutor, Kingaroy
—Prosecutions Branch, Cairns (Sgt Andrew Carr, Sgt Di Fisher, Sgt Brad Hafner, Sen Sgt Jim MacKenzie, Sgt Matt Orme)
—Snr Sgt Kev Smith, prosecutor, Townsville
—Sgt M Turner, prosecutor, Toowoomba
Mr John Ramsamy, Acting Chairperson, Aboriginal and Torres Strait Islander Overview Committee
Mr David Rawlison, Aboriginal Court Liaison Officer, Lismore
Mr Anthony Reilly, South Brisbane Immigration and Community Legal Service Inc
Ms Dianne Reys, Rape Crisis Centre, Cairns
Mr Grant Riethmuller, barrister, Townsville
Professor Bruce Rigsby, Anthropology Department, University of Queensland
Ms Lucy Rogers, Women's Refuge Centre, Yarrabah
Mr John Scantleton, Probation Service (NSW), Casino
Ms Maureen Schull, Courts and Tribunals Branch, Attorney-General's Department (Cwlth), Canberra
Ms Joanne Selfe, Attorney-General's Department (NSW), Sydney
His Honour Judge J P Shanahan, Chief Judge of District Courts
Mr Steve Sharratt, Aboriginal Legal Service of Western Australia, Geraldton WA
Mr Gary Short, Clerk of the Court, Kyogle
His Honour Judge N A Skoien, Senior Judge of District Courts
Ms Madge Smith, Court of Petty Sessions, Perth
The Honourable D G Stewart, Sydney
Mr Phil Thompson, Registrar, ACT Magistrates Court, Canberra
His Honour Judge Trafford-Walker, District Court, Townsville
Ms Pat Trezise, Tharpuntoo Legal Service, Cairns
Ms Penny Tripcony and Mr Michael Williams, Aboriginal and Torres Strait Islander Studies Unit, University of Queensland
Mr Mike Tupper, Njiku Jowan Legal Service, Innisfail
Mr Clain Underwood, Yarrabah

Mr Chris Vass SM, Magistrates Court, Port Adelaide SA
Wadjularbinna, Doomadgee
Ms Maude Walsh, Law Society of Western Australia, Perth
His Honour Judge P White, District Court, Cairns
Ms Cathy Woodward, Aboriginal Justice Advisory Committee, Victoria
Mr Gordon Wragg, Wakka Wakka Legal Service, Murgon
Ms Cherry Yates and Mr Reg Yates
Mr Alan Yorkston SM, Magistrates Court, Toowoomba
Mr Francis Yunkaporta, Aurukun

APPENDIX 3
CAPE YORK PENINSULA MAGISTRATES COURTS STATISTICS

PLACE	GUILTY PLEAS	NOT GUILTY PLEAS	REMANDS	COMMITTALS		EX PARTE MATTERS	BAIL FORFEITURE OR WITHDRAWALS	CHAMBER APPLICATIONS	APPLICATIONS OR APPEALS
				District Court	Supreme Court				
Aurukun	339	6	253	47	6	9	25	0	33
Bamaga	86	0	15	4	1	0	1	0	18
Coen	36	0	24	0	0	1	2	0	2
Kowanyama	179	6	58	18	1	2	5	12	50
Lockhart River	113	4	43	2	0	0	10	0	5
Pormpuraaw	122	0	39	4	0	1	13	0	N/A
Thursday Island*	198	24	444	27	13	10	47	18	51
	(308)	(26)	(609)	(50)	(13)	(10)	(85)	(18)	(51)
Weipa*	235	10	360	8	17	1	63	4	121
	(420)	(20)	(570)	(17)	(17)	(5)	(101)	(4)	(121)

Source: Unpublished data received from Courts Division, Department of Justice (formerly Department of Justice and Attorney-General), October 1995.

Notes:

1. Figures are for matters heard July–December 1994 inclusive.

2. * Figures in parentheses for Thursday Island and Weipa are for matters heard July 1994–June 1995 inclusive.

APPENDIX 4
PROPOSED DIRECTIONS TO JURY

This appendix contains suggested directions to be given to juries in cases involving Aboriginal witnesses who are speakers of Aboriginal English or Torres Strait Creole.

The Aboriginal English version is a revision by Dr Diana Eades of the University of New England, in consultation with the Honourable Justice Mildren of the Northern Territory Supreme Court and Mr Michael Cooke of Batchelor College, Northern Territory, of a form originally suggested by Justice Mildren (1996, pp. 28–30). It has been reviewed specifically to be relevant to the situation of Aboriginal people in Queensland. Even so, as Justice Mildren noted, it will obviously require adaptation to the individual circumstances.

The Torres Strait Creole version is by Ms Helen Harper of Batchelor College, Northern Territory. It is relevant to Aboriginal people for whom Torres Strait Creole has become a first language, like those in parts of Cape York Peninsula. Where an Aboriginal person from Cape York Peninsula is involved as a witness, the Judge will need to determine whether the witness is a speaker of Torres Strait Creole or Aboriginal English before choosing the directions.

The two sets of directions (concerning Torres Strait Creole speakers and concerning Aboriginal English speakers) cover many of the same issues.

DIRECTIONS TO JURY CONCERNING ABORIGINAL WITNESSES (SPEAKERS OF ABORIGINAL ENGLISH)

Introduction

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

2 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.

Aboriginal English

3 Many Aboriginal people in North Queensland, including Aboriginal people of mixed descent, do not speak English as their first language. And many, in all parts of the State, who do speak English as their first language have learnt to speak English in a manner which is different from other speakers of English in Australia: they are speakers of Aboriginal English.

4 Aboriginal English is not the same all over the State: it ranges from "heavy" Aboriginal English to "light" Aboriginal English. Heavy Aboriginal English is harder for non-Aboriginal people to understand fully, but even with speakers of light Aboriginal English there are some important things you should be aware of. And remember that speakers of heavy and light Aboriginal English are found all over the State, even in Brisbane and even with people you may think do not look distinctively Aboriginal.

Word meaning, grammar and accent

5 It is important that you listen carefully to the context in which words are used in order to prevent misunderstanding as far as possible. Sometimes ordinary English words are used by Aboriginal English speakers differently than in Standard English. Counsel will do their best to ensure that this becomes clear to you as the evidence unfolds, but you can often realise this for yourselves if you listen carefully to the context.

6 There are a number of grammatical differences between Aboriginal English and other kinds of English. For example, 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 it is the past or the future that is being talked about. You may also notice that pronouns, such as "he", "she" and "you", are used differently at times. 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.

7 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 or her what is wrong so that we can see if the matter can be remedied.

Ways of communicating

8 Aboriginal English speakers may also have different cultural values which affect the way they speak and behave. The things I will tell you about now are common with a wide range of speakers of Aboriginal English, even among many who speak light Aboriginal English. Remember that skin colour is not a reliable indicator of the way that an Aboriginal person communicates. Many Aboriginal cultural values and ways of communicating are strong even in places like Brisbane.

9 It is very common for Aboriginal people to avoid direct eye contact with those speaking to them, because it is considered to be impolite in Aboriginal societies to stare. On the other hand, in most non-Aboriginal societies people who behave like this might be regarded as shifty, suspicious or guilty. You should be very careful not to jump to conclusions about the demeanour of an Aboriginal witness on the basis of the avoidance of eye contact, as it cannot be taken as an indicator of the Aboriginal witness's truthfulness.

10 It is customary among 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 courtroom, and they are used to having the chance to think carefully before talking about serious matters, so it may take time for them to adjust to this method of imparting information.

11 It is very common for witnesses to be asked questions in a form in which the answer to the question is suggested by the question itself. Lawyers call this type of question a 'leading question'. An example of such a question is one like this: 'You saw the red car hit the blue car, didn't you?' Many Aboriginal English speakers will answer 'yes' to this type of question, even if they do not agree with the proposition being put to them in the question, and even if they do not understand the question. The same applies if the proposition is put in a negative question which is a leading question. For example, if the question was 'You didn't see the red car hit the blue car, did you?', they will often answer 'no' in the same way. Such an answer should not always be taken to mean 'I agree with what you have just put to me'. This communication pattern in Aboriginal English has been documented by scholars, and it can sometimes

cause difficulties, especially in the cross-examination of some Aboriginal witnesses. I will be doing my best to ensure that counsel do not exploit this cultural difference, and for this reason I may disallow some questions.

12 Similarly the answers 'I don't know' and 'I don't remember' do not always refer directly to the Aboriginal English speaker's knowledge or memory. They can be responses to the length of the interview, or to the length of the question, or to the difficulty which a number of Aboriginal people have in adjusting to the use of repeated questioning.

13 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.

14 Some concepts, such as time and number, are understood by Aboriginal English speakers very differently from Standard English speakers. Hopefully witnesses who do not use numbers and measurements the same way you are used to using them, will not be asked questions by counsel about those sort of things. The necessary information can be elicited in a different way. However, it may be that a witness will say that 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.

Hearing problems

15 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. In such a situation the witness may answer inappropriately or may ask for the question to be repeated.

16 Sometimes Aboriginal people speak very softly and are hard to hear, even with a microphone. 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.

Conclusion (optional)

17 Aboriginal English can differ in many important ways from other kinds of English. It is not a witness's physical appearance which is relevant to the use of Aboriginal English, but the way that the witness was brought up, and the kinds of successful communication experienced by the person. I hope that this outline of some important features of Aboriginal English can help you to realise that, even if an Aboriginal person's language sounds like English, we can't always make the same assumptions about their meaning.

DIRECTIONS TO JURY CONCERNING ABORIGINAL WITNESSES (SPEAKERS OF TORRES STRAIT CREOLE)

Note to Judges

Torres Strait Creole is spoken mainly by Torres Strait Islanders, but some Aboriginal people from communities in Cape York Peninsula also speak a variety of Torres Strait Creole as their first language.

Introduction

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

2 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 who speak Torres Strait Creole.

Torres Strait Creole

3 Some Aboriginal people in Queensland, including those of mixed descent, do not speak English as their first language. Their first language may be a traditional language. Many Aboriginal people from the Northern Peninsula area of Queensland also speak a language called Torres Strait Creole. Torres Strait Creole is also sometimes called 'Broken', 'Pidgin' or 'Blackman'.

4 Torres Strait Creole is similar to English; in fact a lot of the words in Creole came from English. But an English speaker can't always understand people who speak Creole, and many Creole speakers have never learnt to speak Standard Australian English. Not all Creole speakers speak Creole in the same way: some people speak a Creole which sounds very much like Standard English, while others speak a Creole which doesn't sound like English at all and is therefore hard for English speakers to understand. Sometimes Creole speakers know enough English to get by in everyday life, but they find it very difficult to speak English in formal situations. Remember that speakers of Torres Strait Creole live all over the State, even in Brisbane and other towns.

Word meaning, grammar and accent

5 It is important that you listen carefully to the context in which words are used in order to prevent misunderstanding as far as possible. Sometimes ordinary English words are used by Torres Strait Creole speakers differently than in Standard English. You should be aware that Creole speakers giving evidence in English may be influenced by their first language, and that therefore their intended meaning may sometimes be ambiguous. For example, in Creole 'too much' can mean the same as it does in English, but it can also mean 'a lot', depending on the context.

6 There are a number of grammatical differences between Torres Strait Creole and English and so Torres Strait Creole speakers may be influenced by Creole grammar when they speak English. For example, they may order their words differently. You may also notice that pronouns, such as 'he', 'she' and 'you', are used differently at times. 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.

7 Many Torres Strait Creole speakers 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 or her what is wrong so that we can see if the matter can be remedied.

Ways of communicating

8 Aboriginal people may also have different cultural values which affect the way they speak and behave. The things I will tell you about now are common with a wide range of Torres Strait Creole speakers, even among many who speak Standard English. Remember that many Aboriginal cultural values and ways of communicating are strong even in places like Cairns, Townsville and Brisbane. Remember too that skin colour is not a reliable indicator of the way that an Aboriginal person communicates.

9 Aboriginal people often avoid direct eye contact when people are speaking to them, partly because they may be shy, and partly because in their societies it is considered impolite to stare. On the other hand, in most non-indigenous societies people who behave like this might be regarded as shifty, suspicious or guilty. You should be very careful not to jump to conclusions about the demeanour of an Aboriginal witness on the basis of the avoidance of eye contact, as it cannot be taken as an indicator of the Aboriginal witness's truthfulness.

10 Some Torres Strait Creole speakers are comfortable speaking English, but some are not so comfortable, although they may sound like they speak English well. People who are not comfortable with speaking English may hesitate frequently, or may keep their answers to questions as short as possible. 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 Torres Strait Creole speakers are not used to direct questioning in the way in which it is used in the courtroom, and they are used to having the chance to think carefully before talking about serious matters, so it may take time for them to adjust to the question and answer method of imparting information.

11 It is very common for witnesses to be asked questions in a form in which the answer to the question is suggested by the question itself. Lawyers call this type of question a 'leading question'. An example of such a question is one like this: 'You saw the red car hit the blue car, didn't you?' Because English is not their first language, Torres Strait Creole speakers sometimes misunderstand or don't fully understand such questions. You should be aware that some Torres Strait Creole speakers may answer 'yes' to this type of question, even when they don't understand it, just because they want to appear to be polite or co-operative.

12 Similarly the answers 'I don't know' and 'I don't remember' do not always refer directly to the Torres Strait Creole speaker's knowledge or memory. They can be responses to the length of the interview, or to the length of the question, or to the difficulty which a number of Aboriginal people have in adjusting to the use of repeated questioning.

13 You should also be aware that many Torres Strait Creole speakers use gestures which are often very slight and quick movements of the eyes, head or lips to indicate location or direction.

14 Some concepts, such as time and number, are understood by Torres Strait Creole speakers very differently from Standard English speakers. Hopefully witnesses who do not use numbers and measurements the same way you are used to using them, will not be asked questions by counsel about those sort of things. The necessary information can be elicited in a different way. However, it may be that a witness will say that 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.

Hearing problems

15 Many Aboriginal people suffer from hearing problems. It may be that if a witness has a hearing difficulty, he or she may have problems understanding questions put to them. In such a situation the witness may answer inappropriately or may ask for the question to be repeated.

16 Sometimes, especially in formal situations, Aboriginal people speak very softly to Europeans and are hard to hear, even with a microphone. 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.

APPENDIX 5
AUSTRALIAN INTERPRETERS LEGISLATION

The following table compares provisions about witnesses' entitlements to the assistance of an interpreter in legal proceedings.

ISSUE	COMMONWEALTH AND NEW SOUTH WALES (*Evidence Act 1995*, s. 30)	VICTORIA (*Magistrates Courts Act 1989*, s. 40)	SOUTH AUSTRALIA [*Evidence Act 1929*, s. 14(1)]	AUSTRALIAN CAPITAL TERRITORY (*Evidence Act 1971*, s. 63A)
When?	In any proceeding.	If the defendant is charged with an offence punishable by imprisonment.	In any proceedings.	In a proceeding.
In what circumstances?	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.	If the court is satisfied that the defendant does not have a knowledge of the English language that is sufficient to enable the defendant to understand, or participate in, the proceedings.	Where — (a) the native language of the witness is not English; and (b) the witness is not reasonably fluent in English.	Where the party or a witness is — (a) unable to communicate effectively in English; or (b) unable to hear, or to speak, effectively.
Who?	A witness.	A defendant.	A witness who is to give oral evidence.	A party or witness.
What happens?	A witness may give evidence about a fact through an interpreter.	The court must not hear and determine the proceeding without a competent interpreter interpreting it.	The witness is entitled to give that evidence through an interpreter.	The court shall permit the party or witness to be assisted by a competent interpreter.
Any limitations?	See above.	See above.	See above.	A court shall not permit a party or a witness in a proceeding to be assisted by an interpreter where the court considers that it would not be in the interests of justice to do so.
Who provides the interpreter?	Not specified.	Not specified.	Not specified.	(a) in criminal proceedings – the prosecutor; or (b) in any other case – the party who requires, or whose witness requires, the assistance of the interpreter.

PUBLISHED REPORTS AND PAPERS OF THE CRIMINAL JUSTICE COMMISSION AS AT 14 JUNE 1996

Date of Issue	Title	Availability
May 1990	Reforms in Laws Relating to Homosexuality – An Information Paper	Out of print
May 1990	Report on Gaming Machine Concerns and Regulations	Out of Print
September 1990	Criminal Justice Commission Queensland Annual Report 1989-1990	Out of print
November 1990	SP Bookmaking and Other Aspects of Criminal Activity in the Racing Industry – An Issues Paper	Out of print
November 1990	Corporate Plan	Out of print
February 1991	Directory of Researchers of Crime and Criminal Justice – *Prepared in Conjunction with the Australian Institute of Criminology*	Out of print
March 1991	Review of Prostitution – Related Laws in Queensland – An Information and Issues Paper	Out of print
March 1991	The Jury System in Criminal Trials in Queensland – An Issues Paper	Out of print
March 1991	Report of an Investigative Hearing into Alleged Jury Interference	Out of print
April 1991	Submission on Monitoring of the Functions of the Criminal Justice Commission	Out of print
May 1991	Report on the Investigation into the Complaints of James Gerrard Soorley Against the Brisbane City Council	Out of print
May 1991	Attitudes Toward Queensland Police Service – A Report (Survey by REARK)	Out of print
June 1991	The Police and the Community, Conference Proceedings – *Prepared in Conjunction with the Australian Institute of Criminology Following the Conference Held 23–25 October 1990 in Brisbane*	Out of print
July 1991	Report on a Public Inquiry into Certain Allegations Against Employees of the Queensland Prison Service and its Successor, the Queensland Corrective Services Commission	Out of print
July 1991	Complaints Against Local Government Authorities in Queensland – Six Case Studies	Out of print
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Date of Issue	Title	Availability
September 1991	Police Powers – An Issues Paper	In stock as at time of printing of this report
September 1991	Criminal Justice Commission Annual Report 1990/91	In stock as at time of printing of this report
November 1991	Report on a Public Inquiry into Payments Made by Land Developers to Aldermen and Candidates for Election to the Council of the City of Gold Coast	In stock as at time of printing of this report
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March 1992	Report on an Inquiry into Allegations Made by Terrance Michael Mackenroth MLA the Former Minister for Police and Emergency Services; and Associated Matters	Out of print
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March 1992	Crime Victims Survey – Queensland 1991 *A Joint Publication Produced by Government Statistician's Office, Queensland and the Criminal Justice Commission*	In stock as at time of printing of this report
June 1992	Forensic Science Services Register	Out of print
September 1992	Criminal Justice Commission Annual Report 1991/1992	In stock as at time of printing of this report
September 1992	Beat Area Patrol – A Proposal for a Community Policing Project in Toowoomba	Out of print
October 1992	Pre-Evaluation Assessment of Police Recruit Certificate Course	In stock as at time of printing of this report
November 1992	Report on S.P. Bookmaking and Related Criminal Activities in Queensland *(Originally Produced as a Confidential Briefing Paper to Government in August 1991)*	In stock as at time of printing of this report
November 1992	Report on an Investigation into the Complaints of Kelvin Ronald Condren and Others	Out of print
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January 1993	First Year Constable Study Summary Report #2	In stock as at time of printing of this report
April 1993	Submission to the Parliamentary Criminal Justice Committee on the Use of the Commission's Powers Under Section 3.1 of the Criminal Justice Act 1989	Out of print

Date of Issue	Title	Availability
May 1993	Report on a Review of Police Powers in Queensland Volume I: An Overview	In stock as at time of printing of this report
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May 1994	Report on a Review of Police Powers in Queensland Volume IV: Suspects' Rights, Police Questioning and Pre-Charge Detention	In stock as at time of printing of this report
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Date of Issue	Title	Availability
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October 1994	Report on a Review of Police Powers in Queensland Volume V: Electronic Surveillance and Other Investigative Procedures	In stock as at time of printing of this report
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