

Chapter Six: Pre-Trial Matters

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AUTHORITIES

In this Chapter each case which is listed under the sub-heading “Authorities” involves an Aboriginal accused person or persons.

- *Barnes v R* (1997) 96 A Crim R 593
- *Ebatarinja v Deland* (1998) 194 CLR 444
- *Green v R* (2001) 24 WAR 192
- *Ngatayi v The Queen* (1980) 147 CLR 1
- *R v A.T.* (Unrep., NT Sup Ct, Thomas J, SCC No 62 of 1992)
- *R v Jacky Jagamara* (Unrep., NT Sup Ct, O’Leary J, 24 May 1984)
- *R v Joe Murphy Jungarai* (1981) 9 NTR 30
- *R v Miller (No 2)* [2000] SASC 152
- *R v Minor* (1992) 2 NTLR 183
- *R v Willie* (1885) 7 QLR (NC) 108
- *Unchango v R* (Unrep., WA Sup Ct, Templeman J, 12 June 1998)
- *Wassa v Norman* (1982) 14 NTR 13

NOTE:

Brief notes relating to general principles of Western Australian law are contained at the commencement of various sections of this Chapter. These are included only for the purposes of this Benchbook’s function as a model for other jurisdictions. The notes are not intended to comprise a summary of the relevant law.

CHAPTER SIX

Pre-Trial Matters

This Chapter examines a number of pre-trial matters which may impact upon the conduct of criminal proceedings involving Aboriginal accused persons.

6.1

COMMITTAL ISSUES

In Western Australia committal proceedings and preliminary hearings in respect of indictable offences take place in Courts of Petty Session. Such proceedings are governed by Parts IV and V of the *Justices Act 1902* (WA).

6.1.1 Committal Proceedings

Authorities:

- *R v Jacky Jagamara*¹.

In *The Recognition of Aboriginal Customary Law* the Australian Law Reform Commission (ALRC) expressed concern about the operation of committal procedures upon Aboriginal accused persons, particularly those from traditional communities for whom summary justice is the norm. The problems which were identified included the following:

- An unsophisticated Aboriginal accused may not understand the purpose or effect of committal proceedings;
- An unsophisticated Aboriginal accused may become confused and anxious by the realisation that, notwithstanding the technical, legalistic proceedings, the matter has not been concluded²;
- An unsophisticated Aboriginal accused may mistake a preliminary hearing for the actual trial. In *R v Jacky Jagamara* the accused, believing that he had been tried at the preliminary hearing, went away and failed to appear at the substantive hearing;
- A preliminary hearing may be equally problematic for an unsophisticated Aboriginal witness, who may not understand why he or she has to return to court for a second time;

¹ Unrep., NT Sup Ct, O'Leary J, 24 May 1984.

² ALRC *The Recognition of Aboriginal Customary Law* Vol. 1, Report 31, AGPS, 1986, para 575, pp 428-429.

- By the time the substantive hearing is held, it is possible that any dispute arising from the alleged offence within an Aboriginal community will be resolved.

Justice Kriewaldt, formerly of the Northern Territory Supreme Court, took the view that the committal proceedings were “quite useless, and to some extent harmful” to Aboriginal persons³.

In *The Recognition of Aboriginal Customary Law* the ALRC concluded that the frequent failure of Aboriginal accused persons and witnesses to appear at criminal proceedings might be attributable as much to confusion with the legal process, as to other matters such as transport difficulties⁴. It also noted that where the assistance of the Aboriginal Legal Service was available, the committal experience was greatly improved for Aboriginal participants. The ALRC expressed the view that the safeguards provided by a preliminary hearing to an accused probably outweighed the disadvantages, since it provided that accused, and his or her legal advisers, with the opportunity to become better informed of the nature and the strength of the prosecution case⁵.

Note: A list of the contact details of the 17 offices of the Aboriginal Legal Service of Western Australia (Inc.) is contained in the Appendix to Chapter Six⁶.

Note further: in its 1999 *Review of the Criminal and Civil Justice System: Final Report*⁷ (Report) the Western Australian Law Reform Commission (WALRC) recommended that preliminary hearings should be abolished (Recommendation 302). The WALRC took the view that the functions of the preliminary hearing could be achieved by legislation. Recommendations 252, 282, 287 and 291 of the Report proposed the enactment of provisions requiring full disclosure by the police and the Director of Public Prosecutions prior to a trial upon indictment. In Recommendations 307 and 308 of the Report the WALRC proposed that power to examine and, where appropriate, to penalise late decisions to withdraw or alter indictments, should be conferred upon the courts. The State Attorney-General, the Hon James McGinty, has signalled the Government’s intention to abolish preliminary hearings.

6.1.2 Section 49 Aboriginal Affairs Planning Authority Act 1972 (WA)

Authorities:

- *Green v R*⁸.

General Principles: In Western Australia, where an Aboriginal accused offers a plea of guilty in committal proceedings, the question of compliance with s 49(1) *Aboriginal Affairs Planning Authority Act 1972 (WA)* (AAPAA) may arise.

³ The Hon Justice M Kriewaldt ‘The Application of the Criminal Law to the Aborigines of the Northern Territory’ (1960) 5 *UWA Law Rev*, Pt 1, at 31.

⁴ ALRC *The Recognition of Aboriginal Customary Law*, n 2, paras 574-578, pp 428-430.

⁵ ALRC *The Recognition of Aboriginal Customary Law*, n 2, para 577, pp 429-430.

⁶ The Appendix to Chapter Six also contains a list of Aboriginal Court Officers who have been appointed to assist Aboriginal persons *inter alia* in criminal proceedings pursuant to s 48 *Aboriginal Affairs Planning Authority Act 1972 (WA)*.

⁷ Western Australian Law Reform Commission, 1999 (<http://www.wa.gov.au/lrc/finalreport/freportindex.htm>).

⁸ (2001) 24 WAR 192.

Section 49 (1) AAPAA, which was enacted as a protective measure for Aboriginal persons charged with serious offences, provides as follows:

“49 (1) In any proceedings in respect of an offence which is punishable in the first instance by a term of imprisonment for a period of six months or more the court hearing the charge shall refuse to accept a plea of guilt at trial or an admission of guilt before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want or comprehension of the nature of the proceedings alleged, or of the proceedings, is or was not capable of understanding that plea of guilt or that admission or confession.

(2) The provisions of subsection (1) of this section are in addition to, and not in derogation of, any rules of law or practice relating to the admissibility of pleas of guilt or admissions of guilt or confessions.”

The term “person of Aboriginal descent” is defined in s 4 AAPAA as:

“any person living in Western Australia who is wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted by such in the community in which he lives”.

Note: the interpretation of the statutory definition of “person of Aboriginal descent” is discussed in Chapter One at **1.6**.

In *Green v R* the Court of Criminal Appeal examined the duty which s 49 (1) AAPAA imposes upon a magistrate who takes a plea of guilty from an Aboriginal accused. The judgment of Malcolm CJ in *Green v R* makes it clear that in the circumstances contemplated by s 49 (1) AAPAA, a magistrate who records a plea of guilty on the “fast-track” system must ensure that the requirements of s 49 (1) AAPAA are complied with. The magistrate should make written notes to evidence the fact of that compliance⁹. Such caution may be especially important in cases involving Aboriginal defendants who have had little or no experience with the criminal justice system.

See also:

- *Smith v Grieve* [1974] WAR 193;
- *Munro v Sefton* (Unrep., Sup Ct WA, Jones J, 14 June 1974, No 38 of 1974);
- *Narkle v Heald* (Unrep., Sup Ct WA, Pidgeon J, 17 May 1983, No.'s 82-84 of 1983).

NOTE: The operation of s 49 AAPAA is discussed in detail in Chapter Seven (Criminal Proceedings).

⁹ *Green v R*, n 8, at 192.

6.1.3 *Ex Officio* Indictments

Authorities:

- *Ebatarinja v Deland*¹⁰.

General Principles: the High Court has emphasised the important role of committal proceedings in protecting defendants against “wanton or misconceived prosecution”¹¹.

However, *ex officio* indictments may have an important function in respect *inter alia* of Aboriginal accused persons. In *Ebatarinja v Deland* the appellant, a deaf-mute Aboriginal male, had been charged with a number of offences including murder. The appellant was not able to understand the charges or the nature of committal proceedings, nor was he able to communicate with a lawyer. The parties accepted that it would not be possible to find a suitable interpreter. The Juvenile Court magistrate had stated a special case to the Supreme Court of the Northern Territory, asking whether the committal proceedings should be stayed. Subsequently the Director of Public Prosecutions filed an *ex officio* indictment in the Supreme Court charging the appellant with murder. Mildren J held that the magistrate should comply with the committal provisions of the *Justices Act 1979* (NT) notwithstanding that in the circumstances committal proceedings would be essentially ritualistic. His Honour then stayed the *ex officio* indictment.

On appeal, the High Court held that any committal proceedings undertaken in the appellant’s physical presence would not be taken “in the presence or the hearing of the accused” within the meaning of the *Justices Act 1979* (NT). Accordingly, such proceedings would be a nullity. However, the High Court stated that nothing prevented the Crown from proceeding with the *ex officio* indictment in the Supreme Court. In proceeding with that indictment, the appellant’s fitness to plead could be determined in the Supreme Court, which had sole jurisdiction to determine that issue¹².

¹⁰ (1998) 194 CLR 444.

¹¹ *Barton v The Queen* (1980) 147 CLR 75 at 99 per Gibbs ACJ and Mason J; *Grassby v The Queen* (1989) 168 CLR 1 at 15 per Dawson J.

¹² *Ebatarinja v Deland*, n 10, at 456 per the Court.

6.2

JUDICIAL BAIL

In 2000 a total of 35,984 persons were apprehended and charged in Western Australia. Of those persons, 7.1% were held in custody, 38.9% were released on bail, 20.7% were issued with a summons and no information was recorded in respect of the remainder¹³. Almost half of the persons detained in custody were Aboriginal¹⁴.

Research in a number of jurisdictions has suggested a correlation between pre-trial imprisonment, the likelihood that a plea of guilty will be made (or the likelihood that a defendant will be found guilty) and the likelihood of imprisonment upon conviction¹⁵.

6.2.1 Remand in Custody

Recommendation 89 of the *Royal Commission into Aboriginal Deaths in Custody: National Report* (Final Report) advocated that:

“...the operation of bail legislation should be closely monitored to ensure that entitlement to bail is being recognised in practice...”¹⁶

It has been observed that several factors operate to the particular disadvantage of Aboriginal accused persons remanded in custody:

- many Aboriginal people are highly socio-centric, and therefore an Aboriginal accused is likely to find separation from family and support persons especially traumatic;
- where an Aboriginal accused is addicted to alcohol and/or other substances, the symptoms of withdrawal from the addictive substance tend to magnify the ordeal of separation;
- the personal demoralisation and distress suffered by an Aboriginal accused who has been remanded in custody may make it especially difficult for that accused to actively pursue the preparation of a defence;

¹³ AM Ferrante, J Fernandez J, NSN Loh *Crime and Justice Statistics for Western Australia: 2000* The University of Western Australia Crime Research Centre, November 2001, p 47.

¹⁴ AM Ferrante et al, n 13, p 47.

¹⁵ E Eggleston *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* ANU Press, Canberra, 1976, p 8; M Zander 'Bail: A Reappraisal' [1967] *Crim LR* 25 128 at 135-9; 'A Study of the Administration of Bail in New York City' *U Pa L Rev* (1958) p 693; S Cole 'Remands in South Australian Criminal Courts' Australian Institute of Criminology, Canberra, 1980, quoted in K Hazlehurst, ed, *Ivory Scales: Black Australia and the Law*, UNSW Press, 1987, at 110.

¹⁶ E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* Vols 1-11, AGPS, Canberra, 1991, at Vol. 3, p 54. Note that watchhouse bail is discussed *inter alia* in R Harding et al *Aboriginal Contact With the Criminal Justice System and The Impact of the Royal Commission into Aboriginal Deaths in Custody* The Hawkins Press, 1995; A Hucklesby 'Remand Decision Makers' [1997] *Crim LR* 269 at 275.

- an Aboriginal accused may be detained in custody so far from his or her home that visits by family are difficult or impossible; causing the Aboriginal accused further stress and alienation¹⁷.

Note: it is not suggested that the hardships referred to above are experienced only by Aboriginal accused persons.

6.2.2 *Bail Act 1982 (WA)*

Authorities:

- *Unchango v R*¹⁸.

General Principles: In Western Australia bail is governed by the *Bail Act 1982 (WA)* (*Bail Act*) and relevant principles of common law¹⁹. Except in the case of a child²⁰, there is no *prima facie* right of an accused to bail²¹. The *Bail Act* requires that a judicial officer consider the case for bail of an unconvicted defendant, unless that person is already in custody for some other reason²². Although as a general rule, each court is empowered to grant bail to a person who appears before it²³, a judge of the Supreme Court has an overriding jurisdiction to grant bail or to vary bail conditions for any person in custody²⁴.

The *Bail Act* provides for the imposition of conditions intended to secure performance of bail undertakings, including the forfeiture of money and the giving of security²⁵. However, the *Bail Act* also provides that any conditions which are imposed:

“...shall not be any more onerous on the defendant than [the Judge] considers is required in the public interest having regard to the nature of the offence for which the defendant is in custody and the circumstances of the defendant²⁶.”

Notwithstanding that protective provision, conditions imposed pursuant to the *Bail Act* may create serious practical difficulties for Aboriginal applicants for bail.

Part VI of the *Bail Act* contains stringent requirements as to sureties and to surety undertakings: see ss 38, 39 *Bail Act*. In practice, these provisions operate to disqualify many prospective sureties or to render them unacceptable. Many

¹⁷ Personal communication, Victoria Williams, Research Officer, Aboriginal Legal Service, Perth, Perth, 26 July 2001.

¹⁸ Unrep., WA Sup Ct, Lib. No. 980346, 12 June 1998.

¹⁹ *Jemielita v R* (1995) 78 A Crim R 91 at 96 per Pidgeon J (Owen and White JJ concurring); *WCVB v R* (1989) 1 WAR 279 at 283 per Ipp J.

²⁰ Note Cl 2, Pt C, Sch 1 *Bail Act*. For a discussion of matters relating to Aboriginal children and bail see *inter alia* Q Beresford and P Omaji *Rites of Passage: Aboriginal Youth, Crime and Justice* Fremantle Arts Centre Press, 1996, pp 101 – 103.

²¹ A statutory *prima facie* right to bail exists in some Australian jurisdictions e.g. *Bail Act 1977 (Vic.)*, *Bail Act 1980 (Qld)*.

²² Section 7 *Bail Act*. Subject to certain qualifications, that duty continues until the conclusion of the trial: see s 7(3)(4)(5) *Bail Act*.

²³ Section 13(1); Pt A, Sch 1 *Bail Act*. Except in the case of a child (in relation to whom a judge of Children's Court may grant bail) only a judge of the Supreme Court, (or, in certain circumstances, the Full Court or the Court of Criminal Appeal) is empowered to grant bail to persons charged with murder or wilful murder: Section 15 *Bail Act*.

²⁴ Section 14 *Bail Act*.

²⁵ Other conditions include the deposit of a passbook to any account, or mortgaging, charging or assigning of any assets. See s 17 (1); Cl 1 and Cl 2 Pt D Sch 1 *Bail Act*.

²⁶ Section 17 (2), Pt D Sch 1 *Bail Act*.

Aboriginal people (as well as many non-Aboriginal people) do not own real property, significant savings, investments or other substantial assets which can be secured.

Bail may also be granted subject to a home detention condition, the requirements of which are set out in Cl 3 Pt D Sch 1 *Bail Act*. That clause requires that:

- the defendant be over the age of 17 years;
- the defendant be considered by a community corrections officer to be suitable for home detention;
- the place where the defendant will remain while subject to the home detention condition be “a suitable place”²⁷; and
- unless a home detention condition is imposed, the defendant will not be released on bail.

In particular, the requirement that a defendant remain in “a suitable place” while on bail may be difficult to satisfy. Overcrowded conditions or a lack of appropriate support persons for the applicant may mean that a proposed place of residence is deemed unsuitable.

Thus, in practice, the statutory bail requirements may operate in a discriminatory way upon Aboriginal accused persons in poor socio-economic circumstances²⁸. In 2000 the *Report of the Standing Committee on Estimates and Financial Operations in Relation to Financial Management of Prisons*²⁹ recognised that -

“...bail requirements needed to be modified so as to recognise the disadvantages experienced by specific cultural groups. This comment was supported by the Western Australian Police Service...”³⁰

In June 2001 the *Government of Western Australia 2000 Implementation Report* reported that Aboriginal accused persons who are unable to return to their communities may be released on bail into hostel accommodation, which accommodation has been obtained through the advocacy of Community Corrections Officers³¹.

A court may release an applicant for bail upon that applicant's personal undertaking, even where the offence alleged is an extremely serious one. In *Unchango v R* the applicant for bail was an Aboriginal woman from Kalumburu who had been charged with murder. Were bail not to be granted, the applicant would have to spend more than six months on remand at Bandyup Prison, near Perth. The applicant proposed to remain at a diocesan treatment and recovery centre at Turkey Creek, pending the trial. Applying the statutory guidelines for the grant of bail³², Templeman J considered that although the applicant had a criminal record, it was comprised of relatively minor offences. His Honour expressed the view that the applicant, who was in a stable relationship, and had six children, would not pose a threat to the community if released upon bail. Moreover, it appeared that the applicant intended to rely on the defence of self-defence at the hearing of the charge.

²⁷ Cl 3 (2)(b) Pt D Sch 1 *Bail Act*.

²⁸ Personal communication, her Honour Judge Yeats, District Court of Western Australia, 19 June 2001.

²⁹ Report 29 to the Legislative Council of Western Australia, 29 June 2000.

³⁰ *Report of the Standing Committee on Estimates and Financial Operations in Relation to Financial Management of Prisons*, n 33, p 28.

³¹ Indigenous Affairs Department, June 2001, p 57. This Report examines the extent of the implementation in 2000 of the 339 recommendations of the Final Report (see n 16).

³² See Pt C Sch 1 *Bail Act*.

Templeman J remarked that it would be extremely undesirable for the applicant to be taken a great distance away from her family and from her traditional community for an extended period. It appeared that there was little risk of the applicant being subject to a “payback” attack were she to reside at the diocesan treatment and recovery centre. His Honour concluded that these circumstances of the case were sufficiently “exceptional”³³ to justify the granting of bail. Templeman J released the applicant on a personal undertaking subject to the conditions that she reside at the diocesan centre and report regularly to the authorities.

6.2.3 Compliance with Bail Conditions

Authorities:

- *Wassa v Norman*³⁴.

Release upon bail may pose the following problems for Aboriginal accused persons³⁵:

- an Aboriginal accused may unwittingly breach bail conditions, due to an inability to understand the legal language of bail undertakings³⁶.
- an Aboriginal accused may forget to comply with a bail condition. This appeared to be the case in *Wassa v Norman*, where an Aboriginal accused, who had failed to report to the police as ordered, was found 150m from the police station. There was nothing to suggest that the accused had intended to breach bail conditions, but the magistrate estreated the accused person’s recognizance of \$5000 and directed that he be held in custody. An appeal was successful, Forster J holding that the magistrate had failed to consider his statutory power to suspend forfeiture of the recognizance.
- an Aboriginal accused may be aware of bail conditions but nevertheless fail to meet them. A funeral or other important family business may take priority over a bail requirement that an accused report to the police. A breach of bail conditions may also occur simply because the accused has no ready access to transport. The accused may be resigned to the fact that “sooner or later the police will pick me up”. Often, such conduct is underpinned by social factors such as alcohol or other substance abuse³⁷.
- an Aboriginal accused may be released upon bail far from his or her home without sufficient funds to return home. Such a person may become stranded in circumstances which encourage his or her socialisation with inappropriate persons. As a result, the Aboriginal accused may “get into trouble” again very quickly³⁸.

³³ “Special circumstances” or “extremely exceptional circumstances” must exist in order for bail to be granted to a person charged with murder: *Lim v Gregson* [1989] WAR 1; *Jemielita v R*, n 23.

³⁴ (1982) 14 NTR 13.

³⁵ See the discussion in E Johnston QC, Final Report, n 16, Part IV.

³⁶ Personal communication, Victoria Williams, n 17.

³⁷ Personal communication, Victoria Williams, n 17.

³⁸ Personal communication, Victoria Williams, n 17.

It is contended that the most important determinants of whether an accused will appear in court or abscond are the accused person's background and family ties³⁹. Aboriginal accused persons who fully understand and are cognisant of the terms of their bail conditions are unlikely to be less reliable than non-Aboriginal accused persons in fulfilling bail conditions and appearing in court when required⁴⁰.

6.2.4 Traditional Punishment Considerations

Authorities:

- *R v Joe Murphy Jungarai*⁴¹;
- *Barnes v R*⁴²;
- *R v Minor*⁴³.

In *The Recognition of Aboriginal Customary Law* the ALRC recommended that a court should not necessarily prevent an Aboriginal accused from being released upon bail for the purpose of undertaking traditional punishment. The ALRC commented:

“A court should not prevent a defendant from returning to his or her own community (with the possibility or even the likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for bail are met. In fact it is not unusual for bail to be granted by the police or magistrates to enable a defendant to return to his or her community to resolve through traditional processes the dispute the offence has caused. A rare reported decision to this effect is that of Chief Justice Forster in *R v Joe Murphy Jungarai*. Of course the other conditions for bail must be met: the defendant should not be a risk to the community and there must be sufficient assurance that he or she will not abscond to avoid trial. But subject to these requirements, the courts will not necessarily decline bail in these kinds of cases. To do so would be a form of paternalism and might, as Chief Justice Forster pointed out, exacerbate the situation in the defendant's community.”⁴⁴

In the case referred to that extract, *R v Joe Murphy Jungarai* an Aboriginal accused who had been charged with murder applied for bail for the express purpose of undertaking traditional punishment. The accused, who suffered from alcohol-related amnesia, could not recall the circumstances of the offence: however, there was some evidence that he had been provoked. In considering the accused's application for bail, Forster CJ took in account a number of factors. First, under Aboriginal law and custom, the accused was responsible for the victim's death; secondly, it was probable that the traditional punishment would consist of a single ceremonial spearing in the leg, and a period of banishment from the community; thirdly, the families of the accused and the victim were in a state of mutual hostility which would be likely to endure until the accused was punished under traditional law; and fourthly, the accused was anxious to be released in order to undertake the punishment.

³⁹ JB Bishop *Criminal Procedure*, Butterworths, 1998, p 246 (discussion of the 1960s 'Manhattan Bail Project'); see also Western Australian Law Reform Commission Working Paper 64 *Review of Bail Procedures*, 1977.

⁴⁰ Eggleston, n 15, pp 74-75.

⁴¹ (1981) 9 NTR 30.

⁴² (1997) 96 A Crim R 593.

⁴³ (1992) 2 NTLR 183.

⁴⁴ ALRC *The Recognition of Aboriginal Customary Law*, n 2, para 506, p 366.

Noting that persons charged with murder are not usually released on bail, Forster CJ nevertheless ordered that the accused be released upon bail. His Honour emphasised that the order was not to be viewed as a precedent:

“[T]his should not be regarded as a precedent in the sense that a mere assertion of similar facts from the bar table will be sufficient....to justify a similar order in every case....Aboriginal customs vary greatly from place to place and, of course, the circumstances of killings must differ....I should also say that for the purpose of dealing with the application for bail I express neither approval nor disapproval of the course to be taken by the family of the deceased, endorsed as it is by the community – including the family of the accused. Whether or not the proposed action constitutes an offence under the law of the land seems to me, for present purposes, to be irrelevant...What will almost certainly happen is simply, for present purposes, an important fact to be considered.”⁴⁵

Note: subsequently the accused was convicted and sentenced to a term of imprisonment of six and one half years, with a non-parole period of two years and six months⁴⁶.

In *Barnes v R* Bailey J of the Northern Territory Supreme Court took a very different approach. In that case the accused, who had been charged with the murder of his nephew, applied for bail in order to undertake traditional punishment for the peace and well being of the community and for his own well-being.

Bailey J refused the application. His Honour noted that since the decision in *R v Joe Murphy Jungarai* the *Bail Act 1982* (NT) had come into force, and His Honour held that the criteria prescribed in that statute for the grant of bail were exclusive criteria. Accordingly, “the welfare of the community”, which consideration had informed the decision in *R v Joe Murphy Jungarai*, could not be taken into account in assessing the applicant’s application for bail.

Further, Bailey J pointed out that the traditional punishment proposed in the instant case was much harsher than that imposed in *R v Joe Murphy Jungarai*. The accused would be repeatedly punched, speared, and hit with boomerangs, with only a small shield for protection.

Bailey J approved the view of Mildren J in *R v Minor* (a sentencing case) that:

“...it would be quite wrong for a judge to structure his judgment to facilitate an unlawful act.”⁴⁷

In *R v Minor* Mildren J had considered the question of whether a person could consent to an assault against him or her. His Honour had concluded that an assault “authorised” by a “victim” would be unlawful only if the person committing the assault intends to kill or cause grievous harm⁴⁸.

In *Barnes v R* Bailey J distanced himself somewhat from the view of Mildren J in *R v Minor* in respect of the question of lawful consent to assault:

⁴⁵ *R v Joe Murphy Jungarai*, n 41, p 31-32.

⁴⁶ ALRC *The Recognition of Aboriginal Customary Law*, n 2, para 511, p 371.

⁴⁷ *R v Minor*, n 43, at 195 per Mildren J; *Barnes v R*, n 42, at 596 per Bailey J.

⁴⁸ *R v Minor*, n 43, at 196 per Mildren J.

“In the absence of full argument, I express no view as to whether a person can lawfully consent to an assault falling short of one intended to cause grievous bodily harm.”⁴⁹

See also *Ebatarinja v R* [2000] NTSC 26.

In Western Australia the statutory guidelines for the grant of bail in Western Australia do not constitute exclusive criteria⁵⁰. The question of whether an Aboriginal accused may be released on bail for the purpose of receiving traditional punishment appears to be open⁵¹.

⁴⁹ *Barnes v R*, n 42, pp 596-597.

⁵⁰ *Jemielita v R*, n 23, at 96.

⁵¹ See the discussion in the Hon DK Malcolm AC CitWA, Chief Justice of Western Australia *Traditional Law and Punishment: A Non-Aboriginal Perspective* Aboriginal Cross-Cultural Training Programme for Justices of the Peace, Kalgoorlie, 27 November 1998, p 8. See also his Honour Judge HH Jackson 'Can the Judiciary and Lawyers Properly Understand Aboriginal Concerns?' *Brief*, Law Society of Western Australia, May 1997, p 12, at 15.

6.3

FITNESS TO PLEAD

The determination of fitness to stand trial is a threshold issue in criminal justice proceedings, because a person who is unfit to plead must be diverted from the trial process.

Fitness to plead is a broader concept than mental capacity to plead. In *Eastman v The Queen*⁵² Gaudron J stated:

“[T]he question whether a person is fit to plead may arise for reasons other than mental illness. It may arise, for example, because a person is deaf and dumb, or, more generally, because language difficulties make it impossible for him or her to make a defence.”⁵³

In Western Australia incapacity to plead by reason of mental impairment is governed by the *Criminal Law (Mentally Impaired Defendants) Act 1996 (WA)*. Since fitness to plead is a broader concept than mental incapacity, the general position at common law is briefly outlined first.

6.3.1 Fitness to Plead at Common Law

General Principles: If an accused is incapable of following the proceedings of a trial, of giving evidence, or of instructing counsel, then no plea can be taken and the trial cannot proceed⁵⁴. An accused person’s fitness to plead is not to be determined solely by reference to his or her condition at the commencement of the trial: regard is also to be had to his or her likely condition during the trial⁵⁵. An accused is not necessarily unfit to plead by reason of the fact that he or she suffers from a high degree of abnormality⁵⁶, from delusions⁵⁷, or from hysterical amnesia⁵⁸.

The usual consequence of a determination of unfitness to stand trial is that the accused is incarcerated indefinitely. Accordingly, it is ordinarily in the interests of an accused that he or she be brought to trial, rather than to suffer such incarceration⁵⁹.

6.3.2 *Criminal Law (Mentally Impaired Defendants) Act 1996 (WA)*

The *Criminal Law (Mentally Impaired Defendants) Act 1996 (WA)* (MID Act) provides for the judicial determination of fitness to plead by reason of mental impairment.

⁵² [2000] HCA 29.

⁵³ *Eastman v The Queen*, n 52, para 59, per Gaudron J.

⁵⁴ *R v Podola* [1960] 1 QB 325; *R v Presser* [1958] VR 45; *R v Webb* [1969] 2 QB 279; *Eastman v The Queen*, n 52.

⁵⁵ *Kesavarajah v The Queen* (1994) 181 CLR 230 at 246 per Mason CJ, Toohey and Gaudron JJ (Deane and Dawson JJ dissenting).

⁵⁶ *R v Berry* (1977) 66 Cr App R 156.

⁵⁷ *R v Taylor* (1992) 77 CCC (3d) 551.

⁵⁸ *R v Podola* [1960] 1 QB 325.

⁵⁹ *Kesavarajah v The Queen*, n 55 at 249 per Deane and Dawson JJ; *Eastman v The Queen*, n 52, para 24 per Gleeson CJ.

Section 9 MID Act provides that a defendant lacks mental fitness to stand trial if that defendant, because of mental impairment, is:

- (a) unable to understand the nature of the charge;
- (b) unable to understand the requirement to plead to the charge or the effect of the plea;
- (c) unable to understand the purpose of the trial;
- (d) unable to understand or to exercise the right to challenge jurors;
- (e) unable to follow the course of the trial;
- (f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
- (g) unable to properly defend the charge.

“Mental impairment” is defined as intellectual disability, mental illness, brain damage or senility⁶⁰. “Mental illness” is defined as “an underlying pathological infirmity of the mind, whether of short or of long duration and whether permanent or temporary, but does not include a condition which results from the reaction of a healthy mind to extraordinary stimuli”⁶¹ (a definition which excludes infirmities caused by alcohol or substance abuse).

The question of mental impairment may be raised at any time before or during criminal proceedings⁶². The presiding judicial officer is required to determine the question of mental impairment on the balance of probabilities. To this end, the judicial officer may inform himself or herself of the relevant matters as he or she sees fit⁶³.

The criminal proceedings may be adjourned pending the determination of the issue of mental impairment. The judicial officer may grant the defendant bail, remand him or her in custody, or, in appropriate circumstances, make a hospital order⁶⁴. Pursuant to a hospital order, a defendant may be detained in an authorised hospital for a period not exceeding seven days for the purposes of examination by a psychiatrist⁶⁵.

Upon a determination that a defendant is mentally impaired, the proceedings may be adjourned for no longer than six months⁶⁶. However, if the judicial officer is of the opinion that that the defendant is unfit to be tried and is unlikely to become fit for trial within six months, the indictment is quashed and the accused is discharged or kept in custody until released by order of the Governor⁶⁷. The circumstances in which a custody order may be made are strictly circumscribed⁶⁸.

⁶⁰ Section 8 MID Act.

⁶¹ Section 8 MID Act. Note that this definition is different from the definition of mental illness formulated for the purposes of the *Mental Health Act 1996* (WA).

⁶² Sections 11, 17, 17, 19 MID Act.

⁶³ Typically, through psychiatric and other appropriate expert reports: see s 12 MID Act. Note that the question of the mental impairment of an accused for the purposes of the MID Act has been discussed *inter alia* in *R v Ryan* (WADC) 1998, Lib. No D 980032; *R v Gardiner* (No 2) [1999] WADC 23; *R v Gardiner* (No 3) (2000) 24 SR (WA) 136; *R v Watson* [2000] WADC 235 and *R v Robson* [2001] WADC 133.

⁶⁴ Section 14 MID Act.

⁶⁵ Section 5 MID Act.

⁶⁶ Sections 14, 18, 19 MID Act.

⁶⁷ Sections 16-19, 24, 25, 35 MID Act.

⁶⁸ Section 19 MID Act.

Note: *R v Miller (No 2)*⁶⁹ Martin J considered the operation of a statutory provision similar to s 9 MID Act in respect of an Aboriginal accused. Section 269H *Criminal Law Consolidation Act 1935* (SA) (CLCA) provides as follows:

“Mental unfitness to stand trial. A person is mentally unfit to stand trial if on a charge of an offence the person's mental processes are so disordered or impaired that the person is:

- (a) unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or
- (b) unable to understand (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or
- (c) unable to understand the nature of the proceedings, or to follow the evidence or the course of proceedings.”

The Aboriginal accused, aged 31 years, had been charged with attempted rape. Evidence was given that the accused suffered from a serious learning deficit, and a mental disorder, apparently occasioned by a serious head injury. Those conditions were exacerbated by alcohol-induced brain damage. The mental and intellectual capacity of the accused had been assessed by a number of psychologists and forensic psychiatrists. Although those experts agreed that the accused person's mental processes were impaired, they had reached different conclusions as to whether that impairment resulted in the fulfilment of any of the conditions set out in s 269H CLCA. Martin J examined the capacity of the accused to make choices at the relevant points of the trial:

“[T]he accused's [understanding of his rights] to exercise or to give rational instructions about the exercise of procedural rights.....would be very superficial. He would be capable of understanding that the jury would decide whether he did or didn't 'do it'. He could be told and understand superficially that as a juror moved from the body of the court to the jury box and moved past him he could say yes or no. However, he is incapable of understanding any concept associated with the reasoning behind the right to challenge.

The accused is capable of exercising a choice as to whether to give evidence by saying yes or no. However, he does not have the capacity to grasp any of the rationale behind that decision. The accused would be likely to follow the advice of his solicitor because he is suggestible and it would be the easiest option for him. As to a choice between trial by judge alone or trial by jury, the accused can understand at a 'very concrete level' the difference between the judge and a group of 12 people, but he is not able to comprehend what the difference really means at a more complex level.

In the view of Dr [W], at a superficial level the accused could understand that the proceedings were to decide whether 'he did it or did not do it'. To the extent that he is incapable of understanding the nature of the charge of attempted rape, however, both Dr [W] and [Dr C] were of the view that he would not understand the proceedings.....

The extent of his disability [in respect of capacity to retain information] and its impact upon his capacity to follow the evidence should not be underestimated.[I]n my opinion within a few minutes of ...evidence being given the accused would not have retained that evidence in his memory.”⁷⁰

⁶⁹ [2000] SASC 152.

⁷⁰ *R v Miller (No 2)*, n 69, paras 29 – 34.

His Honour then pointed out that no guidelines existed as to the extent of the understanding or capacity which the accused must have in order to stand trial. The statutory formulation simply employed the phrases “unable to understand”, “unable to respond rationally”, and so on⁷¹. Martin J appeared to accept that the relevant standard was that of fitness for trial at common law, as formulated by Smith J in *R v Presser*⁷² and the High Court in *Ngatayi v The Queen*⁷³.

After considering the totality of the expert evidence, Martin J held that the accused’s cognitive impairment was such that he was not capable of understanding the legal concepts of “attempting” to commit an offence, nor was he capable of “knowing” that the complainant was not consenting to sexual intercourse. Accordingly, his Honour held that the accused was not capable of understanding the charge within the meaning of s 269H (a) CLCA, and declared the accused to be unfit to stand trial.

6.3.3 Physical Impairment

Authorities:

- *R v A.T.*⁷⁴;
- *Ebatarinja v Deland*⁷⁵.

The question of fitness to plead by reason of physical impairment is covered by common law principles as stated *inter alia* in *Eastman v The Queen*⁷⁶. In *R v Sexton*⁷⁷ the South Australian Court of Criminal Appeal stated that unfitness to plead could arise from physical disability:

"Unfitness to be tried at common law is not limited to cases of mental illness. There are broader considerations, including one's inability to communicate and participate in the trial process. An inability to communicate or comprehend may be based upon physical disabilities alone, such as hearing and speech impediments. The common law does not require the presence of any psychological or intellectual impairment."⁷⁸

There is abundant evidence that many Aboriginal persons suffer from one or more severe health problems⁷⁹. In the context of the criminal justice process, hearing damage or loss may be especially problematic. Hearing impairment has been described as “endemic” within the Aboriginal community: an estimated 20%-40% of Aboriginal people are affected by hearing loss caused by *otitis media* (middle ear disease)⁸⁰. Unidentified hearing loss may impair the ability of an accused to make a proper defence to a charge and/or to give instructions to his or her counsel.

⁷¹ *R v Miller (No 2)*, n 69, paras 35 – 38.

⁷² [1958] VR 45 at 48. The “minimum standards” laid down in *R v Presser* include that the accused be able to understand the charge, to plead to the charge, to exercise the right of challenge, to understand generally the nature and purpose of the trial, to follow the course of the trial so as to understand generally what is happening, to understand the substantial effect of the evidence being given by the prosecution, to make his defence or answer to the charge.

⁷³ (1980) 147 CLR 1 at 8 per Gibbs, Mason and Wilson JJ.

⁷⁴ Unrep., NT Sup Ct, Thomas J, No 62 of 1992, 26 October 1992.

⁷⁵ (1998) 194 CLR 444.

⁷⁶ [2000] HCA 29.

⁷⁷ [2000] SASC 276.

⁷⁸ *R v Sexton*, n 77, at 11 per Gray J (Prior and Williams JJ concurring).

⁷⁹ See E Johnstone, QC, Final Report, n 16, Vol 2, p 351; House of Representatives Standing Committee on Aboriginal Affairs *Aboriginal Health* AGPS, Canberra, 1979.

⁸⁰ H Kelly and S Eeks ‘Ear Disease in Three Aboriginal Communities in Western Australia’ *The Medical Journal of Australia*, Vol 154, 18 February 1991, quoted in D Howard et al ‘Aboriginal Hearing Loss and the Criminal Justice System’ (1993) 3 *Aboriginal Law Bulletin* No. 65, 9, at 9.

In addition, unidentified hearing impairment may disadvantage an Aboriginal accused in face-to-face communication:

“An interrogation might well proceed with the Aborigine hearing only part of the words addressed to him... Having.... learned to supplement auditory signals with other signals such as the movement of the lips and gestures, the disability may be masked and the interrogator may remain unaware of it. If signs of it do not appear they may be misinterpreted as surliness, or worse still, as the hesitations and the silences of guilt.”⁸¹

In *R v A.T.* a 16 year old Aboriginal defendant pleaded guilty to a number of offences including arson. Thomas J noted that the defendant’s hearing disability had damaging social and psychological effects which had resulted in the development of inappropriate behavioural patterns:

“Although a hearing problem was identified early in [the defendant’s] life and again identified during childhood, it appears that he has not had access to a range of [medical] services....that could have minimised the communicative, social and psychological impact of those problems and I quote one section of the report prepared by Mr Howard in which he states: ‘These communication difficulties have been a major contributor to the development of serious social and psychological problems.’”⁸²

Even if a hearing impairment is subsequently cured, it may leave a legacy of linguistic and communicative incompetence which continues to affect an accused throughout his or her life⁸³.

In *Ebatarinja v The Queen* (discussed above at 6.1.3) the accused, who was deaf and mute, was able to communicate only by simple hand movements. The High Court stated that in order to be tried an accused must be able to understand the nature of the proceedings and to participate in the trial:

“On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her.”⁸⁴

Thus, where physical impairment renders an accused unable to understand the proceedings, to instruct counsel and to make a proper defence, that person is unfit to plead⁸⁵.

⁸¹ Queensland, *Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland* Government Printer, Brisbane, 1977, para 114, quoted in ALRC *The Recognition of Aboriginal Customary Law*, n 2, para 546, p 405.

⁸² *R v A.T.*, n 74, p 48, quoted in D Howard et al, n 80, p 9.

⁸³ D Howard et al, n 80, p 10.

⁸⁴ *Ebatarinja v The Queen*, n 75, at 454, per the Court. Their Honours referred to *Kunnuth v The State* [1993] 4 All ER 30 in which the Privy Council declared (at 35) that it was an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. This required that in addition to the “the corporeal presence” of the defendant at the proceedings, the defendant should be able to understand the proceedings and to decide *inter alia* whether to call witnesses, or to give evidence.

⁸⁵ See also *R v Jabanardi* (1983) 77 FLR 333.

6.3.4 Lack of Comprehension of Proceedings

Authorities:

- *R v Willie*⁸⁶;
- *Ngatayi v The Queen*⁸⁷.

For many Aboriginal persons, particularly those in traditional communities, English may be a second or even a third language. The difficulties experienced by such persons in court proceedings are obvious. Such persons may be wholly or partially unable to comprehend court proceedings and/or to participate in them.

It has been argued that no relevant distinction exists between a person who is unable to participate in a trial by reason of an inability to speak and or understand the English language, and a person who is unable to so participate by reason of a mental or physical disability⁸⁸. In *Eastman v The Queen* Gaudron J considered that the issue of fitness to plead arises where -

“language difficulties make it impossible for [an accused person] to make a defence”⁸⁹.

It is reported that in *R v Willie* Cooper J ordered the discharge of four Aboriginal prisoners who had been charged with murder, on the grounds that no interpreter competent to communicate the charge to the prisoners could be found⁹⁰.

In Western Australia, until its repeal on 13 November 1997 s 631 *Criminal Code 1913 (WA) (Criminal Code)* provided for the empanelment of a jury to ascertain fitness to plead whenever it appeared to be “uncertain, for any reason” that an accused was capable of understanding the proceedings at the trial so as to be able to make a proper defence. The scope of that repealed provision is clearly much wider than that of the provisions of the *Criminal Law (Mentally Impaired Defendants) Act 1996 (WA)*.

The operation of s 631 *Criminal Code* was considered in *Ngatayi v The Queen*. In that case the appellant, an Aboriginal male from a traditional community near Broome, had been charged with wilful murder. At trial, the appellant’s counsel requested that a jury be empanelled pursuant to s 631 *Criminal Code*. Counsel argued that, notwithstanding the assistance of an interpreter, the accused was incapable of understanding that a defence was available to him. (That defence was that the appellant’s intoxication at the time of the attack precluded his forming the requisite intention for the charge.) The trial judge declined to apply s 631 *Criminal Code* and entered a plea of not guilty⁹¹; subsequently the jury convicted the appellant of wilful murder. After an unsuccessful appeal to the Court of Criminal Appeal, the appellant appealed to the High Court on the ground that the trial judge had erred in not empanelling a jury to determine his fitness to plead pursuant to s 631 *Criminal Code*.

⁸⁶ (1885) 7 QLJ (NC) 108.

⁸⁷ (1980) 147 CLR 1.

⁸⁸ A Crouch ‘The Way, the Truth and the Right to Interpreters in Court’ *Law Institute Journal*, Vol 59, 1985, 687, p 688.

⁸⁹ *Eastman v The Queen*, n 76, para 59 (and cases therein cited).

⁹⁰ This case is briefly discussed in *Ngatayi v The Queen*, n 87.

⁹¹ It appeared that the plea was entered pursuant to s 49 (1) *Aboriginal Affairs Planning Authority Act 1972 (WA)*. This provision is discussed in Chapter Seven.

By majority, the High Court granted special leave to appeal but dismissed the appeal. Gibbs, Mason and Wilson JJ (Barwick CJ and Murphy J dissenting for different reasons⁹²) held that the appellant was capable, through the interpreter, of giving evidence as to the circumstances from which the charge arose. Their Honours held that the fundamental issue was whether an accused can understand the proceedings so as to be able to make a proper defence. The fact that an accused did not know, or did not understand the law which governed his case, was not in issue. Their Honours held that an accused's lack of comprehension is relevant only if it means that he or she is unable to give relevant instructions or information to his counsel⁹³.

Gibbs, Mason and Wilson JJ, noting the order made by Cooper J in *R v Willie* to discharge four Aboriginal accused persons because no interpreter could be found for them, observed:

"The report does not disclose the authority, statutory or otherwise, for taking this course."⁹⁴

Their Honours acknowledged, however, that such a discharge might be the only course available where an accused who cannot comprehend the language of the proceedings is not mentally or physically disabled, and where no statutory provision exists pursuant to which that accused might be detained⁹⁵.

⁹² Barwick CJ dissented as to the grant of special leave to appeal; Murphy J dissented as to the dismissal of the appeal, holding that the statutory procedure intended for the accused person's protection had not been followed.

⁹³ *Ngatayi v The Queen*, n 87, p 8-10 per Gibbs, Mason and Wilson JJ. See also *R v Jambajima Yupupu* (Unrep., WA Dist Ct, O'Connor J, No 128 of 1976) and the discussion by LL Davies 'The Yupupu Case' (1976) 2 *Legal Service Bulletin*, 133.

⁹⁴ *Ngatayi v The Queen*, n 87, p 8.

⁹⁵ *Ngatayi v The Queen*, n 87, p 7-8. See also *R v Grant* [1975] WAR 163.

6.4

INTERPRETERS

The *Royal Commission into Aboriginal Deaths in Custody: National Report* (Final Report) emphasised the importance of Aboriginal interpreting services being available to Aboriginal defendants who require it. Recommendation 99 proposed that such an interpreter be provided where any doubt exists as to a defendant's capacity to understand the English language and to express himself or herself in the English language:

"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 are reservations as to these matters proceedings should not continue until a competent interpreter is provided to the person without cost to that person."⁹⁶

Recommendation 100 of the Final Report urged Governments to take a pro-active role in the recruitment and training of Aboriginal interpreters:

"That Governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts."⁹⁷

The extent of an accused person's entitlement to the services of an interpreter is outlined below. A brief discussion of the numerous practical difficulties attendant upon the provision of adequate Aboriginal interpreting services follows.

6.4.1. The Right to an Interpreter

(1) *International Law*

General Principles: A number of international human rights instruments confer the right to an interpreter in court proceedings, either expressly or impliedly. For Australian purposes, the most developed statement relating to the provision of interpreters in criminal proceedings is Article 14(3) of the 1966 *International Covenant on Civil and Political Rights* (ICCPR) which stipulates:

"In the determination of any criminal charge against him, everyone shall be entitled to the following guarantees, in full equality:

.....

(f) the right to the free assistance of an interpreter if the person cannot understand or speak the language used in court."⁹⁸

⁹⁶ E Johnston QC, Final Report, n 16, Vol. 3, p 79.

⁹⁷ E Johnston QC, Final Report, n 16, Vol. 3, p 80.

⁹⁸ See also Articles 14(1) and 26 ICCPR; Article 10 *Universal Declaration of Human Rights* (1948); Article 5 *International Convention on the Elimination of All Forms of Racial Discrimination* (1966); Article 9(2) *Convention on the Right of the Child* (1991).

Since no specific municipal legislation has been enacted to give effect to the provisions of ICCPR, it does not form part of Australian domestic law⁹⁹. In *Dietrich v The Queen*¹⁰⁰ Brennan J stated that, although not part of Australian municipal law, the ICCPR “has a legitimate influence on the development of the common law”¹⁰¹. Toohey J observed that -

“English authority tends to support the argument that a court may, perhaps must, consider the implications of an international instrument where there is a lacuna in the domestic law”¹⁰².

These dicta suggest that judicial discretion should be exercised consistently with Art 14(3)(f) ICCPR to ensure that an Aboriginal accused, who does not understand or cannot express himself or herself in English, receives the assistance of an interpreter in criminal proceedings.

Note: Article 12 of the *Indigenous and Tribal Peoples Convention 169 (1989)*¹⁰³ provides:

“Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary, through the provision of interpretation or by other effective means.”

Note: Australia is not yet a signatory to this Convention, which emphasises *inter alia* the rights of indigenous people to self-determination. However see *Police v Abdulla* [1999] SASR 337 at 344 per Perry J.

(2) **Statutory Entitlement**

In some Australian jurisdictions a statutory right to an interpreter is conferred for the purposes of certain proceedings (see, for example, s 14 *Evidence Act 1929 (SA)*)¹⁰⁴. Participants in proceedings conducted pursuant to certain Commonwealth laws, such as those of the Immigration Review Tribunal and the Refugee Review Tribunal, have a statutory entitlement to an interpreter¹⁰⁵. In Western Australia there is no statutory right to the assistance of an interpreter in legal proceedings.

(3) **Common Law**

Authorities:

- *Ebatarinja v Deland*¹⁰⁶.

⁹⁹ *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550. Note however that the ICCPR appears as Schedule 2 to the *Human Rights and Equal Opportunity Act 1986* (Cth).

¹⁰⁰ (1992) 177 CLR 292. In this case the effect of Art 14(3)(d) ICCPR, which guarantees an accused person the right to counsel “where the interests of justice require it”, was discussed by the High Court.

¹⁰¹ *Dietrich v The Queen*, n 100, p 321. See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, at pp 41-43 Brennan J.

¹⁰² *Dietrich v The Queen*, n 100, p 360. (The English authority referred to was *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770.)

¹⁰³ Adopted in Geneva on 27 June 1989.

¹⁰⁴ See also s 22 *Children and Young Persons Act 1989* (Vic); s 40 *Magistrates Court Act 1989* (Vic).

¹⁰⁵ Section 132(7) *Migration Act 1958* (Cth). See also s 101H *Defence Force Disciplinary Act 1982* (Cth), s 1265 *Social Security Act 1991* (Cth).

¹⁰⁶ (1998) 194 CLR 444.

General Principles: At common law, a party in civil or criminal proceedings is not entitled as of right to an interpreter¹⁰⁷. It has been remarked that appellate courts demonstrate a “disinclination” to disturb the ruling of a trial judge in respect of the provision of an interpreter¹⁰⁸.

However, recent decisions of the High Court suggest that the right to obtain the services of an interpreter may be essential to a fair trial. In *Dietrich v The Queen* Gaudron J took the view that, while the fundamental requirement that a trial be fair does not impinge on the substantive law, it -

“.....may impinge on evidentiary and procedural rules...Speaking generally, the notion of “fairness” is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result. Thus....the procedures may be modified, for example, to allow evidence to be given through an interpreter.”¹⁰⁹

In *Re East: ex parte Nguyen*¹¹⁰ Kirby J commented:

“Where a trial would be unfair because of the absence of an interpreter, it is the duty of the judicial officer to endeavour to ensure that an interpreter is provided....The entitlement to an interpreter is not specifically a language right....so much as an aspect of the commitment of the judicature to fairness of the trial process.”¹¹¹
(footnotes omitted)

In *Ebatarinja v Deland* (discussed above in 6.1.3 and 6.3.3) the Aboriginal accused was deaf and mute. The High Court emphasised that an accused must be able to understand the nature of the proceedings and to participate in the trial in order that a trial not be unfair:

“If the defendant does not speak the language in which the proceedings are conducted, the absence of an interpreter will result in an unfair trial.”¹¹²

These authorities suggest that where an accused is unable to speak and understand English sufficiently well to instruct counsel and make a proper defence, an unfair trial may result.

Note: the overriding requirement that a trial be fair may confer upon a witness, as well as an accused, the right to an interpreter: see *R v Johnson*¹¹³.

¹⁰⁷ *Dairy Farmers v Acquilina* (1963) 109 CLR 458 at 464 per the Court.

¹⁰⁸ *Gragridge v Grace Bros Pty Ltd* (1988) 93 FLR 414 at 420 per Kirby P.

¹⁰⁹ *Dietrich v The Queen*, n 100, p 363; see also Deane J at 330 – 331.

¹¹⁰ (1998) 196 CLR 354.

¹¹¹ *Re East; ex parte Nguyen*, n 110, at 390. See also *R v Saraya* (1993) 70 A Crim R 515.

¹¹² *Ebatarinja v Deland*, n 106, p 454.

¹¹³ (1987) 25 A Crim R 433 at 435 per Shepherdson J; at 440 per Williams J.

6.4.2 Practical Difficulties in Aboriginal Interpreting

Many practical difficulties exist in relation to obtaining the assistance of competent Aboriginal interpreters in court proceedings. These include the following:

(1) Determining Competency in English

There is no objective indicator of the extent to which language disability must be demonstrated before an interpreter is deemed necessary in criminal proceedings¹¹⁴. Apparent fluency in the English language may be misleading, especially to a person from a monolingual and mono-cultural background.

In criminal proceedings, the capacity of an accused to “understand or speak” English is usually ascertained –

“...by a series of questions along the lines of ‘where do you live’, ‘how old are you’, ‘how long have you been in Australia’ and so on, which can generally be answered reasonably well. It is quite a different thing altogether for the accused then to be able to understand the whole course of the evidence and the addresses; and to do so sufficiently well to defend him or herself or give proper instructions to counsel.”¹¹⁵

Dr Michael Cooke, an expert in *Yolgnu* language, has suggested that in determining whether an Aboriginal witness needs the assistance of an interpreter, a judge should not place too much reliance upon counsel or the witness himself or herself:

“Courtroom lawyers...are generally unqualified to judge the linguistic competence of Aboriginal witnesses who speak some English. The person least able to advise the court on this matter is any barrister with an interest in failed communication, such as when the Aboriginal person in question might be considered, by that barrister, to be a hostile witness. The witness may also have difficulty in giving an accurate indication to the court, at the outset, as to his or her own level of skill as a communicator in English.”¹¹⁶

In *Re East: ex parte Nguyen* Kirby J emphasised that the responsibility for determining English-language competency remains with the judge:

“.....[T]he judicial officer will not be relieved of the obligation to ensure a fair trial if it should subsequently appear (from something said or done in the trial) that an interpreter is needed.”¹¹⁷

(2) Lack of Trained Interpreters

The Australian National Accreditation Authority for Translators and Interpreters (NAATI) prescribes a number of standards for translating and interpreting. The minimum NAATI-prescribed standard for interpreting in court proceedings is “Translator/Interpreter” (formerly NAATI Level III). This level of accreditation

¹¹⁴ V Taylor ‘Interpreting the Legal Process’ *Legal Service Bulletin*, 1989, Vol 14, 284, p 286.

¹¹⁵ L Roberts-Smith ‘Communication Breakdown’ *Legal Service Bulletin* Vol 14, No 2, April 1989, 75, at 76.

¹¹⁶ M Cooke ‘Aboriginal Evidence in the Cross-Cultural Courtroom’ in D Eades, ed, *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* UNSW Press, Sydney, 1995, 55, p 93.

¹¹⁷ *Re East, ex parte Nguyen*, n 110, p 390.

requires the undertaking of a three-year university degree. It appears that in Australia very few Aboriginal interpreters have acquired the “Translator/Interpreter” level of competency and accreditation.

In Western Australia the School of Communication and Cultural Studies at Central Metropolitan TAFE in Perth conducts one-year Diploma of Interpreting Aboriginal Languages courses. Upon successful completion of a Diploma course, students attain “Paraprofessional” accreditation (formerly NAATI Level II).

Note: details of the Aboriginal interpreter training courses and availability of Aboriginal interpreters who have been trained to Paraprofessional level are contained in the Appendix to Chapter Six.

(3) Inability to Obtain the Services of an Interpreter

A trained Aboriginal interpreter may not be available to assist the court in a criminal proceeding for reasons which may include:

- insufficient notice may have been given to the relevant interpreting service organisation. A demand for an interpreter “straightaway” often cannot be met¹¹⁸;
- an interpreter trained in the relevant Aboriginal language or dialect may not be available in the location where the proceedings are to be conducted;
- an appropriately-trained interpreter may be unavailable by reason of being unwell or even by reason of being in prison himself or herself¹¹⁹;
- an appropriately-trained interpreter who is otherwise available may become “unavailable” to interpret for reasons attributable to that interpreter’s own local relationships. The interpreter may believe (in some cases, correctly) that his or her involvement in the court proceedings will be construed as “taking sides” in the matter. Accordingly, the interpreter might be blamed for the verdict in the trial, and accordingly punished or “paid back” by the accused, his or her family or members of the broader community¹²⁰.

(4) Alienating Effect of Court Environment

There is evidence that second language competency decreases markedly under trauma or stress¹²¹. The formal court environment and the use of technical legal language may be overwhelming for an Aboriginal interpreter¹²². Such difficulties may be exacerbated by counsels’ styles of interrogation, as discussed in Chapter Five.

¹¹⁸ R Goldflam ‘Silence in Court! Problems and Prospects in Aboriginal Interpreting’ in D Eades, ed, *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*, UNSW Press Ltd, NSW, 1995, 28, p 50.

¹¹⁹ Interview with Ms Dagmar Dixon, Coordinator of Aboriginal Interpreting Programs, TAFE, Perth, 5 May 2001.

¹²⁰ Interview with Ms Dagmar Dixon, n 119.

¹²¹ Ethnic Affairs Commission *Use of Interpreters in Domestic Violence and Sexual Assault Cases: A Guide for Interpreters*, Sydney, EAC, 1995.

¹²² Personal communication from Mr Steve Carter, Western Australian Aboriginal Justice Council, 19 July 2001.

(5) Use of Untrained Interpreters

The use of untrained interpreters is inherently problematic. In particular:

- the use of a family member as an interpreter may be humiliating for a witness and/or may significantly inhibit a witness from disclosing information to the court¹²³.
- untrained interpreters may be deficient in language and interpreting skills; they may possess inadequate cross-cultural understanding, or may choose imprecise, inappropriate or misleading words.

(6) Lack of Conceptual Equivalence

An interpreter may find it extremely difficult to translate certain legal words or phrases for which there is no conceptual equivalent. Difficult concepts might include the meaning of a “not guilty” plea, the relevance of “intention” to certain offences; the meaning and operation of “mitigating” and “aggravating” factors, and so on¹²⁴.

(7) Language/Semantic Differences

As discussed in Chapter Five, an English word may have one or more different meanings in Aboriginal languages, and vice versa. The word “kill” may mean “hit” and “hurt” as well as, literally, “to kill”. In one reported case an Aboriginal suspect stated that he intended to “kill” the complainant. On closer questioning, it was revealed that his intention was not to murder the complainant, but to “kill her a little bit”, “kill her on the leg”¹²⁵.

(8) Resource Implications

The use of interpreters in criminal trials has obvious and significant resource implications for courts, not least in that trials involving the participation of an interpreter inevitably take longer than those which do not.

(9) Judicial Misgivings

There is evidence of judicial misgivings about the role and function of interpreters. Judicial comments have included the following:

- “Experience has 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”.¹²⁶

¹²³ L Roberts-Smith, n 115, at 77-78; K Laster and V Taylor *Interpreters and the Legal System* The Federation Press, Sydney, 1994, p 91. See also *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4.

¹²⁴ H McRae et al *Indigenous Legal Issues* LBC Information Services, North Ryde, 1977, p 372. Such inability to understand technical legal concepts, of course, may apply equally to non-Aboriginal people.

¹²⁵ J Coldrey ‘Aboriginals in the Criminal Courts’ in K Hazlehurst, ed, *Ivory Scales: Black Australia and the Law*, UNSW Press, 1987, 81, at 87-88.

¹²⁶ *R v Johnson* (1987) 25 A Crim R 433 at 442 per Williams J.

- "...it is all too common an experience to hear the interpreter giving the effect instead of a literal translation of questions and answers and of his own accord interpolating questions and eliciting responses."¹²⁷
- "[W]itnesses with some but inadequate English language skills [face a dilemma]. Do they continue in English even though they may be disadvantaged or do they use an interpreter and risk being regarded as devious, evasive or running for cover?"¹²⁸
- "...it appeared to me that the defendant was pretending that he did not understand English to the degree that he did and was also consistently endeavouring to get opposing counsel to rephrase questions in an endeavour to gain greater time for himself to work out the answers. This manoeuvre was patently obvious. There were occasions...where the interpreter had translated what she thought the witness had said and the witness then in English corrected the translation..."¹²⁹

(9) Additional Issues

In *Access to Interpreters in the Australian Legal System: Report*¹³⁰ the Commonwealth Attorney-General identified a number of problems as endemic:

- the interpreter may appear to "take sides" and act as an advocate;
- the interpreter may appear to summarise and "package" the client's story;
- the interpreter may appear to act in an unscrupulous manner¹³¹.

The difficulties experienced first, in obtaining sufficient numbers of people to train as Aboriginal interpreters, and secondly, in being able to avail the services of trained interpreters, are significant and of great concern. Since the handing down of the Final Report numerous other reports, including *Access to Justice: An Action Plan*¹³² and *Multiculturalism and the Law*¹³³ have reinforced the urgent need for sufficient, competent Aboriginal interpreters in the conduct of criminal proceedings.

¹²⁷ *Filios v Morland* (1963) 63 SR (NSW) 33 at 333 per Brereton J.

¹²⁸ Sir James Gobbo, Supreme Court of Victoria, quoted in Commonwealth Attorney-General's Department *Access to Interpreters in the Australian Legal System: Report* AGPS, Canberra, 1991, 3.3.7 (p 45).

¹²⁹ *Hatzigeorgalis v Ange* (No 2) (Unreported, Sup Ct NSW, Young J, No 3506 of 1986, 17 June 1991) p 20, quoted in K Laster and V Taylor, n 130, p 97.

¹³⁰ Commonwealth Attorney-General's Department *Access to Interpreters in the Legal System: Report* AGPS, Canberra, 1991.

¹³¹ Commonwealth Attorney-General's Department, n 130, p 89.

¹³² Access to Justice Advisory Committee, Commonwealth of Australia, 1994.

¹³³ Australian Law Reform Commission, Report No 57, Commonwealth of Australia, 1992.

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