
Redressing the Imbalance Against Aboriginals in the Criminal Justice System*

The Hon Justice Dean Mildren**

Supreme Court of the Northern Territory

Aboriginals involved in the criminal justice system are disadvantaged because of the lack of sufficient court-trained interpreters, and because of cultural differences which affect their ability to understand and be understood. It is proposed that adjustments can be made to the existing system to make the process fairer without the need for legislative change. The article discusses the main language and cultural difficulties facing Aboriginals involved in the criminal justice system, and ways to reduce the effect of those difficulties in order to promote justice. It is recommended that the police obtain translations of the caution and of the advice given to suspects and prisoners' friends in the main Aboriginal languages. The article discusses ways in which police, counsel and judges can more fairly elicit information in the English language from Aboriginals or persons of mixed descent. It is proposed that trial judges should give a suitable direction to the jury before the witnesses are called, drawing attention to the main areas where misunderstandings can occur. It is submitted that trial judges should exercise stronger control over forms of advocacy likely to operate unfairly to Aboriginal witnesses and accused persons, and the article discusses the ways in which this can be achieved.

Introduction

The problems of providing a fair and just system for the investigation of complaints made by and against Aboriginal people, the trial of Aboriginal defendants and the appropriate use of the court's

sentencing powers have been a subject of much academic discussion for a very long time. While many of the worst inequities have gone, there are still many problems which remain to be adequately addressed. There is no shortage of academic writings about what the problems are; suggested solutions are, however, much harder to find. Apart from some isolated recommendations which occasionally have surfaced from commissions of inquiry on broader-based subjects, most academic writers do not suggest solutions. Those who do, fall broadly into two classes: first, those who suggest radical change; and secondly, those who suggest gradual change by increased education and cultural and social awareness. The main plank of the former

* This article is based on a paper delivered at the 5th Biennial Conference of the Northern Territory Criminal Lawyers Association, Bali, Indonesia, 26 July 1995.

** I acknowledge the assistance of Mr Michael Cooke of the School of Community Studies, Batchelor College, Northern Territory, in the revision of this article.

is the establishment of village courts run by the Aboriginals themselves.¹ This solution has not gained widespread support and was recently rejected by the Australian Law Reform Commission.² There are obvious and serious flaws in conferring jurisdiction upon specially constituted courts. The purpose of this article is not to suggest radical change to the present criminal justice system, but to examine the present system and to see what can be done by police, advocates and judges to improve upon it, especially where no legislative change is necessary.

The investigative process

There is little doubt that the Northern Territory has pioneered changes in the way evidence is gathered, particularly from Aboriginal suspects. The main reforms have been achieved by the Anunga Rules,³ the Commissioner of Police's General Standing Orders and by the provisions of the *Police Administration Act* 1978 (NT) relating to the recording of confessions.⁴ Although the main problems which these measures have been designed to redress are well known, it is worth briefly recapitulating them. Language difficulties and cultural differences may place an Aboriginal at a disadvantage in communicating with the police. While most Aboriginals in the Northern Territory are able to speak some English, few are completely fluent in the language even today, and the vast majority are illiterate. Even those who speak

English are liable to be misunderstood. Common English words are not infrequently used by Aboriginal speakers in quite a different sense to their common meaning: for example, the word "kill" is often used in the sense of "injure". Competent interpreters are very difficult to find and in any event many English words and concepts do not have an equivalent word or concept in the relevant Aboriginal language and vice versa. It is not uncommon to find Aboriginals who speak a mixture of languages, the speaker using words from whichever language he or she considers most appropriate. Cultural difficulties can also lead to barriers. Apart from shyness, Aboriginals may be reluctant to discuss certain topics for various reasons; for example, the topic may be one about which only certain individuals are permitted to speak. Some Aboriginals find it difficult to distinguish between what they know of their own knowledge and what they have learned from others. It is often assumed that these problems are restricted to full-blood Aboriginals who have been living a traditional lifestyle. There is ample evidence to suggest that there are similar problems among even urban Aboriginal people of mixed descent. It is submitted that the time has come to review the Anunga Rules in the light of the experience of the courts since 1976.

Rule 1 requires an Aboriginal suspect to have available an interpreter "unless he is as fluent in English as the average white man of English descent". Recent decisions have tended to water down this requirement. In *Butler (No 1)*, Kearney J said:⁵

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

This approach has been followed by other members of the Supreme Court of the Northern Territory.

¹ See, eg, the review article by L MacNamara in (1993) 16(1) *University of New South Wales Law Journal* 302.

² ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31, Summary Report (1986), para 132.

³ *Anunga* (1976) 11 ALR 412.

⁴ *Anunga* has been followed in the Australian Capital Territory in *Clevens* (1981) 55 FLR 453; 37 ACTR 57 and by the Full Federal Court in *Gudabi v The Queen* (1984) 1 FCR 187; 12 A Crim R 70. In Queensland it has sometimes been treated as a guide in the case of tribal Aborigines (see *W* [1988] 2 Qd R 308 at 319), but in both that State and South Australia the subject of interrogation of Aborigines is governed by police guidelines, the breach of which gives rise to a discretion to reject the confession: *W* [1988] 2 Qd R 308; *S and J* (1983) 32 SASR 174; 8 A Crim R 88. There are no reported cases on the topic from the other State courts. Section 85 of the *Evidence Act* 1995 (NSW) and s 85 of the *Evidence Act* 1995 (Cth) provide that an admission is inadmissible unless the circumstances are such as to make it unlikely that the truth of the admission was adversely affected.

⁵ (1991) 102 FLR 341 at 346; 57 A Crim R 451 at 455.

Due to the difficulties in obtaining competent interpreters, a practical approach in accordance with the spirit of the guideline has been adopted. In other cases the prisoner's friend has been able to act as interpreter, but what we often see is that the interpreter's comprehension of English is little better than that of the suspect.

There are plainly difficulties in obtaining competent interpreters in the Northern Territory, and I suspect elsewhere, although there are some very competent interpreters around. The main difficulty is that there are not enough of them. Those who do exist are usually not in government employ and have to be seconded by the police to perform their task. Only rarely will an interpreter, even a competent one, have sufficient knowledge of police or court procedures or of the criminal law to be able to achieve a high level of mutual understanding, let alone the "complete" mutual understanding which Rule 1 seeks to achieve. Mutual understanding is not just about the suspect's ability to comprehend English when spoken to; it is also about the ability of the suspect to express himself or herself in English, a point which must not be overlooked.

I do not think that enough is being done to require the significant effort which needs to be made to ensure that there is an adequate supply of interpreters in the main Aboriginal languages. I see no reason why the courts should exercise undue leniency in relation to Rule 1 based on pragmatic considerations unless the court concerned is persuaded that all that could have been done was done to secure the services of a competent interpreter. I do not think that courts should too readily reach the conclusion that because the interview was conducted in simple English the required level of mutual understanding had been achieved. I would suggest that the Aboriginal legal aid agencies are probably best equipped to be involved in the identification of those people willing and able to act as interpreters. It may be that the land councils, some of the church organisations and other bodies and institutions, such as Batchelor College in the Northern Territory, and Aboriginal councils also know of such people. So far as I am aware, there is no database anywhere recorded in the Territory containing a list of these persons. An

interpreter service exists in Alice Springs, but none of the interpreters available have been fully trained as court interpreters. I think such a list needs to be prepared and made generally available to police, legal aid agencies, members of the legal profession and the courts. I suggest also that effort should be made towards some practical training of these people, perhaps by courses run by the local Criminal Lawyers Association or Law Society, in criminal law and procedure and in what to do during a record of interview or during a trial. Ideally, interpreters should have familiarity with police and court procedures and a reasonable understanding of the criminal law. Even partly trained interpreters who have had some practical teaching in basic court procedures would be better than none at all.

It is often assumed that an interpreter who has done the National Accreditation Authority for Translators and Interpreters Level III Exam is *ex hypothesi* a professional interpreter competent to interpret in a court or in legal matters. However, it is clear that the accreditation to NATI Level III by examination is no substitute for tertiary and specialist training and that the skill of interpreters varies widely.⁶ Nevertheless, the fact that the record of interview has been recorded means that any errors of interpretation can be corrected later.

While there can be no satisfactory substitute for trained interpreters, it seems inevitable that it will be many years before this problem is remedied. In the meantime, the system must cope as best it can.

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

⁶ See A Crouch, "The Way, the Truth and the Right to Interpreters in Court" (1985) 59 (7) *Law Institute Journal* 687.

must be that of the suspect.⁷ In *Butler (No 1)*, Kearney J emphasised that the prisoner's friend should be aware of the respective rights and duties of the police and of the suspect in the interview so that he or she can ensure that the suspect is aware of the possible consequences of his or her answers; the friend should be seen to be independent of the police and have a temperament such that he or she is not intimidated by the interviewing environment; and the friend should be able to speak the suspect's principal language. For the suspect's choice of friend to be an effective one it is clear that the suspect as well as the friend must know what function it is that the friend is to perform so as to avoid the danger that the choice will be an entirely inappropriate one. The accused should be told that the function of the friend is to act in an advisory role to the accused and to assist him or her to understand the matters which the police wish to speak about, that preferably the friend should be someone who is able to speak the same language and someone who is also reasonably fluent in English. The suspect should be told that the prisoner's friend should be someone that he or she trusts and has confidence in and will feel supported by. The suspect should also be told that he or she will be afforded the chance to speak privately to the friend before any formal record of interview takes place, that the suspect should choose someone who is aware of the rights of a suspect and the rights and duties of police when interviewing suspects, that the friend should be someone independent of the police, someone not likely to be afraid of the police and someone not involved in the investigation either as a suspect or as a witness.⁸ Clearly this explanation should be recorded in the most common Aboriginal languages as should the explanation of the friend's role by the police to the friend, and copies of those recordings should be available in all police stations. Both explanations should be given at an appropriate time, and the explanations recorded, preferably on videotape in the case of serious offences. It is no use telling the accused what the friend's role is so as to help in making an appropriate choice if the

choice has already been made. It is of little use explaining to the friend and to the accused that they can have a private conversation if the record of interview has already commenced. It is pointless giving an explanation of these roles in English if neither the suspect nor the friend has a good command of English.

One problem which fortunately has so far not yet arisen, is whether any admissions made privately to the prisoner's friend are able to be adduced by the Crown. Nevertheless, there have been cases where the suspect has been "dobb'd in" by the prisoner's friend during the formal record of interview. There is no rule of evidence which attaches any privilege to such admissions. It is likely that any such admissions would be excluded in the exercise of the fairness discretion, given that the police have suggested to the accused that he or she may speak to the friend privately. But as the matter is not free from doubt, it is important that both the accused and the prisoner's friend are told that whatever the prisoner's friend is told by the suspect is confidential and that the prisoner's friend has no right to volunteer information given by the suspect during the record of interview.

There is, of course, no requirement that the prisoner's friend need be a solicitor; nor is there a requirement to advise the suspect of a right to see a solicitor before the interview starts.

Many Aboriginal legal aid services have Aboriginal field officers who can serve as prisoners' friends but no doubt their resources, both in terms of field officers and solicitors, would become stretched if they routinely were required to perform this role. The temptation might be to advise their clients in each case to exercise their right of silence for reasons of personal convenience to the friend rather than what is necessarily in the best interests of their clients.

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

⁷ See *Gudabi* (1984) 1 FCR 187 at 199-200; 12 A Crim R 70 at 82.

⁸ See *Weetra* (1993) 93 NTR 8 at 11.

The main difficulties seem to be as follows:

1. It is common practice for the police to break up the caution, usually into three segments, and at the end of each segment to ask the suspect "Do you understand that?", to which the subject will usually reply "yes". In most cases the value of that answer is nil. It would be better to avoid the question "Do you understand that?" completely, and instead to ask the suspect to repeat what has just been said in his or her own words.

2. There is a problem with the expression "you are not obliged to answer any questions" which is often explained by police as "you do not have to answer any questions". Most Aboriginals have difficulty with the expression "have to" and will frequently answer "yes" if asked the question "Do you have to answer my questions?" The reason for this may be because the suspect uses the expression "have to" to mean "want to". Alternatively, the suspect may be answering the question "yes" out of politeness, or "gratuitous concurrence"⁹ or may be using the expression "have to" correctly. There may be cultural reasons why the suspect "has to" answer the question; pressure may have been brought to bear by relatives who do not wish to suffer "payback" if he or she is not dealt with by the police. It would be better to avoid the expression "have to" altogether. A similar problem arises with "forced to". The expression "make you" seems to create fewer difficulties. It would also be preferable to avoid questions starting with parts of the verb "to be". Many Aboriginals do not frame questions this way, but ask questions by making statements using rising intonation or using "eh" or "hey" at the end of the sentence,¹⁰ or by sentences beginning with "wh-" words (who, what, where, etc).

3. There is also a difficulty in the order in which the ideas and concepts are contained in the caution. Usually the first idea conveyed is that the suspect does not have to answer any questions. If a suspect is told that he or she can remain silent and in fact does so when invited to repeat back the caution, it may not be clear whether the suspect is exercising a right of silence or whether he or she is simply

unable to repeat the caution. It is inherently contradictory to tell a suspect that he or she does not have to answer your questions and then insist upon an answer to the very question which the suspect has been told he or she does not have to answer. This could be avoided by rearranging the ideas contained in the caution in a more logical way.

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

Clearly the preferred method must be to use properly trained interpreters whenever possible. As even partly trained interpreters are not always available, I suggest that the caution be translated into the common languages spoken, and tape-recordings made available to every police station, so that the caution will be understood, if it is necessary to proceed to question the suspect in English.

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

"Question: I have been told about that trouble last night about Amy Smith. Amy says she was hit on the head with a nulla nulla. I want to talk to you about that trouble. Now you tell me back, what do I want to talk to you about?"

Question: When I talk to you and you talk to me, your words and my words go onto this tape,

⁹ See D Eades, *Aboriginal English and the Law* (Continuing Legal Education Department, Queensland Law Society Inc, 1992), p 53.

¹⁰ *Ibid*, pp 33-43.

and this video. Now you tell me back, what did I say to you?

Question: Maybe later I will play this tape to the magistrate. The magistrate will listen to your words and then maybe he will send you to gaol. Maybe the magistrate will listen to your words and he will be happy with your story, I don't know what he will think. Now you tell me back, what did I say to you?

Question: Australian law says you can speak to me about this trouble. Australian law says you can be quiet. You can sit and not talk. You have to think about this yourself. Now you tell me back, what did I say to you?

Question: Maybe you want to be quiet and not talk about that trouble. That's all right. The magistrate won't make trouble from that. Now you tell me back, what did I say to you?

Question: If you want to be quiet, Australian law says I must finish this talk with you now. Maybe you want to be quiet. Maybe you want to tell me about the trouble, then we talk together. Now you tell me back, what did I say to you?

Question: What do you want to do now? Do you want to talk with me about the trouble or do you want to stop now and not talk. You tell me."¹¹

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

Finally, I suggest that police (and counsel) should be encouraged as much as possible to allow Aboriginals to give their explanation of what occurred in narrative form, with as few interruptions as possible, at least in the first instance. Aboriginals are not as accustomed as people from other cultures to the question-and-answer form of interrogation. While I appreciate the difficulties involved (avoiding the irrelevant, the inadmissible or the prejudicial), I consider that the advantages far outweigh the disadvantages, in that information which is vital to the fair investigation of the offence

or the fair conduct of the trial is more likely to be elicited by this form of questioning. I note that s 29(2) of the *Evidence Act 1995* (Cth) and s 29(2) of the *Evidence Act 1995* (NSW) specifically permit this, subject to the leave of the court. However, that is not to say that there is otherwise any rule of law prohibiting this course.

Conduct at trials

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

It is trite to say that counsel, judges, juries and witnesses all need to be culturally educated. The recent experience of the Supreme Court of the Northern Territory is that there are fewer counsel with much idea of how to elicit information from Aboriginal witnesses than there were 10 years ago, or, to put it another way, there is a preponderance of counsel now who have little or no idea how to go about this task, despite the impact of Aboriginal land claim hearings.

There is little in the literature about this topic in Australia although there is an excellent work entitled *Aboriginal English and the Law*, by Dr Diana Eades, published by the Continuing Legal Education Department of the Law Society of Queensland, which is concerned with the situation in that State. In my opinion, much of what is there written is applicable elsewhere in Australia and until something more specific to each region becomes available, this work should become a standard reference book for every judge, magistrate, lawyer and police officer likely to be involved in dealing with Aboriginal witnesses and accused persons. I suggest that every State and Territory Criminal Lawyers Association, Law Society or similar body should engage a suitable linguist to prepare a similar publication for each jurisdiction and that there should be workshops to assist in the training of interested individuals.

So far as the courts are concerned, there are at least two things which should be routinely done during every trial in which Aboriginal witnesses or

¹¹ I am very grateful for the assistance of Mr Michael Cooke, School of Community Studies, Batchelor College, for his assistance in preparing this form of questioning.

accused persons are involved, without the use of interpreters. The first is that the trial judge should give suitable directions to the jury, before the prosecutor opens his or her case. This will enable juries to make a better assessment of the evidence of the witnesses as well as the accused's record of interview, which in nearly every case will be videotaped. It may be objected that this goes beyond the trial judge's function, and that such information should be led by the calling of a suitably qualified expert.

In *Condren*,¹² the Court of Criminal Appeal of Queensland held that evidence of the general characteristics of the speech of persons of Aboriginal descent and the general pattern of their responses to questions is inadmissible. Macrossan J said:¹³

"although I need express no concluded view on this proposition, I am disposed to think that, in cases like the present, evidence of what are said to be normal characteristics of Aboriginal speech and behaviour is no more admissible than evidence of any other aspect of normal human behaviour would be, or the normal behaviour of persons of Anglo-Saxon descent or the Australian community in general and is not a proper subject for expert testimony."

Ambrose J, with whom McPherson J concurred, said:¹⁴

"I concur with the views expressed by Macrossan J that evidence as to the general speech habits of persons described as 'Aboriginals' in Australia or of any tendency that persons within that category may have because of their racial background to make inculpatory statements which are unreliable is inadmissible. It is inadmissible because it is irrelevant to the only issue before the jury – the characteristics of the appellant and not characteristics commonly found within a category of persons described as 'Aboriginal'... It seems to me unlikely that there exists a specialised field of knowledge which qualifies as 'expert' within it to attribute 'unusual' characteristics to all 'Aboriginals' (comprising person of widely varying

genealogical and cultural backgrounds) relevant to the issues which differ significantly from the 'usual' characteristics of persons generally in the community with respect to which of course expert evidence may not be given."

This is to be contrasted with the attitude of the courts to the calling of expert evidence on the stylistic analysis of an individual person's speech patterns¹⁵ or the calling of linguistic evidence relating to an individual's speech patterns to assist the jury to evaluate the reliability of a confession, or indeed, whether it was made at all.¹⁶

Although Dr Eades suggests that Aboriginal English is a "dialect" of standard English, she recognises that there

"are a number of forms of Aboriginal English or more accurately a continuum of Aboriginal English varieties ranging from those close to Standard English at one end (the acrolect or 'light' Aboriginal English), to those close to Aboriginal Kriol at the other (the basilect or 'heavy' Aboriginal English)".¹⁷

Further, racial background is not the sole test of whether or not a particular speaker uses a form of Aboriginal English. Consequently, one cannot assume that generalisations about Aboriginal English-speaking patterns will be applicable to any particular witness or accused person. Nevertheless, awareness that such factors may be applicable would give a jury some basis for forming a view, having seen and heard the particular witness, as to whether or not those generalisations are of any assistance in understanding or forming a view as to the reliability of the evidence of that witness.

If expert evidence on the topic is unlikely to be admissible, is this a basis for rejecting my suggestion that the trial judge should give the jury some preliminary advice concerning this topic? It is submitted that in principle there is no objection to this course. Judges frequently give directions to

¹⁵ See *Tilley* [1985] VR 505.

¹⁶ See *Barry* [1984] 1 Qd R 74; 10 A Crim R 143; *Condren* (1987) 28 A Crim R 261 at 273, 298.

¹⁷ *Op cit* n 9, p 21. Not all linguists share this view apparently, but the broad thrust of the idea that there are varieties of English spoken by different communities does not seem to be in doubt. For a different view I am indebted to an unpublished paper by M Cooke, "Language and Criminal Justice in the Northern Territory" (July 1995).

¹² (1987) 28 A Crim R 261.

¹³ *Ibid* at 267-268.

¹⁴ *Ibid* at 297.

juries concerning the way evidence should be treated where the purpose of the direction is to enhance a fair trial. This is no principle limiting the type of direction which may be given to a particular class of case. The most familiar type of direction commonly given concerns the need for corroboration. The underlying assumptions upon which a corroboration direction is given are based on the court's experience. As the court's experience changes, so may there be a perceived need for a new direction, for example, the *McKinney* direction.¹⁸ Nor are directions universally confined to assisting the accused: for example, in some jurisdictions, it is permissible for the trial judge to comment on the accused's failure to give sworn evidence.¹⁹ Similarly the trial judge may comment on the failure of the accused to call a witness in a situation where the rule in *Jones v Dunkel*²⁰ applies. Directions are also required where the Crown relies upon circumstantial evidence designed to assist the jury to give that evidence proper weight. The underlying principle upon which each of these types of direction rests, it is submitted, is to ensure the fairness of the trial.²¹ The purpose of the proposed direction is not to usurp the jury's function as the finders of fact, but to draw their attention to matters which in the court's experience may assist them in their function of evaluating the evidence. Given that in most cases where the Crown calls Aboriginal witnesses, the accused will also be an Aboriginal, and that in most cases the Crown will be relying upon a video-recorded confession, the directions may, in fact, be of as much assistance to the accused as they are to the Crown and will therefore not be

seen as an attempt by the court to bolster the Crown case. A suggested form of direction (which would obviously have to be moulded to the circumstances of the case) is set out in the Appendix to this article.²²

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

1. *Leading questions*

In *Anunga*,²³ the court recognised that Aboriginals have a propensity to answer leading questions in the way the Aboriginal thinks the questioner wants. Similar observations appear in much of the literature.²⁴ This is not confined to leading questions put by non-Aboriginal authority figures. Eades²⁵ observes:

"Aboriginal English speakers often agree to a question even if they do not understand it. That is when Aboriginal people say 'yes' in answer to a question it often does not mean 'I agree with what you are saying to me'. Instead, it often means 'I think that if I say "yes" you will see that I am obliging, and socially amenable and you will think well of me, and things will work out between us'."

2. *"Either ... or..." questions*

Eades observes:²⁶

"Aboriginal English speakers are often confused by 'either ... or' questions, that is, questions which ask the respondent to choose one of two alternatives. Aboriginal answers to such

¹⁸ *McKinney v The Queen* (1991) 171 CLR 468; 52 A Crim R 240.

¹⁹ In Tasmania, South Australia, Western Australia and the Australian Capital Territory, the prosecution is prohibited from commenting on the accused's failure to give evidence: see *Evidence Act* 1910 (Tas), s 85(8); *Evidence Act* 1929 (SA), s 18(i)II; *Evidence Act* 1906 (WA), s 8(1)(c); *Evidence Ordinance* 1971 (ACT), s 74(1). This prohibition extends to the trial judge in New South Wales, Victoria and the Northern Territory: see *Evidence Act* 1995 (NSW), s 20(2); *Crimes Act* 1958 (Vic), s 399(3); *Evidence Act* 1939 (NT), s 9(3); and to cases where s 20(2) of the *Evidence Act* 1995 (Cth) applies although the prohibition in the New South Wales and Commonwealth Acts is not in absolute terms.

²⁰ (1959) 101 CLR 298.

²¹ See *McKinney v The Queen* (1991) 171 CLR 468 at 482; 52 A Crim R 240 at 249 per Brennan J.

²² The suggested direction is designed for the northern part of the Northern Territory, and would need to be adapted for other jurisdictions. I am grateful to Dr Diana Eades for her suggestions concerning the form of the direction.

²³ (1976) 11 ALR 412.

²⁴ See, eg, A P Elkin, "Aboriginal Evidence and Justice in North Australia" (1947) 17 *Oceania* 173 at 176.

²⁵ *Op cit* n 9, p 26.

²⁶ *Ibid*, p 55.

questions often but not always, refer to the last alternative proffered.”

Eades suggests the following alternative technique:²⁷

“DON'T ASK: Were you at the camp then or were you already at the pub?

INSTEAD, ASK: Maybe you were at the camp. Maybe you were already at the pub. Tell me where you were then?”

3. *Questions seeking quantifiable specification either as to numbers or time*

Aboriginal languages have no counting system similar to English, and this is often reflected in Aboriginal English.²⁸ Aboriginals will respond either by listing, for example, if asked how many people were there, they will list the people present, or by using expressions such as “mob” or “big mob”. Very few Aboriginals wear watches and many lack familiarity with the Western concept of time. However, there may be ways of establishing time with some accuracy. In many communities, events occur daily at specified times, for example, the store may always close at 6pm, and this will be a matter of common knowledge. Thus a time may be able to be fixed by reference to whether the store was closed or not. Questions seeking quantifiable specification as to time or numbers need to be carefully constructed to avoid misleading answers, and also to avoid demeaning the witness. Thus it may not be helpful to ask if there were six or seven people present, but there is no objection to asking the witness to say the names of the persons present. Similarly it may not be helpful to ask what time the event occurred, but there is no objection to asking if, when the event occurred, the sun was up, or if it was dark, or if Fred was there then. Distances can also be a problem, especially if estimates in kilometres are sought. Evidence of distances can often be elicited from other witnesses whose knowledge can be expected to be accurate. If so, it is pointless to pursue this question with a witness not likely to be able to provide an accurate estimate.

4. *Offensive questions*

Questions which it may be proper to put to persons of other cultures may be offensive to Aboriginal English speakers, and therefore

objectionable.²⁹ For example, it is well known that one should never refer to a deceased Aboriginal by name.³⁰ Similarly, it is considered extremely rude to refer to words for the genitalia, and this should be avoided unless it is absolutely necessary. On the other hand, swear words and obscene language are not culturally offensive as a general rule.

5. *Direct eye contact*

Direct eye contact, particularly staring, is seen by many Aboriginals as threatening or rude and should be avoided by counsel.

It is generally thought that counsel has the right, in cross-examination, to put leading questions to any witness. However, that is not the case. The trial judge has a discretion to disallow them.³¹ In *Mooney v James*,³² Barry J said:

“The basis of the rule that leading questions may be put in cross-examination is the assumption that the witness’s partisanship, conscious or unconscious, in combination with the circumstance that he is being questioned by an adversary will produce a state of mind that will protect him against suggestibility. But if the judge is satisfied that there is no ground for the assumption, the rule has no application, and the judge may forbid cross-examination by questions which go to the length of putting into the witness’s mouth the very words he is to echo back again (cf *R v Hardy* (1794) 24 How St Tr 659 per Buller J at p 755). Answers given in such circumstances usually would not assist the court in its investigation because they would be valueless, and in the exercise of his power to control and regulate the proceedings the judge may properly require counsel to abandon a worthless method of examination. This brings out an essential feature of trial by British courts, namely, that it is the duty of the judge to regulate and control the proceeding so that the issues for

²⁹ *Evidence Act* 1995 (Cth), s 41; *Evidence Act* 1995 (NSW), s 41; *Evidence Act* 1958 (Vic), ss 39, 40; *Evidence Act* 1977 (Qld), s 21; *Evidence Act* 1906 (WA), s 26; *Evidence Act* 1929 (SA), s 25; *Evidence Act* 1910 (Tas), s 103; *Evidence Act* 1971 (ACT), s 59; *Evidence Act* (NT), s 16.

³⁰ See *Bara Bara* (1992) 87 NTR 1.

³¹ See *Cross on Evidence*, para 17465; *Evidence Act* 1995 (Cth), s 42; *Evidence Act* 1995 (NSW), s 42.

³² [1949] VLR 22.

²⁷ *Ibid*, p 8.

²⁸ *Ibid*, p 29.

adjudication may be investigated fully and fairly.”³³

It is submitted that more use should be made of this power to prevent questions being put unfairly to Aboriginal witnesses in leading form in cross-examination whenever it appears or it is made to appear to the trial judge that the witness is likely not to be protected from suggestibility. Apart from gratuitous concurrence, “scaffolding” (where the witness adopts a word or phrase not familiar to him put to him by the questioner) is not uncommon particularly among language learners. As a general rule, it is submitted that the cross-examiner of a witness who is plainly Aboriginal by culture should not put leading questions to such a witness without the leave of the trial judge.³⁴ That is not to say that counsel should be prevented from putting his or her case or otherwise vigorously, if necessary, testing the reliability of a witness’s testimony. For example:

Question: You hit Fred with that nulla nulla first, didn’t you?

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

Question: Who hit Fred with that nulla nulla the first time?

Answer: Matthew.

or

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

Answer: Matthew.

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

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

Answer: (no response).

Question: Who hit Fred that first time?

Answer: Matthew.

Question: I think maybe someone else hit Fred that first time, eh? I need to know who hit Fred that first time?

Answer: Matthew.

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

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

Another common problem is that Aboriginal witnesses often refuse to answer questions, or questions on a particular topic. There may be many reasons for this other than deliberate evasion. First, silence is an important and positively valued part of many Aboriginal conversations, and it may simply indicate a desire for time to think in the way in which he or she is accustomed and for time to get comfortable with the courtroom situation. Secondly, the information sought may be something which the witness is culturally unable to give, either because there is someone else more appropriate to give it, or because it is inappropriate for it to be given in the presence of certain persons who happen to be in the courtroom. Thirdly, there may be a fear of retribution if the question is properly answered, either because the matter has already been dealt with and is finished business so far as the witness is concerned, or out of genuine fear of the accused’s relatives, or the witness’s own relatives who happen to be sitting in court.

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

1. Adjourn the witness until later in the day, or the following day to complete his or her evidence. This may be effective if the reason for the silence is the first reason given.
2. Skip the question and move onto another topic with a view to returning to it later. This may be effective if the reason is for the second reason given.
3. Ask the witness if there is anyone in the courtroom he or she is afraid of (“little bit frightened of”). Look for eye movement or slight hand movements which may indicate the source of concern. If so, ask the court to have the witness declared a vulnerable witness or

³³ Ibid at 28.

³⁴ See also the recommendation of the Australian Law Reform Commission, *Evidence*, Report No 38 (1987), pp 65 and 66, paras 115 and 116.

special witness.³⁵ Ask for a *voire dire* hearing if necessary, to establish this, and to establish which procedure will best meet the circumstances (screening, closed circuit television, having a relative or friend in the witness box, closed court, or a suitable combination of these). This may be effective if the reason for silence is the third reason given.

Of course, it is possible to ask the court to direct the witness to answer the question on pain of being in contempt, and no doubt this could be done in a proper case. In my experience this is rarely done in practice, particularly with Aboriginal witnesses, and it would take a strong case to make out the grounds for such an order. If, having tried each of the above techniques, the witness still refuses to answer, the only course which may be left is to ask the court to release the witness and direct the jury that the whole of the witness's evidence is to be ignored.³⁶

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

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

prohibiting publication of the evidence in question) would not be sufficient. It would also be necessary to ensure that no similar difficulties would arise (with respect to persons of the other sex) to evidence of other witnesses, including especially the victim of the offence."

McRae, Nettheim and Beacroft³⁷ observe that this result is usually achieved by the use of challenges by agreement between prosecution and defence and with the court's consent. Given that the Crown may stand aside witnesses as well as exercise the usual peremptory challenges, this may work in practice where the Crown chooses to be co-operative. However, in the trial of Sydney Williams, Wells J (Supreme Court of South Australia) excluded women from the jury panel by ordering women from the court at the time the jury were selected and during the whole of the trial, apparently relying upon s 69 of the *Evidence Act* 1929 (SA), which permitted such action where it appears to the court that the publication of any evidence is likely to offend against public decency. His Honour also apparently took judicial notice of the fact that publication of tribal secrets would offend Aboriginal standards of decency.³⁸ It may be that the provisions of the various *Juries Acts*,³⁹ which provide that a judge may excuse a person summoned to attend as a juror "for sufficient cause", is wide enough to empower the court to make such an order. A prohibition order could also be made under appropriate provisions of the various *Evidence Acts*.

Interpreters

An accused person who does not understand the language of the court is entitled to an interpreter and this right cannot be waived unless the person is represented by counsel.⁴⁰ In civil cases a party – and, it is submitted, in both civil and criminal cases, a witness – may have the services of an interpreter

³⁵ *Evidence Act* (NT), s 21A; *Evidence Act* 1977 (Qld), s 21A; *Evidence Act* 1929 (SA), s 13; *Evidence Act* 1906 (WA), s 106A.

³⁶ See Cross, op cit n 31, para 17480.

³⁷ See *Aboriginal Legal Issues* (Law Book Co, Sydney, 1991), p 261.

³⁸ See A Ligertwood, "The Trial of Sydney Williams" (1976) 2 (4) *Legal Service Bulletin* 136.

³⁹ *Juries Act* (NT), s 15; *Juries Act* 1967 (ACT), s 14; *Jury Act* 1929 (Qld), s 10(2), (5); *Juries Act* 1927 (SA), s 16(2); *Juries Act* 1967 (Vic), s 13(2)(3); *Juries Act* 1957 (WA), s 32.

⁴⁰ *Lee Kun* [1916] 1 KB 337.

only with the leave of the court.⁴¹ In practice, the problem is not so much whether an interpreter will be permitted, but whether one will be able to be provided, and if so, at whose cost. Not all courts have a court-based interpreter service. Nevertheless, Art 14(3) of the International Covenant on Civil and Political Rights (1966), to which Australia is a party, guarantees the right to have “the free assistance of an interpreter if [an accused] cannot understand or speak the language used in court”.

It would seem that if a non-English-speaking Aboriginal accused was unrepresented, the court would have no option but to adjourn the proceedings until a suitable interpreter could be found, and that if it failed to do so, any verdict of guilty would be liable to be set aside on the ground that the accused did not have a fair trial.⁴² I suggest that the result would inevitably be the same if the accused was represented but no interpreter was provided by the accused’s lawyers because no suitable interpreter could be found. Having regard to the fact that the accused has a right to an interpreter and that right cannot be waived except by his or her counsel, it may also be that if counsel’s instructors refused to provide an interpreter for any reason whatsoever, and the accused’s counsel refused to waive the right, the trial could not proceed and it would be then up to the prosecution to remedy the matter. Further, it must not be overlooked that the right to an interpreter includes a right to have the evidence interpreted to the accused, as well as generally, as to what is happening in court.⁴³

Even if interpreters are made available, there remain many potential problems. Competence among interpreters varies widely. One writer has suggested that

“where interpreters in the courts are concerned, they should be required to wear a badge indicating their level of interpreting competence so that the judge, barrister, police and the accused all know, at least prima facie, what standard of interpreting can be expected”.⁴⁴

⁴¹ *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458 at 464

⁴² *Ngatayi v The Queen* (1980) 147 CLR 1 at 8-9 per Gibbs, Mason and Wilson JJ.

⁴³ *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

⁴⁴ See Crouch, op cit n 6 at 688.

For the reasons previously discussed, the standard ranges from excellent to rather poor, with many Aboriginal interpreters at the lower end of the scale. There is a significant danger, particularly when interpreting evidence, of the evidence being misunderstood.

Further, interpreters need to know what is permitted of them, and what is not. There are no guidelines readily available covering such matters. 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. This may be due to cultural differences or language structures.⁴⁵ Well-trained court interpreters should know how to deal with this type of problem, and at the same time let the court know what is happening, but 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.

Cross-examination as to documents

It is still a not-infrequent occurrence to see counsel for an accused person attempt to cross-examine an Aboriginal witness on the evidence given at the committal proceedings with a view to showing that this evidence is unreliable. Kriewaldt J deprecated this practice, and proposed that committal proceedings be abolished where Aborigines are concerned.⁴⁶ Few counsel appreciate that there are common provisions in the various

⁴⁵ See, eg, M Cooke, “Understood by All Concerned? Anglo/Aboriginal Legal Translation,” in M Morris (ed), *Translation and the Law* (John Benjamin’s, Philadelphia, 1995).

⁴⁶ M Kriewaldt, “The Application of the Criminal Law to Aborigines of the Northern Territory” (1962) 5 UWALR 1.

Evidence Acts which put serious obstacles in the path of the cross-examiner.⁴⁷ The effect of these provisions is that, although a witness may be cross-examined about what he or she said in the committal proceedings (or for that matter what was said in a prior written statement) without the transcript or the written statement being shown to the witness, the witness may not be contradicted (for example, by tendering the document or transcript pages) without calling to the witness's attention "those parts of the writing which are to be used for the purpose of so contradicting him". Presumably in the case of an illiterate witness, not only must the document be shown to the witness, but it would have to be read to him or her as well.⁴⁸ Further, the trial judge has a discretion to exclude matters irrelevant to the inconsistency, and should inspect the document so that a decision can be made as to what parts of the document or transcript should be read to the witness and admitted in evidence.⁴⁹ There must be proof of adoption of the document by the witness before it can be tendered, which, in the case of evidence taken at a committal hearing but not signed by the witness or acknowledged by him or her to be accurate, can be attended to by calling the relevant reporter.⁵⁰ There are now common statutory provisions in some jurisdictions which provide the basis for tendering recorded testimony provided that the deposition has been authenticated by the proper officer of the court.⁵¹ Nevertheless, a trial judge has a discretion to prevent cross-examination as to credit if the imputation is of

"such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the

credibility of the witness on the matter to which he testifies".⁵²

It is submitted that more use should be made of this section in relation to Aboriginal witnesses cross-examined as to discrepancies in their evidence given at committal proceedings. The trial judge should be invited to examine the transcript to see if the evidence at the committal was elicited fairly from the witness, or whether, as is sometimes the case, the witness's evidence is a confused muddle due to the techniques used by counsel at the committal hearing, or for any other cause, which would make persistence with the proposed cross-examination as to credit virtually worthless. Of course, the authorities show that the trial judge has to give counsel for the accused considerable latitude, and should not exclude matters which are relevant to credit unless they are clearly of no material weight,⁵³ even to the point, at least in the opinion of Hunt J (with whom Newman and Abadee JJ agreed), of allowing a merciless and prolonged cross-examination:

"Others would prefer to keep going, extracting every ounce – no matter how repetitive or remote – until the eyes of every juror were glazed over and until each juror had completely 'turned off'. I have in the past sat through such cross-examinations which have lasted days; some have lasted over a week. They reminded me of a dentist continually probing a hole in a tooth without the patient having the benefit of an anaesthetic. And I am sure that in many cases such cross-examinations are quite counter-productive. All of this is permissible, of course: *Wakeley* (1990) 64 ALJR 321. The point is that different counsel have different views as to the effectiveness of such cross-examinations."⁵⁴

With the greatest of respect to the Court of Appeal of New South Wales, I do not think that the authorities suggest that the cross-examiner has a

⁴⁷ *Evidence Act* 1995 (Cth), s 43(2); *Evidence Act* 1995 (NSW), s 43(2); *Evidence Act* 1977 (Qld), s 19; *Evidence Act* 1929 (SA), s 29; *Evidence Act* 1910 (Tas), s 99; *Evidence Act* 1958 (Vic), s 36; *Evidence Act* 1907 (WA), s 22; *Evidence Act* 1971 (ACT), s 62; *Evidence Act* (NT), s 20.

⁴⁸ See generally Cross, op cit n 31, para 17545.

⁴⁹ *Walker* (1993) 61 SASR 260 at 268; 70 A Crim R 440 at 447.

⁵⁰ *Ibid*.

⁵¹ *Recording of Evidence Act* 1962 (Qld); *Recording of Proceedings Act* 1980 (WA); *Magistrates Court Act* 1930 (ACT), s 54A; *Records of Depositions Act* 1970 (NT).

⁵² *Evidence Act* 1995 (Cth), ss 102, 103; *Evidence Act* 1995 (NSW), s 103; *Evidence Act* 1977 (Qld), s 20; *Evidence Act* 1929 (SA), s 23; *Evidence Act* 1910 (Tas), s 102; *Evidence Act* 1958 (Vic), s 37; *Evidence Act* 1906 (WA), s 25; *Evidence Act* 1971 (ACT), s 58; *Evidence Act* (NT), s 15.

⁵³ *Wakeley v The Queen* (1990) 64 ALJR 321 at 325; *Aldridge* (1990) 20 NSWLR 737; 51 A Crim R 281.

⁵⁴ *Dib* (1991) 52 A Crim R 64 at 71.

right to go that far. In *Wakeley v The Queen*, the High Court clearly recognised that, although cross-examination must as far as possible be left to the cross-examiner's discretion and judges should give the cross-examiner leeway, particularly at the start of the cross-examination,

"there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case."⁵⁵

The role of the trial judge

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 there may be no objection even where plainly there should be; 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 also 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 or her 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. This is a difficult

task not only because the judge must not appear to favour either the Crown or the accused, but because of the dangers of a mistrial and of any conviction being upset on appeal because the judge interfered too much. Consequently great care must be taken; hence the need for proper preparation.

Depending on the skill of the advocates, the trial judge may be called upon to ask questions of Aboriginal witnesses in order to clarify the witnesses' evidence more frequently than may be usual. I usually prefer to raise with counsel any perceived ambiguities or problems and to suggest possible solutions, if appropriate, rather than interfere myself, but if this is not effective, I will then ask questions of the witness concerned. Of course, care must be taken not to overstep the proper bounds of the judicial role.

Finally, the trial judge ought to draw to the jury's attention any passages in the evidence which appear to him or her to be possible examples of gratuitous concurrence or scaffolding, always, of course, in such a way as to leave it to the jury to decide what weight they give to the evidence. Likewise, comment may be necessary if other problems arise of the sort discussed in this article. This is usually best left to the summing up, but in some cases it may be appropriate for comment to be made at the time the problem occurs.

Conclusions

There has been considerable progress made in the trial of Aboriginal accused persons over the last 50 years to make the system fairer. Clearly they have benefited from the emergence of the Aboriginal legal aid agencies, the Anunga Rules, police techniques in recording interviews, more sympathetic police guidelines, the development of the case law relating to the sentencing process, the improved general education of the Aboriginal population, schemes devised to prevent drunkenness causing mayhem on the settlements, better awareness of cross-cultural problems among police, lawyers and judges, the decriminalisation of public drunkenness, the establishment of "dry" communities and so on. However, the time has now come to look more closely at some of these issues again, and in particular, at the techniques and methods which may be used to make the existing

⁵⁵ (1990) 64 ALJR 321 at 325.

system work better, not only for Aboriginal accused persons but for Aboriginal witnesses as well. It is submitted that the proposals in this article, although some might think them novel or even radical, are no more than logical extensions of existing principles, or the application of existing principles which might be used by judges, magistrates and counsel to redress the imbalance in the criminal justice system which presently exists whenever people who are culturally Aboriginal are involved.

Appendix

Directions to jury concerning Aboriginal witnesses

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 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 some of the Aboriginal witnesses.

Aboriginal English

3. Many Aboriginal people in the Northern Territory, including Aboriginal people of mixed descent, do not speak English as their first language. And many, in all parts of the Territory, 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.

Word meaning, grammar and accent

4. 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 in a way which is different from that of standard English.

Counsel will do their best to ensure that this becomes clear to you as the evidence unfolds, but you can often realise this for yourselves if you listen carefully to the context.

5. There may be grammatical differences between Aboriginal English speakers 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 past time or future time which 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.

6. 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

7. Aboriginal English speakers may also have different cultural values which affect the way they speak and behave. These things I will tell you about now are common with a very wide range of speakers of Aboriginal English, even among many who apparently speak English quite well. Remember that skin colour is not a reliable indicator of the way that an Aboriginal person communicates.

8. 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.

9. It is customary among many Aboriginal people 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 people 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 some time for them to adjust to the question and answer method of imparting information.

10. 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 people 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 is a very well-recognised communication pattern in Aboriginal English speakers, 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.

11. Similarly the answers "I don't know" and "I don't remember" do not always directly refer 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, and the difficulty which a number of Aboriginal people have in adjusting to the use of repeated questions.

12. 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.

13. 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 sorts 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 people present at the time, and if this happens you should be aware that this may not always 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

14. 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.

15. 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 are 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.