

Chapter Seven: Criminal Proceedings

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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.

- *Bennie v R* [1999] WASCA 238
- *Binge and Ors v Bennett* (1989) 42 A Crim R 93
- *Bolton v Nielsen* (1951) 53 WALR 48
- *Brooking v Dunlop* (Unrep., WA Sup Ct, Pidgeon J, App No. 365 of 1982,)
- *Clinch v Atkins* (Unrep., WA Sup Ct WA, Jones J, No 106 of 1973, 19 November 1973)
- *Collard v R* [2000] WASCA 417
- *Condron v R* (1990) 49 A Crim R 79
- *Coulthard v Steer* (1981) 12 NTR 13
- *Director of Public Prosecutions v Secretary* (1995) 129 FLR 39
- *Dixon v McCarthy* [1975] 1 NSWLR 617
- *Gibson v Brooking* [1983] WAR 70
- *Green v R* (2001) 24 WAR 192
- *Gudabi v R* (Unrep., NT Sup Ct, Forster CJ, 30 May 1983)
- *Gudabi v R* (1984) 52 ALR 133
- *Hayward v R* (Unrep., WA Sup Ct, CCA, No 50 of 1993, 10 Sept 1993)
- *Kina v R* (Unrep., Q'ld Sup Ct, CCA, 29 Nov. 1993)
- *McArthur v Eastman* (Unrep., WA Sup Ct, Ipp J, No 1080 of 1992, 29 Sept. 1992)
- *Munro v Sefton* (Unrep., WA Sup Ct, Jones J, 14 June 1974)
- *Ngatayi v R* [1980] WAR 209
- *Ngatayi v The Queen* (1980) 147 CLR 1
- *Roast v Bynder* [1988] WAR 217
- *Smith v Grieve* [1974] WAR 193
- *R v Anunga* (1976) 11 ALR 412
- *R v Bara Bara* (1992) 87 NTR 1
- *R v Cobby* (1883) 4 LR (NSW) 355
- *R v Gibson* (Unrep., SA Sup Ct, 12 November 1973)
- *R v Grant* [1975] WAR 163
- *R v Grant and Lovett* [1972] VR 423
- *R v Gudabi* (Unrep., Sup Ct NT)
- *R v Williams* (1992) 8 WAR 265
- *R v Williams* (2000) 24 SR (WA) 219
- *R v Jacky Jagamara* (Unrep., NT Sup Ct, O'Leary J, 24 May 1984)
- *R v Nandoo* (Unrep., Sup Ct WA, Owen J, No 130 of 1996)
- *R v Njana* (1998) 99 A Crim R 273
- *R v Sydney Williams* (1976) 14 SASR 1
- *R v Walker* (1989) 2 Qd R 79 at 85
- *State of Western Australia v Ben Ward* (1997) 76 FCR 492
- *The Queen v Foster* (1993) 113 ALR 1
- *Webb v R* (1994) 13 WAR 257
- *Winder v Milner* (Unrep., WA Sup Ct, Jackson CJ, App No 158 of 1974, 3 April 1974)

IMPORTANT NOTE:

Brief notes relating to general principles of Western Australian law are contained at the commencement of each section of this Chapter. The notes are included only for the purposes of this Benchbook's purpose as a Model for other jurisdictions. They are not intended to comprise a summary of the relevant law.

CHAPTER SEVEN

Criminal Proceedings

The Hon Justice Dean Mildren has commented on the need for the trial process to operate more fairly in respect of Aboriginal accused persons and witnesses:

"It is widely recognised that the trial process operates unfairly to Aboriginal witnesses and accused, because that process is often outside 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."¹

The contents of this Chapter may be of particular application to cases involving Aboriginal persons from traditional communities in Western Australia. However, they may also be relevant where urban Aboriginal persons who are socially, culturally, economically, and/or educationally disadvantaged become involved in the criminal justice system.

7.1

PLEADING TO THE CHARGE

7.1.1 Not Guilty Plea

Authorities:

- *R v Jacky Jagamara*².

General principles: A plea of not guilty is treated as a demand to have the issues raised by that plea tried by a jury³. If, upon being called upon to plead, an accused remains silent, that silence is generally taken to be a plea of not guilty⁴. At the election of the accused, and subject to the consent of the Crown, the trial may be held without a jury⁵.

In *R v Jacky Jagamara* an Aboriginal person from the Pintubi community, who spoke and understood very little English, was charged with unlawful killing. At trial, attempts to translate the meaning of the "not guilty" plea into the Pintubi language proved unsuccessful. Eventually a formula was devised which amounted to an admission of the facts and a statement that the accused did not wish or need

¹ The Hon Justice Dean Mildren 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal*, 7, p 12.

² Unrep., NT Sup Ct, Alice Springs, O'Leary J, 24 May 1984, noted in (1985) 12 *Aboriginal Law Bulletin* 11.

³ Section 616 (2) *Criminal Code*; s 622 *Criminal Code*.

⁴ Unless that person is mentally unfit to stand trial in terms of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA): s 619 *Criminal Code*.

⁵ Section 651A *Criminal Code*. The judge sitting alone may make any findings or give any verdict that could have been made or given by a jury and has the same effect as a finding or verdict of a jury: s 651B *Criminal Code*.

witnesses to be called. O'Leary J accepted this formula as amounting to the legal effect of a "not guilty" plea⁶.

7.1.2 Guilty Plea

Authorities:

- *Hayward v R*⁷.

General principles: An accused may plead that he or she is guilty of the offence charged in the indictment, or (with the consent of the Crown), of any other offence of which he or she might be convicted upon the indictment⁸. A plea of guilty must be *inter alia* clear and unambiguous, and must constitute an admission of all the facts essential to establish guilt of the relevant offence⁹. A plea of guilty must be made through the exercise of a free choice¹⁰. Counsel is required to assist an accused in the determination of an appropriate plea and to impress upon that accused the consequences of that plea. Although counsel may advise an accused in strong terms, improper or undue pressure must not be brought to bear upon the accused¹¹.

In *Hayward v R* the Court of Criminal Appeal considered *inter alia* whether improper or undue pressure had been brought to bear by a legal representative upon the applicant, an Aboriginal male. The applicant sought leave of the Court for an extension of time within which to appeal against certain serious convictions. The applicant and the other two men had been charged with breaking and entering (breaking); assault occasioning grievous bodily harm (assault), or, in the alternative, attempted unlawful killing (attempted murder); and conspiring to pervert the course of justice (conspiracy). The complainant had alleged that the applicant, together with two other men, had broken into her flat; that the applicant had pushed her through a bedroom window onto the ground three storeys below; and that the applicant, with the two other men, had moved her body so as to cause the police to believe that she had fallen from the balcony of her flat. (The last allegation gave rise to the conspiracy charge.) It was common ground that the complainant had sustained serious and permanent injuries in exiting the flat.

At trial the applicant had pleaded guilty to the charges of breaking, assault and conspiracy. The Crown had refused to accept the plea of guilty to the assault charge and the trial proceeded. Subsequently the applicant was convicted of breaking and entering, attempted murder and conspiracy. The grounds for the application for leave to extend the time within which to appeal included *inter alia* that the applicant's pleas of guilty to the charges of assault and conspiracy were not made of his own free will.

It was not disputed that, until the day of the trial, the applicant had intended to plead not guilty to all charges other than the breaking, and had instructed his counsel accordingly. However, approximately half an hour before the trial was due to

⁶ *R v Jacky Jagamara*, n 2, at 11.

⁷ Unrep., WA Sup Ct, CCA, No 50 of 1993, 10 September 1993.

⁸ Section 616(1) *Criminal Code*.

⁹ *Di Camillo v Wilcox* [1964] WAR 44 at 46 per Hale J. The court should reject a plea of guilty "accompanied by a disclaimer of guilty intent": *Lutter v Davis* [1992] 7 WAR 72 at 79 per Nicholson J.

¹⁰ *R v Turner* [1970] 2 QB 321 (CA); *Heffernan v Ward* [1959] Qd R 12.

¹¹ *R v Turner*, n 11, at 326 per Lord Parker CJ (for the Court).

commence, the applicant had been approached in the holding cells by a legal practitioner (lawyer) whom he had never met. The lawyer informed the applicant that the applicant's counsel was unavailable to represent him and that he (the lawyer) would conduct the applicant's defence. The applicant informed the lawyer that he intended to plead not guilty to all charges other than the breaking. However, the lawyer had informed the applicant that the Crown case against him was strong, and advised the applicant in forceful terms to plead guilty to the assault charge and, apparently, to the conspiracy charge. The lawyer advised the client that the crown might accept the plea of guilty to the lesser assault charge in satisfaction of the attempted murder charge. After being left to consider that advice for approximately fifteen minutes, the applicant authorised the lawyer to put that proposal to the Crown. Shortly afterwards the accused was brought into court. The Crown rejected the lawyer's proposal that a guilty plea to the assault charge would dispose of the attempted murder charge. The trial commenced, the applicant pleading guilty to the breaking, assault and conspiracy charges. At the conclusion of the proceedings, the applicant was convicted of breaking, attempted murder and conspiracy.

Rowland J expressed strong disapproval of the events which had transpired in the holding cells shortly before the commencement of the trial:

“[I]n my view, no young person, whatever his background, should have been placed in a position where he was obliged to make such a vital and important decision in the circumstances that applied here. The uncontradicted evidence is that he had consistently maintained to his solicitors that he intended to plead not guilty to counts 2, 3 and 4. The charges against him were extremely serious....This apparently street-wise Aboriginal man, aged 19 years, was, half an hour before the commencement of his trial, faced with a practitioner whom he had never seen before, told that the case against him was a strong one and that if he pleaded not guilty and lost he would be dealt with in a most severe manner – they would probably throw away the key; whereas, if he pleaded guilty to the lesser of the two major offences which were charged in the alternative, and presumably the further charge the subject of count 4, his chances would be much better.....”¹²

Rowland J concluded, however, that the pleas of guilty were not made in circumstances of duress or improper inducement¹³.

Nicholson J held that the applicant had not proved that his will had been overborne in the manner required for the pleas to be set aside. However, his Honour was similarly critical of the events which had transpired in the holding cells:

“The features of the circumstances surrounding the applicant's plea to [conspiring to pervert the course of justice] which initially are suggestive of factors relevant to a finding of a miscarriage of justice are that he had consistently maintained instructions to plead to the contrary; he was faced in the holding cells with new counsel; he was unable to contact the counsel in whom he had placed his confidence; there was a short time to the commencement of the trial; he was then aged 19; he was a person of Aboriginal descent; he was given advice in strong terms to plead in a certain way; he was also advised that if he did not do so he would suffer heavy sentences.”¹⁴

Murray J held that although the practitioner's advice had been given in, at the least, “forthright” terms, the applicant had been given time to consider the practitioner's

¹² *Hayward v R*, n 7, at 17 per Rowland J.

¹³ *Hayward v R*, n 7, at 19 per Rowland J.

¹⁴ *Hayward v R*, n 7, at 28 per Nicholson J.

advice before the proceedings commenced. His Honour held that the appellant's will had not been overborne: his pleas of guilty had been made in the exercise of a free choice¹⁵.

[Note: by majority, the Court of Criminal Appeal set aside the applicant's convictions on the charges of attempted murder and conspiracy on other grounds: see **7.1.3**, below.]

7.1.3 Change of Plea

Authorities:

- *R v Williams*¹⁶;
- *Hayward v R*¹⁷.

General Principles: (a) Change of Plea Before Conviction: No legal issue arises in circumstances where an accused who has pleaded not guilty in committal proceedings changes that plea to one of guilty in the higher court. However, pursuant to s 618 *Criminal Code 1913* (WA) (*Criminal Code*) a person who pleads guilty in a lower court may be bound by that plea in the sentencing court. Section 618(3) *Criminal Code* provides that where an accused has pleaded guilty on the "fast-track" in committal proceedings then, unless the facts presented by the Crown to the sentencing judge are "materially different" from those presented at committal, the sentencing judge shall enter a plea of guilty, notwithstanding that the accused has pleaded not guilty in the higher court¹⁸. Notwithstanding the operation of s 618 *Criminal Code*, the court possesses an inherent discretion to permit an accused to change his or her plea of guilty to a plea of not guilty¹⁹.

In *R v Williams* the accused, an Aboriginal male, had been committed for sentence on the "fast-track" in the Albany Court of Petty Sessions. The accused had been charged with forcibly removing a child under the age of 16 years from its parent; and unlawful assault occasioning bodily harm and sexual penetration of that child. A pre-sentence report was requested, and the accused was remanded to appear in Perth. Upon appearing in Perth, the accused sought leave to withdraw his pleas of guilty, claiming that they had been entered in circumstances of "doubt and confusion" on the part of the accused about the legal implications of such pleas.

Hammond CJDC stated that the onus of establishing facts relevant to the exercise of the judicial discretion to allow a plea of guilty to be withdrawn lies upon an applicant. His Honour stated, further, that the judicial discretion should be exercised only in exceptional circumstances and that in exercising that discretion the Court may examine the Crown's evidence. That examination is to be conducted with a view to ascertaining whether "an area of doubt or difficulty"²⁰ exists in the Crown's evidence which calls for the judicial discretion to be exercised in favour of the applicant.

¹⁵ *Hayward v R*, n 7, at 17 per Murray J.

¹⁶ (2000) 24 WAR (SR) 219.

¹⁷ Unrep., WA Sup Ct, CCA, No 50 of 1993, 10 September 1993.

¹⁸ Section 618(4) *Criminal Code* makes similar provision for an accused who has pleaded guilty in a lower court, other than on the "fast-track", and then wishes to change the plea to one of not guilty in the higher court.

¹⁹ *Tihanyi v R* (1999) 21 WAR 377 at 381 per Malcolm CJ; at 389 per Murray J (Parker J concurring). See also *Margetson v R* [1980] WAR 135; cf *R v Arlotta* [1979] WAR 84. See also *R v Strezos* (1999) 23 SR (WA) 156.

²⁰ *R v Williams*, n 16, at 223, quoting from the judgment of Legoe J in *R v Roach* (1990) 54 SASR 491.

After examining the police video record of interview, relevant reports and the written submissions of counsel, Hammond CJDC concluded that the Crown case against the accused was extremely strong, and that no relevant “area of doubt or difficulty” existed. His Honour held that the accused had failed to discharge the onus of proof, and refused the application to withdraw the plea of guilty.

General Principles (b) Change of Plea After Conviction: After the entry of a conviction, that plea will be set aside only in exceptional circumstances. Such circumstances might include those in which the accused did not appreciate the nature of the charge; or did not intend to admit that he or she was guilty; or where, upon the admitted facts, the accused could not have been convicted in law of the charge²¹.

In *Hayward v R* (the facts of which are set out in detail at 7.1.2, above) the applicant had been convicted of charges of breaking, attempted murder, and conspiracy, having pleaded guilty to charges of breaking, assault (which charge had been preferred in the alternative to the attempted murder charge), and conspiracy. The applicant sought leave to withdraw his pleas of guilty to the assault and conspiracy charges. The Court of Criminal Appeal considered the following factors relating to the totality of the case:

- the charges referred against the applicant were serious;
- the applicant had maintained his intention to plead not guilty to all charges except the breaking charge until shortly before trial;
- half an hour before the trial, while in the holding cells, the applicant was informed by a lawyer whom he had never met that his counsel was unavailable, and that he (the lawyer) would represent the applicant in the criminal proceedings;
- the lawyer advised the accused in forceful terms to plead guilty to the charge of assault (and, apparently, to the conspiracy charge) on the basis of the apparent strength of the Crown’s case;
- the applicant had pleaded guilty to the assault conditionally, having been informed that the charge of attempted murder was likely to be withdrawn if he did (which withdrawal did not occur);
- two inconsistent records of police interview existed: in the first record of interview the applicant stated that the complainant had jumped from the balcony of the flat. That first record of interview was never put into evidence at trial. A second record of interview contained a confessional statement apparently made by the applicant: it was put into evidence, but the content was not challenged by the lawyer. The lawyer had only (unsuccessfully) challenged the voluntariness of the confessional statement;
- on a voir dire to establish the voluntariness of the confessional statement, the applicant had given evidence which was inconsistent with his pleas of guilty;
- fresh evidence was available to the Court: the complainant gave evidence that she had jumped from the balcony of her flat, and had not been pushed by the applicant out the window. The complainant stated that at trial she had falsely maintained that the applicant had pushed her from the window in order that he might suffer as much as she had suffered from the events which had occurred.

²¹ See *Eyre v R* (Unrep., WA Sup Ct, CCA, No 930149, 18 March 1993). See also *Forde v R* [1923] 2 KB 400.

Rowland J stated that in order for a plea of guilty to be withdrawn after conviction, a miscarriage of justice must be established:

“The overriding rule which must apply before allowing a prisoner to withdraw his plea of guilty upon which a conviction is founded is that it must be shown that a miscarriage of justice has occurred, and usually this will only be permitted in exceptional circumstances. Some of the authorities are collected and discussed by Wallwork J in *Eyre v R*, unreported; CCA SCt of WA; Library No 930149; 18 March 1993.....”²²

His Honour discussed the facts of the case, and remarked that those facts did not fit into any of the established categories which permit a plea of guilty to be withdrawn after a conviction has been entered:

“It is difficult to place the facts in this case into any of the categories of case that has permitted the retraction of a plea of guilty that conditions a conviction. It cannot be said, in my view, that the applicant did not know the nature of the charge, or that he did not intend to plead guilty, or that the plea was made in circumstances of duress or improper inducement. He in fact was given advice, was asked to consider it and, having done so, he accepted that advice.....

What really concerns me, however, is whether the applicant really appreciated the significance of his plea to [the assault charge] and the consequences if the Crown did not accept his plea to [that charge]. ...

There is another matter which makes me wonder whether he understood the significance of his pleas, and that is when being cross-examined on the voir dire, not only did he deny pushing [the complainant] through the bedroom window, but he also denied moving her body later. The learned trial judge noted... that those statements were inconsistent with his plea. One is therefore left with the first confessional statement that she jumped from the balcony. That, as it turns out, is consistent with [the complainant’s] present evidence and, as well, gains some support from the evidence that another person left via the bedroom window....

It seems to me that the most probable explanation for the pleas is that they were entered in the belief that this would minimise as far as possible the punishment for conduct for which he knew he was responsible inside the flat, namely, being responsible for the complainant leaving the flat by some means and that he simply did not, at that time, consider or follow through the consequences of his plea to [the conspiracy charge], which offence, apart from this plea, he has denied.”²³

Rowland J concluded that the circumstances of the case were -

“...sufficiently extraordinary as to justify a finding that there was a miscarriage of justice.”²⁴

His Honour ordered that the applicant’s convictions in respect of attempted murder and conspiracy charges be set aside, and granted the applicant leave to withdraw his pleas of guilty to the charges of assault and conspiracy.

Nicholson J made findings in similar terms to those of Rowland J.

Murray J, dissenting, held that the Crown’s case had been a strong one:

²² *Hayward v R*, n 17, at 14 per Rowland J.

²³ *Hayward v R*, n 17, at 14-20 per Rowland J.

²⁴ *Hayward v R*, n 17, at 20 per Rowland J.

“Not only was it a strong case upon the basis of the circumstantial evidence which was available, but it was a strong case once the voluntariness of the applicant’s confession was accepted and in the absence of evidence from him to deny the accuracy of that confession. It was strong both as to the acts which would be sufficient to constitute the attempt and with respect to the intention to kill, which was necessary for the Crown to establish...”²⁵.

His Honour discussed the new evidence of the complainant and concluded that it lacked credibility and cogency:

“[I]n the final analysis, having regard to [the complainant’s] evident state when she gave her evidence to us, to the gross inconsistency with the evidence which she gave at the trial, to the unconvincing explanation that she committed perjury at the time and the reason for so doing, to the inherent lack of credibility in the proposition that she jumped from the balcony in the way she described having regard to the physical evidence upon the police examination of the scene, to the confession and consistent guilty plea of the applicant, and to the other matters to which I have referred, I have concluded that her new evidence lacks a sufficient degree of cogency or credibility, that it might have been accepted by the jury so as to cast doubt upon the conclusion to be drawn from their acceptance of the applicant’s confession, supported by the circumstantial evidence.”²⁶.

Murray J held that the application for an extension of time to appeal should be refused.

See also *Green v R* (2001) 24 WAR 192 at 200 per Malcolm CJ; at 216-217 per Wheeler J.

²⁵ *Hayward v R*, n 17, at 20 per Murray J.

²⁶ *Hayward v R*, n 17, at 28 per Murray J.

7.2

SECTION 49 ABORIGINAL AFFAIRS PLANNING AUTHORITY ACT 1972 (WA)

7.2.1 Background: Statutory Measures 1911-1972

In 1911 statutory measures for the protection of Aboriginal persons charged with criminal offences were introduced into Western Australia. Section 59A(1) *Aborigines Act 1905* (WA) (*Aborigines Act*) provided that, subject to s 59A(2) *Aborigines Act*, a judicial officer court could not accept a plea of guilty from an Aboriginal defendant: the judicial officer was required to enter a plea of not guilty, upon which basis the trial would proceed. Section 59A(2) *Aborigines Act* provided that a plea of guilty could be accepted if that plea was made in the presence and in the hearing of a protector of Aborigines (such protector being appointed pursuant to the *Aborigines Act*) if that protector had satisfied the presiding judicial officer that –

“...the accused aboriginal native understands the nature of the accusation against him, and is aware of his rights to trial, and without duress or pressure of any sort desires to plead guilty, and that the protector approves of such plea of guilty being pleaded”.

In 1936 s 60 *Native Administration Act 1936* (WA) introduced additional protective provisions relating to the admissibility of confessional statements by Aboriginal defendants. In 1954 the *Native Welfare Act 1954* (WA) repealed *inter alia* statutory provisions regulating pleas of guilty by Aboriginal defendants, although the regulation of the admission of confessional statements from Aboriginal defendants continued.

On 1 July 1972 the *Aboriginal Affairs Planning Authority Act 1972* (WA) came into force, repealing the *Native Welfare Act 1954* (WA). Section 49 *Aboriginal Affairs Planning Authority Act 1972* (WA) creates a protective mechanism for Aboriginal accused persons in relation to pleas of guilt, and out-of-court admissions and confessions, in respect of more serious offences..

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

Section 49 *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPAA) provides as follows:

“Court may refuse to accept plea

(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 or confession 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 of comprehension of the nature of the circumstances 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.”

In *Webb v R*²⁷ Malcolm CJ (Seaman J concurring) emphasised the importance of s 49 AAPAA:

“Section 49 of the *Aboriginal Affairs Planning Authority Act* imposes significant obligations upon Judges and Magistrates in the case of persons of Aboriginal descent.”²⁸

7.2.3 Summary: The Operation of s 49 AAPAA

Since the operation of s 49 AAPAA is not without complexity, an attempt to summarise that operation follows. Note that the points contained in the summary, below, should be read subject to the expanded discussion which follows it. To some extent that discussion leaves certain aspects of the application and operation of s 49(1) AAPAA open to debate.

Authorities:

- *Smith v Grieve*²⁹;
- *Clinch v Atkins*³⁰;
- *Munro v Sefton*³¹;
- *McArthur v Eastman*³²;
- *Winder v Milner*³³;
- *Ngatayi v R*³⁴;
- *Ngatayi v The Queen*³⁵;
- *Roast v Bynder*³⁶;
- *Hayward v R*³⁷;
- *R v Williams*³⁸;
- *R v Nandoo*³⁹;
- *Webb v R*⁴⁰;
- *Green v R*⁴¹.

Summary:

²⁷ (1994) 13 WAR 257.

²⁸ *Webb v R*, n 27, at 259. (Seaman J concurring).

²⁹ [1974] WAR 193.

³⁰ Unrep., WA Sup Ct, Jones J, No 106 of 1973, 19 November 1973.

³¹ Unrep., WA Sup Ct, Jones J, No 38 of 1974, July 1974.

³² Unrep., WA Sup Ct, Ipp J, No 1080 of 1992, 29 September 1992 at 6.

³³ Unrep., WA Sup Ct, Jackson CJ, Appeal No 158 of 1974, 3 April 1974.

³⁴ [1980] WAR 209.

³⁵ (1980) 147 CLR 1. Note that this case involved the same applicant as *Ngatayi v R* [1980] WAR 209: in the appeal to the High Court the second “t” in the applicant’s name was dropped.

³⁶ [1988] WAR 217.

³⁷ Unrep., WA Sup Ct, CCA, No 50 of 1993, 10 September 1993.

³⁸ (1992) 8 WAR 265.

³⁹ Unrep., WA Sup Ct, Owen J, No 130 of 1996.

⁴⁰ (1994) 13 WAR 257.

⁴¹ (2001) 24 WAR 192.

- Section 49 AAPAA operates in respect of offences which are punishable in the first instance by a term of imprisonment of six months or more: s 49AAPAA.
- The operation of s 49 AAPAA is mandatory: *Smith v Grieve*; *Webb v R*; *Green v R*.
- Section 49(1) AAPAA comes into operation upon the offer of a plea of guilty: *Smith v Grieve*; *R v Grant*; *Roast v Bynder*. (*Semble*, in the case of an admission or a confession, s 49(1) AAPAA comes into operation upon the Crown seeking to put into evidence a relevant admission or confession.)
- The duty to exercise the judicial power to examine an accused pursuant to s 49(1) AAPAA arises whenever it should “reasonably appear” to the court that an accused falls within the statutory provision: *Smith v Grieve*. In broad terms there may be a “wide” and a “narrow” approach to the circumstances in which that duty arises.
- The conduct of the examination is inquisitorial: *Smith v Grieve*.
- The judicial officer need not personally conduct the examination. Where an accused is legally represented, counsel may conduct the examination in a voir dire: *Hayward v R*; *Webb v R*; *R v Nandoo*; *Green v R*.
- Where counsel for an accused conducts the examination of the accused, the accused may also be cross-examined. The judicial officer may intervene in the examination to ensure that the statutory criteria are ascertained: *Green v R*.
- The requirements of the examination are not satisfied by questions being directed to counsel for the accused, as opposed to questions being directed to the accused himself or herself: *Green v R*.
- Where, in committal proceedings, an examination is made pursuant to s 49 (1) AAPAA, a note of that examination and its outcomes should be placed on the court record: *Smith v Grieve*, *Green v R*.
- The examination of the accused is directed, first, to the ascertainment of whether the accused is a “person of Aboriginal descent” as defined in s 4 AAPAA: s 49(1) AAPAA. See *Smith v Grieve*; *McArthur v Eastman*; *Winder v Milner*, *Webb v R*.
- The examination is directed, secondly, to the ascertainment of whether an accused, from a “want of comprehension of the nature of the circumstances alleged, or of the proceedings”, is incapable of understanding that plea of guilt or admission or confession: s 49 (1) AAPAA. See *Ngatayi v The Queen*.

- The level of incomprehension which an accused must manifest is for the presiding judicial officer to determine: cf *Munro v Sefton*; *R v Grant*.
- The duty pursuant to s 49AAPAA is not abrogated by the fact that an accused is legally represented and is assisted by an interpreter (*R v Grant*) or an Aboriginal Court Officer (*Green v R*).
- The duty pursuant to s 49AAPAA is not abrogated by the fact that an accused has been brought before the court on previous occasions: *Green v R*.
- If, upon examination of the accused, the court is satisfied as to the relevant matters, it must reject the plea of guilty, or refuse to admit into evidence the admission or confession: *Smith v Grieve*.
- If the judicial officer rejects a plea of guilty, that officer is authorised by s 49(1) AAPAA, and by necessary implication, to enter a plea of not guilty on behalf of the accused: *Ngatatayi v R*.
- Section 49(1) AAPAA does not empower a judicial officer to dismiss a complaint: *Roast v Bynder*.
- Mere non-compliance with s 49(1) AAPAA will not of itself constitute grounds for appeal: it must be shown that the non-compliance resulted in a plea of guilty being entered in circumstances which vitiated the capacity of the court to accept the plea: *Hayward v R*; *Green v R*.

7.2.4 Preliminary Points

Authorities:

- *Smith v Grieve*⁴²;
- *R v Grant*⁴³;
- *Roast v Bynder*⁴⁴;
- *Webb v R*⁴⁵.

⁴² [1974] WAR 193.

⁴³ [1975] WAR 163.

⁴⁴ [1988] WAR 217.

⁴⁵ (1994) 13 WAR 257.

(1) The Duty Pursuant to s 49(1) AAPAA is Mandatory

Notwithstanding the use of the word “may” in the marginal note to s 49 AAPAA, it is clear that the duty created by s 49 (1) AAPAA is mandatory: *Smith v Grieve* per Burt J⁴⁶; *Webb v R* per Malcolm CJ⁴⁷.

The marginal note to s 49 AAPAA is also incomplete. Section 49 AAPAA operates in relation to admissions and confessions, as well as to pleas of guilty.

(2) The Duty Arises When a Plea is Offered

Section s 49(1) AAPAA provides that the court –

“... shall refuse to accept a plea of guilt at trial or an admission of guilt or confession before trial in any case where [circumstances detailed] ” (emphasis added).

The duty to exercise the power of examination pursuant to s 49 (1) AAPAA arises upon the offer of a plea of guilty: that is, before the plea of guilty is accepted: *Smith v Grieve* per Burt J⁴⁸; *Roast v Bynder* per Olney J⁴⁹.

A plea must be offered in order for the duty to arise. In *R v Grant*, the accused, an Aboriginal male had been charged with unlawful killing. Through an interpreter the accused had simply responded “yes” to the arraignment. The accused was then examined by his counsel “ostensibly under the provisions of s 49 of the Aboriginal Affairs Planning Authority Act”⁵⁰. Wickham J commented:

“It is doubtful if this procedure is authorised by that section, as in this case he had not yet pleaded guilty to anything and no question of admissions or confessions had yet arisen. However, the procedure was useful in that the Court was in this manner alerted to the degree of comprehension of the accused man.”⁵¹

Semble, in the case of an admission or a confession, s 49(1) AAPAA comes into operation only upon the Crown seeking to put into evidence such admission or confession.

⁴⁶ *Smith v Grieve*, n 42, at 195.

⁴⁷ *Webb v R*, n 45, at 259.

⁴⁸ *Smith v Grieve*, n 42, p 195. Cf *Ngatayi v The Queen* (1980) 147 CLR 1, in which Gibbs, Mason and Wilson JJ stated that s 49 (1) AAPAA is to be applied “when [the accused person] has pleaded” (at 10).

⁴⁹ *Roast v Bynder*, n 44, at 218.

⁵⁰ *R v Grant*, n 43, at 164 per Wickham J.

⁵¹ *R v Grant*, n 43, at 164.

7.2.5 The Circumstances in Which the Duty to Exercise the Power of Examination Arises

There is an apparent variation in judicial approach to the circumstances which will give rise to a duty to exercise the power to examine an Aboriginal accused pursuant to s 49AAPAA. In broad terms, these may be characterised as “wide” and “narrow” approaches.

Authorities:

- *Smith v Grieve*⁵²;
- *Clinch v Atkins*⁵³;
- *Munro v Sefton*⁵⁴;
- *Hayward v R*⁵⁵;
- *R v Williams*⁵⁶;
- *Webb v R*⁵⁷;
- *Green v R*⁵⁸.

The classic formulation of the judicial duty which is created by s 49AAPAA is that of Burt J in *Smith v Grieve*. In that case the appellant had been convicted by justices in Roebourne on his own pleas of guilty to charges of disorderly conduct in a public place and of resisting a police officer in the execution of his duty. The appellant, who had not been legally represented in the proceedings, had been sentenced to three months imprisonment on each charge, which sentences were to be served cumulatively. The appellant appealed on the ground that he had not been examined as required by s 49(1) AAPAA, and that he had not understood the court proceedings in which he had been convicted.

Burt J stated that the duty pursuant to s 49(1) AAPAA arises whenever it should “reasonably appear” to a presiding judicial officer that the accused comes within the statutory description:

“The legislative command to the Court....becomes operative and is to be obeyed when upon examination of the accused person the court is satisfied as to the matters mentioned, and this I think by necessary implication - made necessary by the evident intent of the statute - places upon the court, before accepting a plea of guilty *and whenever it should reasonably appear that the accused person may be within the statutory description*, a duty to exercise the given power to examine the accused person so that it can be satisfied that such is not the case[I]n a situation in which whether the case has arisen or not can only be ascertained by the Court and on its own initiative of an inquisitorial power then, if there exists any reason for supposing that it might be such a case, it is imperative that that power be exercised.”⁵⁹ (emphasis added)

Burt J held that it should have been evident to the justices that the appellant might have fallen within the statutory description. Accordingly, the justices should have examined the appellant pursuant to s 49 (1) AAPAA. His Honour held that in the

⁵² [1974] WAR 193.

⁵³ Unrep., WA Sup Ct, Jones J, No 106 of 1973, 19 November 1973.

⁵⁴ Unrep., WA Sup Ct, Jones J, No 38 of 1974, July 1974.

⁵⁵ Unrep., WA Sup Ct, CCA, No 50 of 1993, 10 September 1993.

⁵⁶ (1992) 8 WAR 265.

⁵⁷ (1994) 13 WAR 257.

⁵⁸ (2001) 24 WAR 192.

⁵⁹ *Smith v Grieve*, n 52, at 195.

circumstances, the pleas of guilty should not have been accepted, and ordered that they be set aside.

The statement of principle by Burt J which is extracted above has been referred to and affirmed in most of the cases in which the operation of s 49AAPAA has been examined. However, it appears that there are different judicial views of the nature of the circumstances which will give rise to the “reasonable appearance” that an examination is required.

On the “wide” view the duty is cast in terms which, literally construed, appear to create an unconditional judicial duty to exercise the power of examination whenever an accused person of apparently Aboriginal descent comes before the court on a relevant charge. However, when the relevant statements of principle are construed against the factual background to a particular case, they may be interpreted more narrowly. The factual background may consist in an accused’s socio-culturally disadvantaged background; his or her physical or mental disability and/or his or her cognitive dysfunction. Such a factual background, without more, may make it “reasonably appear” to the presiding judicial officer that an examination of the accused pursuant to s 49 AAPAA is required. This “wide” approach may be discerned in cases such as *R v Williams*, *Webb v R*, and *Green v R*, which discussed below.

A stricter or more “narrow” view is that the duty pursuant to s 49 AAPAA arises only when a factual reason exists to suppose that an Aboriginal accused lacks the necessary comprehension. This approach is evident in cases including *Clinch v Atkins*, *Munro v Sefton* and *Green v R*, also discussed below.

In *R v Williams* the Aboriginal respondent had been charged with the wilful murder of his wife. Shortly after the victim’s death, in the course of questioning by police, the respondent had admitted that he had been drinking, and that he had stabbed the victim. At trial, the respondent pleaded not guilty, and a voir dire was held to determine whether the respondent’s confession ought to be put into evidence. Expert evidence was given that the respondent had a learning deficit, and probable brain damage and memory loss due to alcohol abuse. The trial judge, ruling that the confession had been made voluntarily, nevertheless excluded it from the evidence in the exercise of his discretion, and directed the jury to bring in a verdict of not guilty. The Crown appealed to the Court of Criminal Appeal.

Rowland and Owen JJ (Franklyn J dissenting) held that, in excluding the respondent’s confession, the trial judge’s discretion had not miscarried. Rowland and Owen JJ considered that, through the failure of the police to take a blood-test at the time of the respondent’s interrogation, the respondent had been deprived of certain evidence which might have been relevant at his trial. Their Honours continued:

“That lack [of evidence] is exacerbated by the fact that the respondent could be classified as a disadvantaged person. He has a low IQ; he has some brain damage and he is a person who is entitled, as a matter of statute law, to scrutiny of admission of guilt he makes in a court of law under s 49 Aboriginal Affairs Planning Authority Act.”⁶⁰

⁶⁰ *R v Williams*, n 56, at 277.

Franklyn J stated that s 49 (1) AAPAA requires -

".....an examination of the accused by the court to determine whether the lack of capacity exists and requires exclusion if the court is so satisfied. To the extent that it is predicated on a lack of capacity to understand the admission or confession, it would seem to add nothing to the common law relating to involuntary statements. Its significance, however, is that it imposes an obligation on the court to examine the accused to satisfy itself first, that he is a person of Aboriginal descent and secondly, because of a relevant lack of comprehension, he was not capable of understanding the admission or confession".⁶¹

Literally construed, the statements of Rowland and Owen JJ and of Franklyn J in *R v Williams* which are extracted above appear to suggest that the duty arises whenever an accused person of Aboriginal descent comes before the courts on a relevant charge. However, it is suggested that the special disadvantages from which the respondent suffered in that case may have sufficed to make it "reasonably appear" that s 49 AAPAA fell to be considered.

In *Webb v R* the appellant, an Aboriginal man from a pastoral station near Port Hedland, was convicted after trial of aggravated sexual assault. At trial the Crown had relied upon oral admissions made to a police officer, and upon a confession made by the appellant in a written record of interview. Counsel for the appellant had contended that the evidence of the confession was inadmissible as it was involuntary, and that in all the circumstances it would be unfair to use it against the appellant. At a voir dire counsel submitted, further, that the confession was inadmissible pursuant to the operation of s 49(1) AAPAA. At the conclusion of the voir dire the Commissioner ruled that the confession was admissible but gave no reasons for the ruling. The appellant appealed against his conviction to the Court of Criminal Appeal, *inter alia* on the ground that it was not possible to know whether the Commissioner had put his mind to s 49AAPAA when ruling upon the admissibility of the confession. On appeal, it was "common ground"⁶² that the appellant was a person of Aboriginal descent. There was evidence that the appellant had a learning deficit, was vision-impaired, and came from a disadvantaged background. Malcolm CJ referred to the duty created by s 49 AAPAA and stated (Seaman J concurring):

"What is required in the performance of the duty was clearly stated by Franklyn J in *Williams* (1992) 8 WAR 265 at 272.....

"It was common ground before the learned Commissioner that the appellant was of Aboriginal descent. Accordingly, the learned Commissioner was obliged, after an examination of the appellant, to determine whether the appellant was capable of understanding the confession which he had made."⁶³

Ipp J (with whom Seaman J also concurred) quoted from the passage of the judgment of Franklyn J in *R v Williams* (extracted above) with apparent approval⁶⁴. His Honour also quoted from the judgment of Rowland and Owen JJ in *R v Williams* (also extracted above) again, with apparent approval⁶⁵. His Honour then stated in relation to the instant case:

⁶¹ *R v Williams*, n 56, at 284.

⁶² *Webb v R*, n 57, per Malcolm CJ at 259; at 265 per Ipp J (Seaman J concurring).

⁶³ *Webb v R*, n 57 p 259.

⁶⁴ *Webb v R*, n 57, p 264.

⁶⁵ *Webb v R*, n 57, p 265.

"It was common cause that the appellant was an Aborigine. Accordingly the learned Commissioner was obliged, after an examination of the appellant, to determine whether the appellant was capable of understanding the proceedings."⁶⁶

The statements of Malcolm CJ and Ipp J in *Webb v R* appear to cast the duty pursuant to s 49(1) AAPAA in absolute terms. Again, however, the statements fall to be construed in the factual context of the case, which was that the appellant was an unsophisticated Aboriginal person from a remote community, who suffered from a learning deficit and a disadvantaged background.

In *Green v R* the appellant, an Aboriginal male, sought an extension of time within which to appeal against his conviction of a charge of aggravated sexual assault. At committal, the appellant had pleaded guilty on the "fast-track" system, and the magistrate had endorsed the charge sheet with a stamp which indicated that the accused understood the charge pursuant to the requirements of s 49 (1) AAPAA. The appellant was legally represented and assisted by an Aboriginal Court Officer in the District Court at Kalgoorlie. At the commencement of proceedings it became immediately apparent that the appellant had hearing difficulties, and the Aboriginal Court Officer stood next to the appellant in order to assist him. The applicant pleaded guilty to the arraignment in circumstances in which the Aboriginal Court Officer's active participation was questionable. The presiding judge questioned the appellant's counsel in relation to the appellant's understanding of court processes, his understanding of the reason for his appearance in court that day and to the appellant's earlier and current instruction of counsel. Counsel for the appellant disclosed that his client was partially deaf and had cognitive problems, but assured the judge of the appellant's comprehension of the proceedings. The appellant was convicted on his plea of guilty and sentenced to three years imprisonment without eligibility for parole, and further, to an indefinite sentence pursuant to s 98 *Sentencing Act*.

The appellant appealed to the Court of Criminal Appeal on the grounds *inter alia* that a miscarriage of justice had occurred. The appellant claimed that he had not understood the nature of the charge which had been made against him, and he had not intended to plead guilty to that charge. The appellant claimed that he thought that he had been brought before the court for "hitting" the complainant, not for sexually assaulting her.

Malcolm CJ noted that that the accused had appeared in criminal courts on numerous previous occasions. His Honour also pointed out that counsel for the accused (who had appeared for the accused on previous occasions) had assured the sentencing judge that the accused knew the reason for being before the court on this occasion. In addition, the appellant had the benefit of representation by counsel in the sentencing court⁶⁷. Malcolm CJ then quoted the passage from the judgment of Franklyn J in *R v Williams* (extracted above) with apparent approval⁶⁸. His Honour continued:

"It was apparent that the appellant was a 'disadvantaged person' at least in terms of his cultural background, cognitive ability and hearing loss....Consequently, as Rowland and Owen JJ said in *R v Williams* (1992) 8 WAR 265 at 277, being a disadvantaged person of Aboriginal descent, the applicant was a person who was:

⁶⁶ *Webb v R*, n 57, p 265.

⁶⁷ *Green v R*, n 58, at 200-201.

⁶⁸ *Green v R*, n 58, at 199-200.

'...entitled, as a matter of statute law, to scrutiny of admission of guilt he makes in a court of law under s 49 of the *Aboriginal Affairs Planning Authority Act*."⁶⁹

Malcolm CJ concluded:

"In the present case, it is apparent that when the appellant appeared before the Magistrate and entered his plea of guilty on the fast-track system, no relevant record was made that the Court of Petty Sessions was satisfied that the appellant properly comprehended the nature of the circumstances alleged or of the proceedings, or was capable of understanding his plea of guilty. Given that the Justice of the Peace had found it necessary to note that s 49 had been complied with, and given the purpose of the provision and the comments of Burt J, this is not an appropriate case in which to apply the presumption of regularity."⁷⁰

As his Honour could not be satisfied that no miscarriage of justice had occurred, Malcolm CJ (Wallwork J concurring and Wheeler J dissenting) ordered that the appellant's conviction be quashed and the case remitted to the District Court for further consideration⁷¹.

In *Clinch v Atkins* the appellant, an Aboriginal woman, had been convicted by justices in Mullewa on her own pleas of guilty to a charge of receiving property to the value of \$5.00. The appellant, who had a record of fourteen previous convictions, had been unrepresented in the sentencing court. She was sentenced to two months imprisonment, and appealed *inter alia* on the ground of non-compliance by the justices with s 49 AAPAA.

Jones J expressed the view that the duty to examine pursuant to s 49(1) AAPAA does not arise "automatically" whenever a person of apparently Aboriginal descent comes before the courts:

"Without purporting to decide the point, I incline to the view that [s 49(1) AAPAA] does not require a court to embark automatically on some form of examination of every person 'of Aboriginal descent' who appears before it on such a charge. There are many persons in the community holding responsible and respected positions (as clerks, executive officers, professional footballers and the like) who are certainly 'of Aboriginal descent' as that expression is defined in the Act; and it is absurd to suppose that if such a person should appear before it on such a charge a court must in every case make some sort of examination of him before dealing with him."⁷²

Jones J stated that the court's responsibility is to alert itself to the "real possibility" that s 49(1) AAPAA might apply in a particular case⁷³. His Honour held that on the facts of the case (in particular, that the justices were aware that she had been before the courts on numerous previous occasions) there was no reason to suspect that the appellant came within the statutory description:

"[T]here is nothing in the evidence before me to show that [the justices] should have suspected that she had any such want of comprehension or of capability as is contemplated by the section. She is, after all, and was known by the justices to be, a person with no inconsiderable experience of this kind. I do not think that the justices were called upon to embark upon any 'examination' of her; but if they had done so, I am sure that so far from being satisfied that she had the want of comprehension or

⁶⁹ *Green v R*, n 58, at 200.

⁷⁰ *Green v R*, n 58, at 198.

⁷¹ *Green v R*, n 58, at 201.

⁷² *Clinch v Atkins*, n 53, at 3.

⁷³ *Clinch v Atkins*, n 53, at 3-4.

of understanding of which the section speaks, they must have been satisfied of the contrary. That sufficiently appears from her own affidavit.”⁷⁴

However, in *Munro v Sefton* Jones J advised that justices should err on the side of caution:

“[I]n all but the simplest and most obvious cases the only safe course – and proper course – for justices, as it seems to me, is to examine such an accused person in open court, to ascertain whether he does or does not understand ‘the nature of the proceedings’.....; and if there is any substantial doubt as to whether he does or not, then not to accept a plea of guilty.”⁷⁵

In *Green v R* (the facts of which are discussed above) Wheeler J expressed the view that the duty pursuant to s 49 (1) AAPAA is a conditional one:

“On its face, [s 49(1) AAPAA] does not purport to impose a duty to examine. Rather, it requires the court to refuse to accept or admit a plea....where the court is satisfied, having conducted an examination, that the accused meets the two criteria of being a person of Aboriginal descent and of lacking the relevant comprehension. On reading the words of the section in their natural sense, no duty to examine is created. The only duty is a duty to refuse to accept a plea in certain circumstances.....

The duty would be a duty, not to examine every accused person in order to ascertain whether they were Aboriginal and whether they lacked relevant comprehension, nor to examine every person apparently of Aboriginal descent to ascertain whether they lacked the relevant comprehension; rather it would be a duty which arose whenever the circumstances sufficiently indicated that it was possible that examination might produce the satisfaction to which the section refers”.⁷⁶

In *Green v R* Wallwork J stated:

“I agree with Wheeler J that, having regard to the purpose of the section, a duty to conduct an examination would arise whenever circumstances suggested that a person might be of Aboriginal descent and might lack the relevant comprehension. As her Honour says in her reasons: ‘...it would be a duty which arose wherever the circumstances sufficiently indicated that it was possible that examination might produce the satisfaction to which the section refers’”.⁷⁷

When considering the different judicial approaches briefly referred to above, it may be appropriate to bear in mind the remarks made by Dwyer CJ in *Bolton v Nielsen* in respect of the legislative provision antecedent to s 49 AAPAA.

“I hope it is for the Judges of the Supreme Court in this State to see that these disinherited and dishonoured people receive the benefit of the provisions made by the Legislature for their protection in courts of justice, and where there is any doubt as to the interpretation of a section enacted for their protection it is my opinion that a liberal interpretation should be given to those provisions.”⁷⁸

⁷⁴ *Clinch v Atkins*, n 53, at 4.

⁷⁵ *Munro v Sefton*, n 54, at 5.

⁷⁶ *Green v R*, n 58, at 212.

⁷⁷ *Green v R*, n 58, at 207.

⁷⁸ *Bolton v Nielsen* (1951) 53 WALR 48 at 50.

7.2.6 The Conduct of the Examination

Authorities:

- *Smith v Grieve*⁷⁹;
- *Hayward v R*⁸⁰;
- *Webb v R*⁸¹;
- *R v Nandoo*⁸²;
- *Green v R*⁸³.

(1) The Examination is Inquisitorial

In *Smith v Grieve* Burt J stated that the power of examination created by s 49(1) AAPAA is “an inquisitorial one“ which is exercisable “by the Court and on its own initiative”⁸⁴.

(2) Counsel for the Accused May Conduct the Examination

Where the accused is legally represented, the examination need not be undertaken by the judicial officer personally. In *Hayward v R* Murray J stated that the examination -

“....has in practice been conducted differently, and properly so in my opinion, in circumstances where the accused is represented or unrepresented.”⁸⁵

(3) Evidence in a Voir Dire May Satisfy the Requirements of s 49AAPAA

Where a voir dire has been held, there may be no need for a separate judicial examination. In *Webb v R* Malcolm CJ stated:

“[The] voir dire....raised issues of voluntariness, fairness and want of comprehension and understanding of the confession, which were the subject of examination, cross-examination and re-examination of the appellant...[Accordingly] it was not necessary in this case for the learned Commissioner himself to embark upon a separate examination, save to the extent that he may have considered it necessary to intervene and ask any questions of his own for the purposes of clarification of the evidence.”⁸⁶

⁷⁹ [1974] WAR 193.

⁸⁰ Unrep., WA Sup Ct, CCA, No 50 of 1993, 10 September 1993.

⁸¹ (1994) 13 WAR 257.

⁸² Unrep., WA Sup Ct, Owen J, No 130 of 1996.

⁸³ (2001) 24 WAR 192.

⁸⁴ *Smith v Grieve*, n 79, at 195.

⁸⁵ *Hayward v R*, n 80, at 6. See also *Green v R*, n 62, at 199 per Malcolm CJ.

⁸⁶ *Webb v R*, n 81, at 259.

In *R v Nandoo*, Owen J concluded that evidence heard in the course of a voir dire obviated the need for a separate judicial examination of the accused:

"In the circumstances of this case, and particularly as I have heard evidence in the course of this voir dire from the accused man, I do not find it necessary to conduct a separate examination of the accused in order to be satisfied of his comprehension or understanding of the nature of the circumstances alleged, or of the proceedings."⁸⁷

In *Green v R*, Malcolm CJ pointed out that the evidence given in a voir dire may be tested by cross-examination:

"In the case of a voir dire the examination could be conducted by counsel for the accused whose evidence could be tested by cross-examination of the prosecutor, if necessary."⁸⁸

Wallwork J agreed:

"[Section 49AAPAA] would be complied with if counsel for the accused examined him or her regarding the relevant matters and an opportunity was provided for counsel for the prosecution to test the relevant evidence, so far as was necessary."⁸⁹

In *Green v R*, Wheeler J commented that the judge may intervene where necessary in an examination conducted by counsel:

"Where an accused person is represented, it will often be preferable for the examination to be conducted entirely or largely by counsel, with such intervention as the Judge may think necessary in order to ascertain that the statutory criteria are appropriately considered."⁹⁰

Her Honour remarked that the proper subject of the examination was the accused himself or herself – not counsel for the accused:

".....I would not see [the examination] as a requirement which could be satisfied other than by requiring the accused himself to answer questions, as opposed to, for example, examining his counsel about the accused's level of comprehension."⁹¹

(4) Written Record of the Examination (Petty Sessions)

In *Smith v Grieve* Burt J stated that where an examination of the accused pursuant to s 49(1) AAPAA has been conducted in Petty Sessions, a note of that examination should be made on the charge sheet:

"In a Petty Sessions Case if the power to examine is exercised then that fact and the result should I think as a matter of practice be noted on the Charge Sheet."⁹²

⁸⁷ *R v Nandoo*, n 82, at 15.

⁸⁸ *Green v R*, n 83, at 199.

⁸⁹ *Green v R*, n 83, at 208-209.

⁹⁰ *Green v R*, n 83, at 214.

⁹¹ *Green v R*, n 83, at 214.

⁹² *Smith v Grieve*, n 79, at 195.

This statement was approved by Malcolm CJ in *Green v R*. His Honour stated that in circumstances such as those in the case before the sentencing judge, it was not appropriate to apply the common law presumption of regularity⁹³.

7.2.7 Matters to be Ascertained by the Examination

Authorities:

- *Smith v Grieve*⁹⁴;
- *McArthur v Eastman*⁹⁵;
- *Winder v Milner*⁹⁶;
- *Webb v R*⁹⁷;
- *Munro v Sefton*⁹⁸;
- *Ngatayi v R*⁹⁹;
- *Ngatayi v The Queen*¹⁰⁰.

The examination conducted pursuant to s 49 (1) AAPAA is directed to establishing the following matters:

- (a) that the accused is “a person of Aboriginal descent”; and
- (b) that the accused, from a want of understanding of:
 - i. “the nature of the circumstances alleged”; or;
 - ii. “[the nature of] the proceedings”.

is incapable of understanding his or her plea of guilt or admission or confession.

Turning to each of those elements:

(a) The Accused is “A Person of Aboriginal Descent”

The court must ascertain whether the accused is a person of Aboriginal descent. The term “person of Aboriginal descent” is defined in s 4 AAPAA as follows:

“person of Aboriginal descent: 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.”

⁹³ *Green v R*, n 83, at 198 (citing *Woolmington v DPP* [1935] AC 484).

⁹⁴ [1974] WAR 193.

⁹⁵ Unrep., WA Sup Ct, Ipp J, No 1080 of 1992, 29 September 1992 at 6.

⁹⁶ Unrep., WA Sup Ct, Jackson CJ, Appeal No 158 of 1974, 3 April 1974.

⁹⁷ (1994) 13 WAR 257.

⁹⁸ Unrep., WA Sup Ct, Jones J, No 38 of 1974, July 1974.

⁹⁹ [1980] WAR 209.

¹⁰⁰ (1980) 147 CLR 1.

The definition of “person of Aboriginal descent” was discussed in Chapter One (at 1.6). The element of descent from the original inhabitants of Australia is clearly satisfied where the relevant person is an Aboriginal person of “full-blood”¹⁰¹; in *Winder v Milner* Jackson CJ considered that one-quarter bloodline sufficed:

“The appellant, it appears, is a quarter caste aboriginal native and as such it was assumed in the court below, and may be assumed here, that he came within the definition of s.4 of the Aboriginal Affairs Planning Authority Act 1972.”¹⁰²

It is probable that a very small amount of biological descent is required: see for example *Attorney-General (Queensland) v State of Queensland*¹⁰³.

The question of whether a particular accused lives in Western Australia, claims to be an Aboriginal person and is accepted as such by his or her community, appears rarely to be in issue¹⁰⁴. In *Webb v R* Malcolm CJ and Ipp J noted that it was “common ground” that the appellant was a person of Aboriginal descent¹⁰⁵.

(b) The Accused, from A “Want of Comprehension of the Nature of the Circumstances Alleged, or of the Proceedings”, is Incapable of Understanding that Plea of Guilt or Admission or Confession

Examining each phrase in turn:

i. “Want of Comprehension”

The clear meaning of the word “want” for the purposes of s 49 AAPAA is “lack” or “deficiency”¹⁰⁶.

The concept of “want of comprehension” is explored further at 7.2.8, below.

ii. “Of the Nature of the Circumstances Alleged”;

It appears that the phrase “the nature of the circumstances alleged” has not received much judicial comment. In *Ngatayi v R* Burt CJ indicated that that phrase refers to the type of charge which has been preferred:

“[T]he trial judge...formed the opinion that the appellant ‘from want of comprehension of the nature of the circumstances alleged’ - a killing with intent to kill - ‘was not capable of understanding his plea of guilty’.”¹⁰⁷

¹⁰¹ *Smith v Grieve*, n 94, at 195 per Burt J.

¹⁰² *Winder v Milner*, n 96, at 1.

¹⁰³ (1990) 94 ALR 515. See also *Gibbs v Capewell* (1995) 120 ALR 577; *Shaw v Wolf* (1998) 83 FCR 113.

¹⁰⁴ See for example *Hart v Rankin* [1987] WAR 144 at 145 per Burt CJ.

¹⁰⁵ *Webb v R*, n 97, per Malcolm CJ at 259; per Ipp J at 265.

¹⁰⁶ Oxford Dictionary and Thesaurus, Oxford University Press, Great Clarendon Street, London, 1993, p 1771.

¹⁰⁷ *Ngatayi v R*, n 99, at 10.

In *Ngatayi v The Queen* Murphy J interpreted the phrase in a similar way:

“[T]he reference to ‘the nature of the circumstances alleged’ appears to mean the charge (as particularized or alleged by the Crown as in committal proceedings).”¹⁰⁸

iii. “Or of [the Nature of] the Proceedings”;

In *Munro v Sefton* Jones J (implying the additional words “the nature of” into the phrase “or of the proceedings”) remarked that a want of comprehension of the “nature of the proceedings” imports more than the “mere mechanics” of a court appearance:

“[I]t is of the first importance...to note that the criterion is want of comprehension not only of ‘the nature of the circumstances alleged’ but also of ‘the nature of the proceedings’. That phrase – ‘the nature of the proceedings’ – is wide enough to cover, and in my opinion is obviously intended to cover, very much more than the mechanics of a court appearance.”¹⁰⁹

In *Ngatayi v The Queen* Murphy J stated that the phrase refers to the entire criminal proceeding:

“‘[T]he nature of the proceedings’ refers to the process of trial including the charge and the plea.”¹¹⁰

iv. Is “Not Capable of Understanding” the Plea of Guilt or Admission or Confession

It appears that this phrase has not been judicially considered. Its plain meaning is that the accused must lack the ability to comprehend the meaning of the plea of guilty or the meaning of incriminating acknowledgments or statements which have been made.

To summarise: the accused must lack, or be deficient in, an understanding of either (a) the charge, as particularised by the Crown or (b) the process at trial, which process encompasses the charge and the plea.

Note: the causal nexus between “want of [the relevant] understanding” and an “incapacity to understand the plea of guilt or admission or confession” appears to be presumed in most cases.

¹⁰⁸ *Ngatayi v The Queen*, n 100, at 13.

¹⁰⁹ *Munro v Sefton*, n 98, at 4.

¹¹⁰ *Ngatayi v The Queen*, n 100, at 13 per Murphy J.

7.2.8 The Meaning of “Want of Comprehension”

Authorities:

- *Munro v Sefton*¹¹¹;
- *R v Grant*¹¹²;
- *Ngatayi v R*¹¹³;
- *Green v R*¹¹⁴.

In strict terms, even the slightest “lack” or “deficiency in” in understanding of the nature of the charge, or of the proceedings, would suffice to satisfy the statutory criterion.

In *Munro v Sefton* the relevant charges were disorderly conduct, resisting a member of the police force in the execution of his duty, and unlawful assault. The appellant, who pleaded guilty to the charges, was unrepresented in the proceedings. Jones J commented:

“[H]ow many [Aboriginal defendants in Courts of Petty Sessions] ...know what are the implications of a charge, for instance, of receiving, or of wilfully doing some unlawful act, or of aggravated assault ? If such a person charged with such an offence does not know these implications, he does not comprehend the nature of the proceedings. So also if he does not know that he has a right to plead not guilty, and a right to seek a remand so that he may consider his position or obtain legal advice or get Departmental assistance, he does not comprehend ‘the nature of the proceedings’.”¹¹⁵

His Honour appeared to take the view if in fact an accused lacked an understanding of the technical meaning of the charges, the legal implications of those charges, and his or her full legal rights in relation to those charges, then that person was “wanting” in comprehension of the circumstances alleged and/or the proceedings, for the purposes of s 49(1) AAPAA.

In *R v Grant* the accused was an Aboriginal male from a traditional community who had been charged with murder. He was legally represented and assisted by an interpreter. The accused simply responded “yes” to the arraignment. It appears that that response may have been initially taken as a guilty plea because the accused was then examined by his counsel (through the interpreter) -

“.....ostensibly under the provisions of s 49 of the Aboriginal Affairs Planning Authority Act.....”¹¹⁶

After that examination the interpreter informed the court that it would be impossible to obtain a plea from the accused. Wickham J observed that during the examination the interpreter and the accused had experienced difficulty in communicating with one another. His Honour further observed that few of the questions and answers appeared to have been literally translated, and that -

¹¹¹ Unrep., WA Sup Ct, Jones J, No 38 of 1974, July 1974.

¹¹² [1975] WAR 163.

¹¹³ (1980) 147 CLR 1.

¹¹⁴ (2001) 24 WAR 192.

¹¹⁵ *Munro v Sefton*, n 111, at 4-5.

¹¹⁶ *R v Grant*, n 112, at 164 per Wickham J.

"...it was impossible to convey to the accused an adequate synonym in his dialect of the terms 'unlawful', 'guilty', and 'not guilty', or to explain their meaning to him."¹¹⁷

Wickham J concluded that the accused's want of comprehension of the proceedings was such that it raised issues of fitness to plead. His Honour ordered that the accused's fitness to stand trial first be tried as a separate proceeding pursuant to s 631 *Criminal Code* (now repealed)¹¹⁸.

The approach of Wickham J in *R v Grant* may be contrasted with that of the High Court in *Ngatayi v The Queen*, the facts of which case were not dissimilar. (In *Ngatayi v The Queen* the issue before the High Court was whether the trial judge had erred in refusing to put the question of the accused's fitness to plead to a jury pursuant to s 631 *Criminal Code*. The accused, who had been charged with and convicted of wilful murder, was an Aboriginal male from a traditional community near Broome who had been intoxicated at the time of the offence: see the brief discussion in Chapter Six.)

The High Court (Murphy J dissenting) dismissed the appeal. Gibbs, Mason and Wilson JJ approved the following statement of Dixon J in *Sinclair v The King*¹¹⁹:

"It does not seem to have been noticed by the text book writers how high a degree of intelligence this test might demand if it were literally applied...

[C]omplete understanding may require intelligence of quite a high order, particularly in cases where intricate legal questions arise."¹²⁰

Cf Murphy J at 13.

In short: cases such as *Munro v Sefton* and *R v Grant* appear to set a very high standard of comprehension on the part of the accused without which the judicial duty pursuant to s 49 AAPAA would be deemed to arise. On the other hand, in *Ngatayi v R* Gibbs, Mason and Wilson JJ warned against setting standards of comprehension of proceedings too highly, albeit in a "fitness to plead" context. Many sophisticated people, Aboriginal or non-Aboriginal, do not understand technical legal concepts such as "lawful", "guilty" or "not guilty". Presumably, what constitutes the relevant "lack of comprehension" in a particular case is a matter for the presiding judicial officer to determine.

Note:

In some early cases the fact that an accused had appeared in court on previous occasions apparently raised a presumption of comprehension. Thus in *Clinch v Atkins*, the appellant's extensive criminal record led Jones J to conclude that the appellant had understood the proceedings in which she was convicted on her own plea of guilty. Similarly, in *Munro v Sefton* Jones J commented that a justice's "knowledge of and experience with" a particular Aboriginal accused might obviate the requirement of examination pursuant to s 49AAPAA¹²¹.

¹¹⁷ *R v Grant*, n 112, at 164.

¹¹⁸ Section 631 *Criminal Code* provided for the empanelling of a jury to establish whether the accused person's capacity to understanding trial proceedings if "when called upon to plead, it appears to be uncertain, *for any reason*, whether he is capable of understanding the proceedings at the trial, so as to make a proper defence." (emphasis added).

¹¹⁹ (1946) 73 CLR 316.

¹²⁰ *Sinclair v The King*, n 119, p 334.

¹²¹ *Munro v Sefton*, n 111, at 4.

However, in *R v Grant*, the fact that the accused was legally represented and assisted by an interpreter did not affect the decision of Wickham J that the accused's difficulties in communicating and comprehending raised essential questions of fitness to plead: cf *Ngatayi v The Queen*.

In *Green v R* Malcolm CJ was not persuaded that the fact of the appellant's long criminal record, and assistance by counsel and an Aboriginal Court Officer in the sentencing court, was sufficient to dispense with the requirement of examination¹²². Wheeler J stated that she attached "no weight" to that fact that the appellant had such experience:

"That circumstance does not necessarily indicate that he has an understanding of court procedures generally, or of the elements of any particular offence, or the implications of a plea of guilty in any particular case."¹²³

7.2.9 Procedure When Court is Satisfied as to the Relevant Matters

Authorities:

- *Ngatayi v R*¹²⁴;
- *Roast v Bynder*¹²⁵.

Where a Court is satisfied that an accused may be wanting in the relevant comprehension, the plea of guilty will be rejected, or the admission or confession will be ruled inadmissible. In *Ngatayi v R* Burt CJ stated (in respect of the trial judge's having refused to accept the appellant's plea of guilty):

".....the trial judge was, I think, by that section and by necessary implication authorized to direct that a plea of not guilty be entered."¹²⁶

In practice, upon a plea of guilty being rejected, a plea of not guilty is entered, and the prosecution is put to proof of its case. However, this practice may create difficulties for the conduct of a trial where the accused has pleaded guilty in front of the jury panel (which occurred in the trial in *Ngatayi v The Queen*). Where the admissibility of a confession or admission is in question, such difficulties may be avoided by the judicial officer ruling on that confession or admission before a jury is empanelled.

In *Roast v Bynder* Olney J affirmed that s 49(1) AAPAA does not empower a court to dismiss a complaint. However, His Honour pointed out that the court may, where appropriate, order that steps be taken to determine the fitness to plead of the accused¹²⁷.

7.2.10 Consequences of Non-Compliance With s 49 (1) AAPAA

¹²² *Green v R*, n 114, at 200 per Malcolm CJ.

¹²³ *Green v R*, n 114, at 217.

¹²⁴ [1980] WAR 209.

¹²⁵ [1988] WAR 217.

¹²⁶ *Ngatayi v R*, n 125, at 211. See also p 216 per Brinsden J.

¹²⁷ *Roast v Bynder*, n 125, at 218.

Authorities:

- *Hayward v R*¹²⁸,
- *Green v R*¹²⁹.

The fact that the requirements of s 49 (1) AAPAA have been not complied will not, of itself, ground an appeal. In *Hayward v R* Murray J stated that a miscarriage of justice within the meaning of s 689(1) *Criminal Code* must first be established:

" I would not in any event in relation to the *Aboriginal Affairs Planning Authority Act* s 49, consider that the mere establishment of non-compliance with the section could result in a successful appeal against a conviction, unless the non-compliance was shown to be productive of a miscarriage of justice in the accepted sense that the making of the plea of guilty in the context of the procedural irregularity of non-compliance with s 49 had resulted in the applicant being deprived of a chance of acquittal which was fairly open to the applicant, subject of course to the possible application of the proviso: *Mraz v R* (1955) 93 CLR 493. The miscarriage would be demonstrated by establishing that the plea had been entered in circumstances which vitiated the capacity of the court to accept it, with the result that there ought to have been a trial by jury of the issues raised by the offence charged. But the mere fact that there had been a non-compliance with the *Aboriginal Affairs Planning Authority Act* s 49 would not establish that."¹³⁰

In *Green v R* (the facts of which are given above at 7.2.5) Malcolm CJ stated:

"In the present case, it is apparent that when the appellant appeared before the Magistrate and entered his plea of guilty on the fast-track system, no relevant record was made that the Court of Petty Sessions was satisfied that the appellant properly comprehended the nature of the circumstances alleged or of the proceedings, or was capable of understanding his plea of guilty. Given that the Justice of the Peace had found it necessary to note that s 49 had been complied with, and given the purpose of the provision and the comments of Burt J [in *Smith v Grieve* [1974] WAR 163], this is not an appropriate case in which to apply the presumption of regularity."¹³¹

His Honour (Wallwork J concurring) concluded that since there had not been a *voir dire* -

"[I]n the present case, in the end result, there was no significant or sufficient examination of the appellant by anyone. In the circumstances, albeit with some regret, I am of the opinion that the provisions of s 49 were not complied with."¹³²

In *Green v R* Malcolm CJ approved the above statement of the law, affirming that mere non-compliance with s 49 (1) AAPAA does not, of itself, constitute a miscarriage of justice. Rather, it must be shown that the plea of guilty was entered in circumstances which vitiated the capacity of the court to accept that plea¹³³.

¹²⁸ Unrep., WA Sup Ct, CCA, No 50 of 1993, 10 September 1993.

¹²⁹ (2001) 24 WAR 192.

¹³⁰ *Hayward v R*, n 128, at 7.

¹³¹ *Green v R*, n 129, at 198.

¹³² *Green v R*, n 129, at 201.

¹³³ *Green v R*, n 129, at 199.

7.3

THE JURY

"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 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....."¹³⁴

In Western Australia the law relating to juries is governed by the *Criminal Code*¹³⁵ and the *Juries Act 1957* (WA).

7.3.1 Adverse Publicity

Authorities:

- *Binge and Ors v Bennett*¹³⁶.

General Principles: The overriding requirement that a trial be fair gives rise to a number of operating principles, including that a jury exercise its functions in a fair and impartial manner¹³⁷.

In *Binge and Ors v Bennett* certain Aboriginal plaintiffs had applied to quash an extradition order which had been made by a magistrate and subsequently confirmed by a judge of the Supreme Court of New South Wales. Pursuant to that order the plaintiffs were to return to Queensland to face charges of riot causing extensive damage to two hotels in Goondiwindi, a country town in Queensland¹³⁸. Subsequently the New South Wales Court of Appeal ordered a re-trial of the extradition issue. The plaintiffs claimed that it would be "unjust or oppressive" to return them to Queensland, on the grounds that the events giving rise to the charges had sparked extensive press coverage in local, State and national newspapers, with strong adverse statements being attributed to a number of Government Ministers, including the Premier of Queensland.

Smart J concluded that the publicity about the events had been "so extensive and so virulent as to make a fair trial in Goondiwindi virtually impossible"¹³⁹. For that and other reasons¹⁴⁰, Smart J held that it would be harsh and oppressive to return the plaintiffs to Queensland, and his Honour quashed the extradition order.

¹³⁴ The Hon Justice Dean Mildren, n 1, pp 12-13. (The second thing is for the judge not to be reluctant to exercise control over the trial, especially in relation to the form of the cross-examination of Aboriginal witnesses: pp 14-17).

¹³⁵ Note particularly ss 625-628, 630-633, 639, 640, 644 and 646 *Criminal Code*.

¹³⁶ (1989) 42 A Crim R 93.

¹³⁷ See e.g. *Cheatle v The Queen* (1993) 177 CLR 541; *Katsuno v The Queen* (1999) 199 CLR 40. See also *R v Ford* (1989) 3 All ER 444.

¹³⁸ It appeared that those events occurred in response to the serious ill-treatment of an Aboriginal boy in Goondiwindi the previous day.

¹³⁹ *Binge and Ors v Bennett*, n 136, at 99.

¹⁴⁰ Those other reasons included findings by Smart J that the nature of both medical and general supervision of prisoners in Queensland watch-houses was discretionary, which would place the plaintiffs at special risk.

Note: Smart J also rejected an application for a change of the trial venue: see below at 7.3.4.

7.3.2 Random Selection of Jurors

Authorities:

- *Binge and Ors v Bennett*¹⁴¹;
- *R v Walker*¹⁴²;
- *R v Grant and Lovett*¹⁴³;
- *R v Gibson*¹⁴⁴.

General Principles: A jury must comprise a body of persons which is representative of the wider community, which body has been randomly or impartially selected¹⁴⁵. An accused is entitled to challenge the composition of a jury, which right may be exercised by counsel on behalf of the accused¹⁴⁶. A juror may be challenged for cause¹⁴⁷ where a proper factual foundation indicates a "prima facie case of a probability of prejudice"¹⁴⁸.

The requirement that jurors be selected at random appears to exclude the notion that an accused is entitled to be judged by a jury which comprises members of a particular racial group (viz., his or her own racial group). In *R v Walker* the court rejected a challenge to the array which had been made on the basis that the jury panel did not contain any persons from the Nunekel, to which language group the Aboriginal accused belonged. The court held that a trial by one's peers, as contemplated by Chapter 39 of the Magna Carta, does not require a trial by persons from the same ethnic background as an accused, but only a trial by the accused's equals.

In *R v Grant and Lovett* the two Aboriginal accused persons challenged the lack of labourers and Aboriginal persons on the jury: Grant was a labourer; Lovett a labourer and an Aboriginal. McInerney J, understanding the challenge to be a challenge to the array, held that the sheriff had not failed in any way to carry out his duties under the *Juries Act* 1976 (Vic.)

In *R v Gibson* the accused, a member of the Pitjantjatjara community in South Australia, challenged the lack of Aboriginal persons on the jury. Several Aboriginal witnesses stated that they had never been called for jury service, nor were they aware of any Aboriginal person who had been called for jury service. The sheriff gave evidence that Aboriginal persons had in fact been summoned. Bright J concluded that in calling the jury the sheriff had made no attempt to exclude Aborigines who were qualified to serve as jurors, and his Honour dismissed the challenge.

¹⁴¹ (1989) 42 A Crim R 93.

¹⁴² (1989) 2 Qd R 79.

¹⁴³ [1972] VR 423.

¹⁴⁴ Unrep., SA Sup Ct, Bright J, 12 November 1973.

¹⁴⁵ *Cheatle v The Queen* (1993) 177 CLR 541 per the Court at 560. See also s 26 *Juries Act* 1957 (WA).

¹⁴⁶ *Johns v The Queen* (1979) 141 CLR 409.

¹⁴⁷ See s 628 *Criminal Code*. Note that the Crown, and the accused, may make up to five peremptory challenges: s 38(1) *Juries Act* 1957 (WA).

¹⁴⁸ *Murphy v The Queen* (1989) 167 CLR 94 at 104. See also *A Judge of the District Courts and Shelley; Ex Parte Attorney-General* [1991] 1 Qd R 170.

7.3.3 Gender Composition of Juries

Authorities:

- *R v Sydney Williams*¹⁴⁹;
- *R v Gudabi*¹⁵⁰.

General Principles: However, difficulties may in respect of the requirement that jurors be selected at random in trials which involve Aboriginal persons from traditional communities, especially where evidence relating to men or women's "business" is to be adduced. Many principles of Aboriginal customary law may not be disclosed to persons of the opposite sex. In such cases it may not be appropriate to empanel a jury in the usual way.

Peremptory challenges have been utilised to empanel a single-sex jury. In *R v Sydney Williams* the Aboriginal accused pleaded guilty to a charge of manslaughter. It appeared that the deceased woman had angered the accused by uttering tribal secrets. With the consent of the Court and the parties, an all-male jury was empanelled to try the case. Similarly, in *R v Gudabi* an all-male jury was empanelled with the consent of the Crown, and all women were excluded from the court. However, it appears that the consent of the parties is critical: in *R v A Judge of the District Courts; Ex parte Attorney-General (Qld)*¹⁵¹ the court held that where the parties do not consent, a court may not order that a jury be drawn from members of a particular sex.

In *The Report into Aboriginal Customary Law* the Australian Law Reform Commission (ALRC) recommended that, in appropriate cases and upon application by an accused, the court should exercise its inherent discretion to make an order that a jury of a particular sex be empanelled. Such cases might include those in which a witness is reticent or unwilling to give evidence, or where giving the evidence to persons of the opposite sex would infringe the witness's customary law. The ALRC suggested that this should only be done in cases where all the relevant evidence might not otherwise be given. It would also be necessary to ensure in a particular case that no similar restrictions applied (with respect to persons of the other sex) to evidence of the other witnesses, particularly the victim of the offence.¹⁵²

See also 7.4.9, below (Gender-Restricted Evidence).

¹⁴⁹ (1976) 14 SASR 1.

¹⁵⁰ Unrep., NT Sup Ct, Forster CJ, SCC No 85/82, 30 May 1983.

¹⁵¹ [1991] 1 Qd R 170; 1990 48 A Crim R 139.

¹⁵² ALRC *The Recognition of Aboriginal Customary Law*, Report No 31, AGPS, Canberra, 1986, para 595, p 440.

7.3.4 Change of Trial Venue

Authorities:

- *Binge and Ors v Bennett*¹⁵³.

In appropriate circumstances the trial judge may exercise his or her discretion to order that a trial be held in another venue, if the accused can show "good cause" for such an order to be made¹⁵⁴. However, it appears that in Western Australia such "good cause" is not established readily¹⁵⁵.

In *Binge and Ors v Bennett* (discussed above at 7.3.1) certain Aboriginal plaintiffs applied to quash an extradition order pursuant to which they were to return from New South Wales to Goondiwindi in Queensland to face charges of riot causing extensive damage. The events giving rise to the charges had sparked extensive adverse press coverage, with strong adverse statements from many persons including several Ministers of the Queensland Government. Smart J rejected an application to change the venue of the trial from Goondiwindi to another location within Queensland *inter alia* on the ground that the publicity which had occurred meant that a fair trial could not be held in Queensland at all.

7.3.5 Under-Representation of Aboriginal People on Juries

Authorities:

- *Binge and Ors v Bennett*¹⁵⁶.

Although Aboriginal people are over-represented as accused persons in trials, they are under-represented in juries. A study undertaken in 1986 by the New South Wales Law Reform Commission indicated that although Aboriginal people in New South Wales constituted 7% of accused persons they represented less than 1% of jurors¹⁵⁷.

The causes of the under-representation of Aboriginal persons in juries have been identified *inter alia* as the fact that many Aboriginal people are not on the electoral rolls; difficulties associated with service of jury notices; and the distances from the relevant courts at which Aboriginal persons may live.¹⁵⁸ In *Binge and Ors v Bennett* Smart J commented:

"The lack of Aboriginals on both jury panels and juries is to be greatly regretted. The present system of making up jury panels does not of itself discriminate against

¹⁵³ (1989) 42 A Crim R 93.

¹⁵⁴ Section 577 *Criminal Code*.

¹⁵⁵ *Grieves & Ors v R* (Unrep. WA Sup Ct, CCA, 18 February 1991 (BC 9101252)); *R v Bridgeman* (Unrep. WA Sup Ct, Walsh J, No 40 of 1992, 6 May 1992); *Casey v R* (Unrep., WA Sup Ct, White J, No 46 of 1993, 23 June 1993). Cf *R v Toh Yu Teng* (1987) 30 A Crim R 203.

¹⁵⁶ (1989) 42 A Crim R 93.

¹⁵⁷ Law Reform Commission, NSW, *The Jury in A Criminal Trial: Empirical Studies*, RR 1, 1986, quoted in J Hunter and K Cronin *Evidence, Advocacy and Ethical Practice*, Butterworths, North Ryde, 1995, p 105.

¹⁵⁸ His Honour Judge HH Jackson 'Can the Judiciary and Lawyers Properly Understand Aboriginal Concerns?' *Brief*, Law Society of Western Australia, May 1997, p 15. Personal communication from Ms Deborah Dickman, Manager, Sheriff's Office, Central Law Courts, Perth, 16 October 2001.

Aboriginals. However, it is a system which, because of their education, lifestyle and attitudes, does not readily encompass them."¹⁵⁹

Many writers have pointed out the problems associated with the trial of Aboriginal persons by juries with few, if any Aboriginal members¹⁶⁰. In earlier times, in rural areas, it appeared to be difficult to obtain convictions of non-Aboriginal persons for alleged offences against Aboriginal persons¹⁶¹.

Calls have been made for the abolition of jury trials for Aboriginal accused persons from traditional communities, for reasons *inter alia* of the non-representativeness of a typical jury¹⁶². However in the *Report into Aboriginal Customary Law* the Australian Law Reform Commission (ALRC) pointed out:

"The Commission has received no evidence to justify the conclusion that jury trials involving Aborigines are, in any regular or recurring way, biased or otherwise unsatisfactory."¹⁶³

¹⁵⁹ *Binge and Ors v Bennett*, n 156, at 107.

¹⁶⁰ See for example E Eggleston *Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia* ANU Press, Canberra, 1976, p 168; His Honour Judge HH Jackson, n 158, p 12.

¹⁶¹ An example of such difficulty in obtaining was discussed by LL Davies in Davies 'The Yupupu Case' (1976) 2 *Legal Service Bulletin*, 133.

¹⁶² AP Elkin 'Aboriginal Evidence and Justice in Northern Australia' (1947) 17 *Oceania* 173, p 175.

¹⁶³ ALRC *The Recognition of Aboriginal Customary Laws*, n 152, para 589, p 437.

7.4

EVIDENCE: GENERAL

In *Fry v Jennings*¹⁶⁴ Muirhead J remarked that his "daily experience" in the Northern Territory demonstrated the existence of many difficulties for Aboriginal witnesses, difficulties which were "compounded by lack of comprehension of issues, shyness, language barriers, embarrassment and fear."¹⁶⁵

In order to assess accurately the testimony of Aboriginal witnesses, participants in the trial process must possess an understanding of the differences in culture and in communication styles of Aboriginal and non-Aboriginal people. Those differences were outlined in earlier Chapters. To briefly re-cap:

- Aboriginal people who are not well educated may not may have a good understanding of English words or of English grammatical construction;
- Some words are ambiguous in translation (e.g. in a traditional Aboriginal community the English verb "to kill" may have a number of additional wider meanings e.g. "to hurt" or "to cut");
- Aboriginal people may attribute an extended meaning to familial relationship terms such as "mother", "brother", "sister" which reflect the classificatory system of kinship;
- It may be difficult to convey to unsophisticated Aboriginal people the meaning of technical legal terms, such as "guilty" and "not guilty";
- Aboriginal people may possess different understandings of quantitative specification (such as time, numbers and distance) from non-Aboriginal people;
- Traditional Aboriginal body language is different from non-Aboriginal people (thus, in traditional Aboriginal culture an averting of the eyes indicates respect, rather than evasiveness or dishonesty);
- Certain health problems which are very common in Aboriginal society (particularly deafness) may have a compounding detrimental effect which may create severe barriers to communication;
- Aboriginal customary law may operate to inhibit or prevent open communication, especially between people of different sexes;
- Aboriginal witnesses may tend to agree with real or apparent authority figures, rather than which tendency may result in the diminution of those witnesses' legal rights;

¹⁶⁴ (1983) 25 NTR 19.

¹⁶⁵ *Fry v Jennings*, n 164, p 26-27.

- Aboriginal people may have different notions of criminal responsibility from those of non-Aboriginal people (e.g. strict liability as opposed to *mens rea*; collective guilt as opposed to individual responsibility).

Any of the above factors, or a combination of them, may seriously impede the capacity of an Aboriginal person to understand, and to be understood in, court proceedings. Additional difficulties may be caused by conflicting cultural factors such as a witness lacking the authority of his or her group, or gender, to speak in relation to a particular matter.

In *The Recognition of Aboriginal Customary Laws* the ALRC identified a number of difficulties experienced by many Aboriginal people undergoing cross-examination. Those difficulties include a lack of comprehension of the question, and a reluctance to reject suggestions and/or propositions put in cross-examination by a person in apparent authority. The ALRC considered that Aboriginal deference to authority -

"...can lead to a propensity to give answers thought to be expected rather than to state what actually occurred. This is a result both of Aboriginal courtesy and custom, but also of the long history of Aborigines working in subservient situations."¹⁶⁶

It appears highly probable that an Aboriginal person, particularly one from a traditional community, who is undergoing cross-examination by an authoritative stranger in formal, unfamiliar and ritualistic court proceedings is more likely than ever to act according to his or her cultural norm. Gratuitous agreement with cross-examining counsel completely defeats the purpose a trial and greatly increases the risk of a miscarriage of justice.

Note: in April 1991 the Law Reform Commission of Western Australia (WALRC) published a *Report on Evidence of Children and Other Vulnerable Witnesses (Vulnerable Witnesses Report)* in which the particular difficulties experienced by Aboriginal persons in giving evidence were acknowledged¹⁶⁷. In June 1996 the Queensland Criminal Justice Commission (Queensland CJC) published a report *Aboriginal Witnesses in Criminal Courts*¹⁶⁸ (*Aboriginal Witnesses Report*), following a period of wide consultation and extensive research. That report contains a comprehensive and non-technical analysis of the major issues confronting Aboriginal witnesses in Queensland criminal courts¹⁶⁹.

7.4.1 Vulnerable Witnesses: Female

"As rape victims [Aboriginal women] do not put their story well. The concept of shame is part of all that. The nature of the charge, the use of language, their shyness and family pressure too. Their story is made to conflict, not because of dishonesty, but because of their use of language."¹⁷⁰

¹⁶⁶ ALRC *The Recognition of Aboriginal Customary Laws*, n 152, para 546, p 404. See also Departments of Justice, the Attorney-General and Aboriginal and Torres Strait Policy and Development *Aboriginal English in the Courts* Queensland Government 2000 (<http://www.justice.qld.gov.au/pdfs/AboriginalEnglish2.pdf>).

¹⁶⁷ WALRC, Project No. 87, Government Printer, Western Australia, April 1991 (at pp 117 - 118).

¹⁶⁸ Queensland Criminal Justice Commission, June 1996.

¹⁶⁹ Note that the catalyst for the report *Aboriginal Witnesses in Criminal Courts* was the notorious "Pinkenba Incident", discussed below at 7.4.2.

¹⁷⁰ Queensland CJC, *Aboriginal Witnesses Report*, n 168, p 96.

In *Aboriginal Witnesses Report* the Queensland CJC identified the following particular difficulties experienced by Aboriginal female witnesses, in addition to the general cultural and language differences outlined above:

- Aboriginal women often face pressure from within their family and/or community not to involve another Aboriginal person in legal proceedings: to do so is likely to be perceived as "betrayal";
- there is often a perception that "white justice" does not "work", and that punishment is best meted out according to traditional Aboriginal dictates;
- the physical courtroom environment is usually intimidating, the legal process is predominantly male, and many legal practitioners appear to be unaware of the issues facing Aboriginal women;
- the presence of the accused or other people in the courtroom may exacerbate the intimidation experienced by the witness;
- significant shame is likely to attach to the discussion of sexual matters in public;
- a person in the court may use Aboriginal sign language in a courtroom to intimidate a witness, which sign language goes unnoticed by non-Aboriginal persons in the court;
- the witness may lack pre-trial preparation and orientation, especially where evidence is to be given of matters relating to sexual assault;
- evidence presented in court about Aboriginal cultural traditions may not present the Aboriginal female perspectives about those traditions;
- existing legal and support services may not meet the needs of Aboriginal women, and Aboriginal women do not access them as much as they could¹⁷¹.

7.4.2 Vulnerable Witnesses: Children

In *Seen and Heard: Priority for Children in the Legal Process*¹⁷² the ALRC emphasised the responsibilities of the courts to child witnesses:

"Magistrates and judges...have particular responsibility to ensure that child witnesses understand the questions asked and are not harassed or intimidated by tone of voice, aggressive questioning, incomprehensible language and unfair or abusive treatment. Judicial officers should ensure that children have appropriate breaks and are not questioned for excessive periods of time. Rules of evidence in each jurisdiction already contain provisions to prevent undue badgering or harassment of witnesses, as do many legal association rules and guidelines. These can provide child witnesses with some protection against harsh, intimidating and confusing questioning. Most rules make no explicit recognition of the particular vulnerability of child witnesses, however."¹⁷³

¹⁷¹ Queensland CJC, *Aboriginal Witnesses Report*, n 168, pp 93 -96.

¹⁷² ALRC, Report No. 84, Commonwealth of Australia, 1977.

¹⁷³ ALRC, *Seen and Heard: Priority for Children in the Legal Process*, n 172, para 14.115 pp 345-346.

It has been suggested that particular care should be taken in dealing with Aboriginal child witnesses whose maturity, English or verbal skills, confidence or educational background may not be the same as a non-Aboriginal child of a similar age.

The difficulties experienced by Aboriginal adolescent witnesses who apparently were speakers of "light" Aboriginal (Non-Standard) English were demonstrated in the "Pinkenba Case". The "Pinkenba Case" comprised committal proceedings conducted in Brisbane's Magistrate's Court in respect of six police officers who had been charged with deprivation of liberty. The charges arose from the conduct of those police officers in taking three Aboriginal boys (aged 12, 13 and 14 years respectively) from a shopping centre in Fortitude Valley to Pinkenba (an industrial area 14 km away). At Pinkenba the officers questioned the boys, then left them to find their own way home: no charges were preferred against the boys. The boys were called to give evidence in the committal proceedings.

Dr Diana Eades, a socio-linguist, who observed the proceedings, identified "serious cultural and linguistic issues" which, in her view, informed the boys' responses to cross-examination¹⁷⁴:

- Counsel for the police failed to allow any time for the boys to be silent after posing a question, which culturally disadvantaged them (given that silence constitutes an important component of Aboriginal communication).
- The boys avoided eye-contact with cross-examining counsel. Dr Eades observed that this conduct was consistent with traditional Aboriginal respect for persons of apparent authority. One cross-examining counsel repeatedly instructed one boy to look at him when answering questions: upon the boy failing to do so, counsel suggested that this "refusal" meant that the boy "was thinking 'we'll see lies written all over his face'". No objection was raised to this remark.
- The questioning of the boys in cross-examination was pressured and prolonged: the questions were rapid-fire direct questions (i.e. "yes-no" questions) with which the boys almost always "gratuitously concurred". Accordingly, the boys frequently gave contradictory answers in their evidence.
- Counsel for the police officers frequently raised their voices in cross-examination (i.e. badgered) the witnesses. This in turn increased the inclination of the boys to "gratuitously concur" with the questions asked, making them appear, in non-Aboriginal cultural terms, "unreliable" witnesses.
- No objection was raised to the manner of cross-examination by counsel for the prosecution or the magistrate

At the conclusion of the three-day hearing, the magistrate found that there was insufficient evidence for the matters to go to trial. In Dr Eades view, the magistrate's findings reflected his lack of appreciation of the serious cultural and linguistic issues encountered by the boys in giving evidence. The boys' lack of "cross-cultural and

¹⁷⁴ D Eades 'Cross-Examination of Aboriginal Children: The Pinkenba Case' 1995 (3) 75 *Aboriginal Law Bulletin* 10, p 10.

linguistic skills" had rendered them unable to deal with such aggressive cross-examination techniques. In Dr Eades' view these disadvantages, coupled with the failure of prosecuting counsel or the magistrate to object to the manner of cross-examination, resulted in a serious travesty of justice¹⁷⁵.

7.4.3 Unsworn Evidence: s 100A Evidence Act 1906 (WA)

General principles: s 100A Evidence Act 1906 (WA) (Evidence Act) provides a statutory exception to the general rule¹⁷⁶ that in criminal trials all evidence shall be heard on oath or solemn affirmation. It provides that a person may give unsworn evidence where the Court is satisfied that that person does not understand the nature of the oath or solemn affirmation but does understand that he is required to speak the truth and that he or she will be liable to punishment if the truth is not told.

In *Lau v R*¹⁷⁷ Murray J pointed out the significance of s 100A Evidence Act for Aboriginal witnesses:

"[Section 100A] was inserted in the Act for the first time in 1976 and it has since been used for the reception of evidence, not only of persons of limited mental capacity, but also persons of an unsophisticated character, such as tribally orientated persons of Aboriginal descent who for reasons of their lifestyle and the lack of substantial contact with the system of criminal justice, lack the understanding of the oath or solemn affirmation to which the section refers. It is important I think to note that s 100A is in its terms and evident purpose, a facilitative provision designed to secure the competence of witnesses to give evidence in circumstances where they would be otherwise precluded from doing so by strict application of the other provisions of the statute."¹⁷⁸

It is clear that s 100A Evidence Act creates a mechanism through which traditionally oriented Aboriginal witnesses may give unsworn evidence. However, it appears that the judicial enquiry required by the provision is not easy to conduct in practice, and a judicial warning to the jury in relation to corroboration may be required¹⁷⁹.

7.4.4 Evidence of Children and "Special Witnesses": ss 106A-106T Evidence Act 1906 (WA)

Authorities:

- *Bennie v R*¹⁸⁰.

General Principles: in 1992 a range of statutory measures were introduced which were intended to assist vulnerable witnesses who would not otherwise be able to give evidence effectively, if at all¹⁸¹. In April 1996 the Justices of the Supreme Court

¹⁷⁵ D Eades, n 174, p 11.

¹⁷⁶ *Brasier v The King* (1799) 1 Leach 199.

¹⁷⁷ (1991) 6 WAR 30. This case involved a witness who was an 18 year-old, intellectually-handicapped girl.

¹⁷⁸ *Lau v R*, n 177, at 40. Seaman J also pointed out that s 100A Evidence Act might be invoked by witnesses "of mature age and full intellectual capacity who, by virtue of their cultural origins, do not understand the nature of or obligations imposed by taking an oath or affirmation": at 39.

¹⁷⁹ See the discussion by Seaman, Murray and Owen JJ in *Lau v R*, n 177.

¹⁸⁰ [1999] WASCA 238.

¹⁸¹ *Acts Amendment (Evidence of Children and Others) Act 1992* (WA). Those measures followed specific recommendations made by the WALRC in the *Vulnerable Witnesses Report*.

of Western Australia implemented certain guidelines known as “Judges’ Rules”¹⁸² to facilitate the operation of those special procedures.

Pursuant to ss 106A - 106T *Evidence Act* special provisions are made for the giving of evidence by children and “special” (vulnerable) witnesses in civil and criminal proceedings. (Note that in the brief discussion which follows an “affected child” is defined in s 106 A *Evidence Act* as a child in a “Schedule 7 proceeding”, which in turn is defined as one in which the witness is alleged to be the victim of an intra-family or domestic sexual or other physical offence in an: see s 106 A *Evidence Act*.)

The special provisions include the following:

- (a) Evidence on Oath or Affirmation (s 106B *Evidence Act*): a child under the age of 12 years may give evidence on oath or affirmation if in the opinion of the Court the child understands that (a) the giving of evidence is a serious matter and (b) in giving evidence, he or she has an obligation to tell the truth which is over and above the ordinary duty to tell the truth.¹⁸³
- (b) Unsworn Evidence (s 106C *Evidence Act*): a child under the age of 12 years who is judged not competent to give evidence for the purposes of s 106 B may give unsworn evidence where the Judge is of the opinion, before the evidence is given, that the child is able to give “an intelligible account” of events which he or she has observed or experienced¹⁸⁴.
- (c) Pre-Trial Statement of an “Affected Child” (s 106H *Evidence Act*): the pre-trial statement of an “affected child” may be recorded electronically or in writing. The defence must be provided with a copy of the statement and the witness made available for cross-examination (e.g. through closed-circuit television facilities). A statement which contains hearsay may be admitted at the discretion of the trial judge¹⁸⁵.
- (d) Pre-Recorded Evidence of an “Affected Child” (ss 106I-106M *Evidence Act*): an “affected child” may be examined, cross-examined and re-examined at a video taped hearing. In addition to sparing the child the ordeal of attending a trial, this is a useful procedure for both the prosecution and defence parties¹⁸⁶.
- (e) Closed Circuit Television and Screening Arrangements (ss 106N-106P *Evidence Act*): where evidence is not pre-recorded, an “affected child” may give evidence at trial in a separate room which is linked to the courtroom by closed-circuit television, or, where such facilities are

¹⁸² *Evidence of Children and Other Special Witnesses: Guidelines for the Use of Television, Videotapes and Other Means by the Judges of the Supreme Court.*

¹⁸³ The operation of s 106B *Evidence Act* was considered *inter alia* in *Grindrod v R* [1999] WASCA 44 (CCA) and *R v Stevenson* (2000) 23 WAR 92. See also *Hoogwerf v R* (1992) 63 A Crim R 302.

¹⁸⁴ The operation of s 106C *Evidence Act* was discussed *inter alia* in *R v Stevenson*, n 183, above.

¹⁸⁵ The operation of s 106H *Evidence Act* was discussed *inter alia* in *Angus v De Lallo* (1994) 11 WAR 93.

¹⁸⁶ See the discussion by his Honour Judge HH Jackson in “Judge’s Guidelines, The Evidence Act and Other Issues”, paper presented at “Out of the Mouths of Babes: The Child Witness” Law Society Seminar, Perth, 31 October 2001 (at pp 16 - 23).

unavailable, by giving evidence in the courtroom while being physically separated from the accused by a screen.

- (f) “Special Witnesses” (s 106R Evidence Act): where, in the court's opinion, a witness is likely to suffer emotional trauma from giving evidence in the normal manner, or to be so intimidated or stressed as to be unable to give effective evidence, that witness may give evidence in a manner similar to that of an “affected child”, i.e. with the assistance of a support person, or at a special videotaped hearing.

Pursuant to s 106S *Evidence Act* an application may be made to the court for a special hearing to consider the directions which should be made.

In *Bennie v R* the Court of Criminal Appeal considered an application by an Aboriginal man for an extension of time for leave to appeal against his conviction of a charge of sexually penetrating a child under the age of 13 years. While giving evidence in chief at the trial in Broome, the complainant (a girl aged 9 years and 7 months) became distressed to the point of becoming unable to testify to the essential facts of the charge. The complainant's prior statement to the police was admitted into evidence pursuant to s 106H *Evidence Act*. The complainant was cross-examined, but not as to sexual penetration. It appeared that certain words in the complainant's statement (namely, Aboriginal words for genitalia) were the words of the investigating police officer, not the complainant. The applicant was convicted by the jury notwithstanding the trial judge's warning to the jury to consider the unsworn evidence of the complainant with caution.

The Court of Criminal Appeal rejected the applicant's contention that his counsel at trial had failed to cross-examine the complainant properly. Scott J stated:

"The complainant had been unable or unwilling to testify about the specific acts performed upon her and it was on that basis that the statement was admitted into evidence. Cross-examination directed to that area may have resulted in the complainant giving direct evidence as to what had happened to her. Counsel for the applicant focussed on the way in which the statement was taken and as to whether the wording in the statement was the complainant's or the police officer's.

It is apparent from the way in which the trial was conducted that counsel for the applicant dealt with the applicant in a sensitive and responsible manner, mindful of the difficulties of the complainant and of the risk that he may have strengthened the prosecution case if he pressed the complainant on the critical area of penetration."¹⁸⁷

The second ground of appeal was that the trial judge had not made the inquiries required by s 106C before admitting the unsworn evidence of the complainant into evidence. The Court of Criminal Appeal rejected that contention, finding that the capacity of the complainant to give sworn evidence had been properly tested by the trial judge, whose decision to admit the statement as unsworn evidence was appropriate in the circumstances.

¹⁸⁷ *Bennie v R*, n 180, paras 19 - 20.

7.4.5 Evidence of Husbands and Wives

Authorities:

- *R v Cobby*¹⁸⁸.

General Principles: s 9 *Evidence Act* contains extensive provisions in relation to the competence and compellability of a "husband" and a "wife" in criminal proceedings in Western Australia¹⁸⁹. Pursuant to s 9 *Evidence Act* a husband or wife is both competent and compellable in certain criminal proceedings, including those in which the alleged offence involves children of or the spouse of the marriage¹⁹⁰. The *Evidence Act* does not define the terms "husband" or "wife".

Historically, Australian law has not recognised traditional Aboriginal marriages¹⁹¹ as legal marriages. In *R v Cobby* Martin CJ stated that evidence of Aboriginal customs would not suffice:

"We may recognise a marriage in a civilized country but we can hardly do the same in the case of the marriages of these Aborigines, who have no laws of which we can take cognisance. We cannot recognise the customs of these Aborigines so as to aid us in the determination of whether the relationship exists of husband and wife."¹⁹²

In *The Recognition of Aboriginal Customary Laws* the ALRC pointed out the difficulty of defining traditional Aboriginal marriage for the purposes of Anglo-Australian criminal law¹⁹³. The ALRC noted the significance of the policy considerations which underlie the broad principle of inter-spousal non-compellability (namely the social, emotional and economic importance of stable marriages) and recommended that:

"Traditionally married persons should be compellable to give evidence for and against each other in criminal cases to the same extent as persons under the general law."¹⁹⁴

¹⁸⁸ (1883) 4 LR (NSW) 355 (FC).

¹⁸⁹ This qualifies the position at common law that the husband or wife of an accused is not a competent witness in criminal proceedings.

¹⁹⁰ See also ss 185, 187-189, 331 *Criminal Code*; s 71(3) *Justices Act*.

¹⁹¹ A traditional Aboriginal marriage is to be distinguished from a de facto marriage: it has been defined as "a socially sanctioned and ratified agreement with an expectation of relative permanency": RM Berndt 'Tribal Marriage in a Changing Social Order' (1961) 5 *UWALR* 326 at 341, quoted in ALRC, *The Recognition of Aboriginal Customary Laws*, n 133, para 236, p 174.

¹⁹² *R v Cobby*, n 188, quoted in ALRC, *The Recognition of Aboriginal Customary Laws*, n 152, para 237, p 175. Cf *R v Neddy Monkey* (1861) 1 W & W (L) 40 (FC Vic) in which Barry J suggested that recognition of Aboriginal marriages might be not be withheld upon the provision of evidence of Aboriginal marriage ceremonies.

¹⁹³ ALRC, *The Recognition of Aboriginal Customary Laws*, n 152, para 265, p 187.

¹⁹⁴ ALRC, *The Recognition of Aboriginal Customary Laws*, n 152, para 315, p 215.

7.4.6 Identification Evidence

Authorities:

- *Collard v R*¹⁹⁵.

General Principles: The trial judge may exercise his or her general discretion to exclude identification evidence if the strict rules of admissibility operate unfairly against the accused¹⁹⁶. Where the identification evidence is disputed, and where identification evidence forms a significant part of the proof of guilt, the trial judge must direct the jury's attention to any weaknesses in that evidence and give the Court's authority to that direction¹⁹⁷.

In Western Australia the photoboard, which is commonly used, has been criticised *inter alia* because the accused is not present when the identification is made, and because it may create a "rogue's gallery" or prejudicial effect upon the jury, which might draw adverse inferences from the fact that police officers have a photograph of the accused in their possession¹⁹⁸.

The dangers inherent in identification evidence, especially in circumstances where evidence of identity depends upon a fleeting or suspect impression of physical appearance, are self-evident. In a submission discussed in the *Report on Aboriginal Customary Law*, the Department of Aboriginal Affairs commented:

"It is especially important in Aboriginal cases to ensure that any identification parades have been carefully conducted because of the danger of witnesses depending primarily on skin colour as an identifying feature. This applies to witnesses who may use skin colour as a primary feature when identifying a person of whom they have had only a 'fleeting glimpse'. We are also concerned that court identification of Aboriginals without prior out-of-court identification could be similarly biased."¹⁹⁹

In *Collard v R* the applicant, an Aboriginal male, had been convicted of charges *inter alia* of stealing with actual violence. The prosecution case had depended almost entirely on identification evidence, which identification had been made from a photoboard. The applicant sought leave to appeal to the Court of Criminal Appeal *inter alia* on the ground that the trial judge had erred in admitting the photoboard evidence when no valid excuse or explanation for the failure to arrange an identity parade had been given.

Wallwork J held that the identification evidence should have been excluded in the exercise of the trial judge's discretion, because of the police officers' failure, without good reason, to disregard the applicant's right to be identified in a properly recognised procedure. Miller J remarked:

¹⁹⁵ [2000] WASCA 417.

¹⁹⁶ *Alexander v The Queen* (1981) 145 CLR 395 at 401 per Gibbs CJ.

¹⁹⁷ *Domican v The Queen*, (1992) 173 CLR 555 at 561 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ. See also *Pinta v R* [1999] WASCA 125.

¹⁹⁸ See also *Pinta v R* [1999] WASCA 125.

¹⁹⁹ See the discussion by Murray J in *Draper v R* [2000] WASCA 160. See also *inter alia* *Dawson v R* (1990) 2 WAR 458; *Hinson v R* (Unrep., Sup Ct WA, No 199 of 1995 (CCA), 5 June 1995; *Pinta v R* [1999] WASCA 125; *Draper v R* [2000] WASCA 417.

¹⁹⁹ ALRC, *The Recognition of Aboriginal Customary Laws*, n 152, para 613, p 452.

"[T]he time has come for the court to make it quite clear that the continued use of the photoboard in lieu of identification parades is unacceptable."²⁰⁰

His Honour concluded that the trial judge's direction about the shortcomings of photoboard evidence was inadequate, and the Court, by majority, allowed the appeal²⁰¹.

Note: in *Roser v R* [2001] WASCA 190 the Court of Criminal Appeal held that there was no rule that trial judges must direct juries to the effect that an identification parade should always be held, and only in exceptional cases is a trial judge required to direct a jury that it would have been better to hold an identification parade.

7.4.7 Expert Evidence: Aboriginal Language Patterns

Authorities:

- *Condrón v R*²⁰².

General Principles: in a criminal trial an expert may be permitted to give evidence upon the vocabulary, literacy and comprehension skills of an accused²⁰³.

In *Condrón v R* the Queensland Court of Criminal Appeal accepted expert evidence on the nature of Aboriginal (Non-Standard) English, in assessing the reliability of a confession made by the Aboriginal appellant²⁰⁴. In that case the appellant had been charged with the murder of an Aboriginal woman: the only evidence against him was his own detailed, signed confession. Shortly after the murder another man confessed to killing an Aboriginal woman at the relevant time, but later repudiated that confession. At trial the appellant pleaded not guilty, and disputed the veracity of the signed confession, but was convicted.

Five months later significant fresh evidence became available (the deceased had been seen alive at a time on the date in question when the appellant was in police custody), but an appeal on that ground failed. Ultimately the Attorney-General referred the matter back to the Queensland Court of Criminal Appeal. At the appeal Dr Diana Eades, a socio-linguist specialising in Aboriginal English, was permitted to give expert evidence relating to the appellant's speech patterns. Dr Eades found marked differences between those patterns and the patterns appearing in the appellant's signed confession. The confession contained unsupported verbal auxiliaries such as "Yes, I did" and "Yes, I was", which grammatical structures are inconsistent with Aboriginal English. Further, the appellant consistently used only simple responses such as "Yes" and "No" to similar oral questions.

Another expert, Walkley, gave evidence for the second time of the appellant's intellectual and other difficulties.

²⁰⁰ *Collard v R*, n 195, para 73.

²⁰¹ Kennedy J, dissenting, held that there was no requirement for the trial judge, in the exercise of his Honour's discretion, to disallow the photoboard identification: at paras 14-16.

²⁰² *Condrón v R* (1990) 49 A Crim R 79.

²⁰³ *Murphy v The Queen* (1989) 167 CLR 94 at 112.

²⁰⁴ See also *Kina v R* (Unrep., Sup Ct Qld, CCA, 29 November 1993) cf *Stuart v The Queen* (1959) 101 CLR 1; *Condrón v R* (1987) 28 ACR 261. The latter cases are discussed *inter alia* by D Eades 'Aboriginal English on Trial: the Case for Stuart and Condrón' in D Eades, ed, *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*, UNSW Press, 1995.

In relation to the evidence of the expert witnesses, Thomas J stated:

“The admissible expert evidence...is that of Mr Walkley and Dr Eades. It includes the evidence already given by Mr Walkley concerning the submissiveness, suggestibility and limited intellectual grasp of Condrón, and various tests performed by Dr Eades including their observations of Condrón’s speech habits and personality to the extent that they may be relevant to the making of admissions or their reliability.”²⁰⁵

His Honour concluded that the experts’ combined observations were not of “overpowering weight”²⁰⁶ such as to necessarily render the confession unsafe or unreliable. Nevertheless, those observations cast doubt upon the reliability of the confession, particularly in the light of the other evidence which had become available. On the basis of the totality of the evidence, the Court ordered that the appellant’s conviction be quashed.

7.4.8 Expert Evidence: “Battered Wives Syndrome”

Authorities:

- *Director of Public Prosecutions v Secretary*²⁰⁷;
- *Kina v R*²⁰⁸.

General principles: the courts treat with caution expert evidence in respect of state of mind of an accused who is charged with a serious crime on the basis of a pre-existing abusive relationship, characterised by cycles of violence, reconciliation and underpinned by fear (“battered wives syndrome”)²⁰⁹. In *Osland v R Kirby J* stated:

“[Battered wives’ syndrome] is not a universally accepted and empirically established scientific phenomenon.”²¹⁰

In *Director of Public Prosecutions v Secretary* the accused, an Aboriginal woman from a traditional community in the Northern Territory, had been charged with the murder of her husband. The accused had obtained a restraining order against her victim, in respect of whom there was evidence of repeated violence, both towards the accused and her children. The victim had a history of alcohol and drug abuse, and the police had removed registered guns from his possession. Shortly before the accused had shot the victim, he had assaulted her and threatened further assaults. He had then fallen asleep. The accused stated in evidence that she feared he would kill her when he awoke. During the trial, the question of whether the issue of self-defence should be left to the jury arose. The relevant provision of the *Criminal Code* (NT) required that the accused have a “reasonable apprehension” of suffering death or grievous bodily harm from the victim.

During the trial a consultant psychiatrist gave evidence of the cycle of physical, sexual and emotional violence which, together with the “learned helplessness” of the victim, constitutes the phenomenon described as “battered wives syndrome”.

²⁰⁵ *Condrón v R*, n 202, at 90.

²⁰⁶ *Condrón v R*, n 202, at 91.

²⁰⁷ (1995) 129 FLR 39.

²⁰⁸ Unrep., Sup Ct Qld, CCA, 29 November 1993.

²⁰⁹ *Osland v The Queen* (1998) 197 CLR 316.

²¹⁰ *Osland v The Queen*, n 209, p 375. Note that Kirby J reviewed the literature on “battered wives syndrome” in depth: see pp 370-382.

Kearney J held that it would be impossible for a reasonable jury to hold on the view of the evidence most favourable to the accused that at the time she shot the victim, she reasonably could have apprehended that she would suffer death or grievous bodily harm when he awoke. His Honour concluded that it had not been clearly established that the “novel scientific evidence” of “battered woman syndrome” which had been tendered had not established that it was a “recognised area of expertise for forensic purposes, as opposed to therapeutic purposes. However, since the Crown had not objected to that evidence being tendered, His Honour accepted it as being properly before the jury²¹¹.

In *R v Kina* the facts giving rise to the appeal were similar to those in *Director of Public Prosecutions v Secretary*. In *R v Kina* the appellant, an Aboriginal woman, appealed against her conviction on a charge of the murder of her husband. During the three years leading up to the killing, the deceased had subjected the appellant to frequent physical and sexual assaults. Prior to the killing the deceased had threatened to anally rape the appellant's 14 year old niece. The appellant did not give evidence in the trial, nor was evidence led as to the factual background to the killing.

The Queensland Court of Criminal Appeal found that crucial matters had not been raised in evidence, and that difficulties of communication had existed between the appellant and her white, male lawyers. Fitzgerald P and Davies JA commented:

"In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:

- (i) her [A]boriginality;
- (ii) the battered woman syndrome;
- (iii) the shameful (to her) nature of the events which characterised her relationship with the deceased.

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions upon the basis of proper advice."²¹²

Those comments indicate that their Honours accepted that evidence of the “battered woman syndrome” was admissible and relevant. The Court of Criminal Appeal held that the appellant's conviction be quashed, on the grounds that a miscarriage of justice had occurred.

7.4.9 Gender-Restricted Evidence

²¹¹ *Director of Public Prosecutions v Secretary*, n 207, at 72.

²¹² *Kina v R*, n 188, at 31, quoted in *CJC, Aboriginal Witnesses Report*, n 168, p 97.

Authorities:

- *State of Western Australia v Ben Ward*²¹³.

As indicated earlier, in traditional Aboriginal communities men and women possess knowledge which, as part of customary law, is not to be divulged to members of the opposite sex. In order for gender-restricted knowledge to be put in evidence before the court, the gender of all participants in court proceedings must be considered.

Federal Court judges have accepted that it may be appropriate in native title proceedings that the giving of certain evidence be gender-restricted. In *State of Western Australia v Ben Ward* (interlocutory proceedings in the Miriuwung-Gagerrong, or Lake Argyle Case) the Full Court of the Federal Court considered orders made by Lee J endorsing a restriction of evidence protocol²¹⁴. Lee J had accepted the applicants' submissions that occasions would arise during on-country hearings which would prevent men and women speaking about certain matters relating to Aboriginal law, ceremony and ritual in the presence of each other. His Honour had ordered that upon application by any party, on no less than 28 days notice, restrictions would apply to the taking, recording and dissemination of evidence on a gender-restricted basis.

On appeal, the Full Court identified the competing interests which existed: on the one hand was the public interest in open justice, and the requirement that a party to proceedings *prima facie* be entitled to access all evidence produced at trial; on the other hand were the private interests of the parties - the probable effect of disclosure of secret matters, and the effect of orders restricting the taking of evidence. Hill and Sundberg JJ (Branson J concurring in a separate judgment) concluded that only where the private interests outweigh the public interest might it be appropriate to make an order restricting publication of the evidence to a particular class of persons. Their Honours held that the Federal Court was empowered to prevent particular counsel representing a party for the purpose of protecting the integrity of the judicial process and ensuring that justice be done, and declined to disturb the substance of the orders made by Lee J. The High Court refused special leave to appeal from the decision of the Full Court.

There appears to be no reason why the inherent discretion of a judge to ensure the fairness of criminal proceedings could not extend to the making of orders which restrict the taking and publication of evidence on a gender-restricted basis.

7.4.10 Suppression of Names from Publication

²¹³ (1997) 76 FCR 492.

²¹⁴ Pursuant to s 50 *Federal Court of Australia Act 1976* (Cth) the Federal Court may make orders restricting the publication of evidence *inter alia* in order to prevent prejudice to the administration of justice.

Authorities:

- *R v Bara Bara*²¹⁵.

General Principles: In Western Australia a judicial officer is empowered to prohibit the publication of the particulars of any particulars of criminal proceedings, subject to certain specified exceptions²¹⁶.

In *R v Bara Bara* the Aboriginal accused had pleaded guilty to a charge of manslaughter. The accused applied for orders prohibiting from publication the deceased's victim's name. Section 57 *Evidence Act 1939* (NT) empowered a court to make an order forbidding the publication of any evidence which was "likely to offend against public decency".

Mildren J stated that where an accused pleads guilty, the facts orally presented to the court from the bar table constitute "evidence" for the purposes of s 57 of the *Evidence Act 1939* (NT). Something which is "likely to offend against public decency" for the purposes of that statute was not limited to blasphemy, obscenity, profanity or sexual indecency: it included that which would be regarded by the public, or a significant section of the public, as lacking in propriety and good taste, or as unbecoming or unseemly. His Honour took judicial notice of the fact that it is extremely offensive to most Aboriginal people in Aboriginal communities in the Northern Territory, and contrary to most tribal customs, to speak of a dead man by his name. Accordingly, Mildren J ordered that the name of the deceased be suppressed on the grounds that it was likely to offend against public decency within the terms of the statute.

²¹⁵ (1992) 87 NTR 1. See also *Quinn v Given* (1980) 29 ALR 88.

²¹⁶ Section 399A *Criminal Code*. See also ss 65, 66 and s 101C(c) *Justices Act 1902* (WA); *R v Craig* [1989] 5 WAR 107.

7.5

CONFESSIONS AND ADMISSIONS

7.5.1 Admissibility of Confessional Statements

Authorities:

- *The Queen v Foster*²¹⁷;
- *Dixon v McCarthy*²¹⁸;
- *Bolton v Nielsen*²¹⁹.

General principles: The fundamental principles relating to the admissibility of confessional statements include first, that a confessional statement or admission must be made voluntarily, that is, "in the exercise of a free choice to speak or be silent"²²⁰. The Crown bears the burden of establishing that a confession is voluntary: a confession is presumed to have been made voluntarily unless there is something to suggest otherwise²²¹. Once any question relating to the voluntariness of a confessional has been raised, however, the onus is upon the Crown to establish, on the balance of probabilities, that the relevant statement was made voluntarily²²². Secondly, a confession which is made voluntarily may still be excluded in exercise of the court's discretion: the court must ask itself is whether in the circumstances it would be unfair to use the accused's own statement against himself²²³.

In *The Queen v Foster* the appellant, a semi-literate Aboriginal person, had been convicted of the offence of maliciously setting fire to a public high school building. The appellant had signed a written statement after having been unlawfully arrested, detained in police custody and subjected to prolonged involuntary questioning. The appellant claimed that during the interrogation the police had threatened to "bash him up" and to "pick up" his younger brother. The decision of the trial judge to allow evidence of a confessional statement to be put to the jury was upheld by the New South Wales Court of Criminal Appeal. The appellant obtained leave to appeal to the High Court.

The High Court considered that a real issue as to voluntariness arose, because the interrogation of the appellant had carried with it the threat of continued unlawful detention until all questions were answered to the satisfaction of the interviewing police. The Court held that in the all circumstances of the detention and interrogation, the confession should have been excluded in the exercise of the trial judge's discretion. McHugh J expressed the view that it was likely that a person of the appellant's age, background, life experience and fragile emotional state at the time of interrogation would have been rendered very susceptible to psychological pressure from his interrogators²²⁴.

²¹⁷ (1993) 113 ALR 1.

²¹⁸ [1975] 1 NSWLR 617.

²¹⁹ (1951) 53 WALR 48.

²²⁰ *MacPherson v The Queen* (1981) 147 CLR 512 at 519.

²²¹ *Hough v Ah Sam* (1912) 15 CLR 452. The onus of proof is thereupon discharged: *Attorney-General (NSW) v Martin* (1909) 9 CLR 713.

²²² *Wendo v The Queen* (1963) 109 CLR 559.

²²³ *The King v Lee* (1950) 82 CLR 133 per Latham CJ, McTiernan, Webb, Fullagar, Kitto JJ at 154. See also *Van der Meer v The Queen* (1988) 62 ALJR 656 per Wilson, Dawson and Toohey JJ at 666.

²²⁴ *The Queen v Foster*, n 217, at 14-22.

It has been held that great care must be taken in admitting into evidence an admission of confession of an Aboriginal child. In *Dixon v McCarthy*, a case involving five young Aboriginal accused persons, Yeldham J stated:

"In view of a child's reduced capacity of understanding his rights and his reduced capacity to protect himself in the adult world, the court must be particularly diligent in considering voluntariness of a confession by a juvenile accused."²²⁵

In *Bolton v Nielsen* two Aboriginal men who had been convicted with two others of the theft of a car battery appealed against their convictions. There had been no evidence implicating those two defendants, who had been arrested merely on the basis of an overheard conversation. After initially protesting their innocence, the two accused ultimately had confessed to the theft. On appeal to the Supreme Court, Dwyer CJ emphasised the need for vigilance in admitting the confessional evidence of Aboriginal persons leading traditional lifestyles since Aboriginal notions of "guilt" are often collective ones deemed in terms of the Anglo-Australian legal system to be inappropriate²²⁶. His Honour upheld the appeal.

7.5.3 The Anunga Guidelines

Authorities:

- *R v Anunga*²²⁷;
- *Coulthard v Steer*²²⁸;
- *Gudabi v R*²²⁹.

In 1976, in *R v Anunga* Forster J, with the approval of Muirhead and Ward JJ, formulated nine guidelines (Anunga Guidelines) intended to reduce the difficulties experienced by Aboriginal people in police interrogations²³⁰. Forster J stated that several reasons existed for the formulation of guidelines:

- (a) Aboriginal people often do not understand English words or concepts. Many such words or concepts are incapable of translation into Aboriginal languages; some English words or concepts which are capable of a literal translation, may mean something else in Aboriginal languages;
- (b) many Aboriginal persons are essentially courteous and polite and will answer a question in the manner which they suppose the questioner wishes;
- (c) many Aboriginal people find the police caution bewildering: "because, if they do not have to answer the questions, why then are the questions being asked?"²³¹

²²⁵ *Dixon v McCarthy*, n 218, at 640.

²²⁶ *Bolton v Nielsen*, n 219, at 51-52.

²²⁷ (1976) 11 ALR 412.

²²⁸ (1981) 12 NTR 13.

²²⁹ (1984) 52 ALR 133.

²³⁰ Note that the *Crimes Act 1914* (Cth) makes special provision for the investigation and questioning of Aboriginal persons suspected of having committed offences against Commonwealth laws.

²³¹ *R v Anunga*, n 227, at 413.

The Anunga Guidelines may be summarised as follows:

- (1) When an Aboriginal person is being interrogated as a suspect, unless he is fluent in English as the average white man of English descent, an interpreter....should be present.
- (2) When an aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" be present....The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported.
- (3) Great care should be taken in administering the caution....Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent....
- (4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not is not suggested in any way.....
- (5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources.....
- (6) Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen it is particularly important that they be offered a meal...when a meal time arrives. They should also be offered tea or coffee.....[or] a drink of water. They should be asked if they wish to use the lavatory....
- (7) It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness....
- (8) Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance...
- (9) When it is necessary to remove clothing for forensic examination or the purposes of medical examination, steps must be taken forthwith to supply substitute clothing...

Forster J acknowledged that Anunga Guidelines might be criticised from two perspectives: certain persons might find them to be unduly paternalistic and therefore offensive; others might consider them to be unduly favourable to Aboriginal accused persons. His Honour commented:

"[The guidelines] are designed simply to remove or obviate some of the disadvantages from which aboriginal people suffer in their dealings with police. These guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements are excluded."²³²

In *Coulthard v Steer* Muirhead J commented upon the difficulty of applying the Anunga Guidelines in practice²³³. His Honour emphasised that the Anunga

²³² *R v Anunga*, n 227, at 415.

²³³ His Honour commented "to get the whole lot of the *Anunga's* case applied in one case, to get them all done perfectly, is about as easy as it is to work out one of those cube blocks that they are selling around town at the moment." (at 19).

Guidelines were not absolute and do not apply to every situation in which Aboriginal people are questioned:

"Many in this Territory are not subject to the disadvantages which the Court had in mind when the rules were pronounced and the Chief Justice did not suggest that they were universal."²³⁴

In *Gudabi v R* the Full Court of the Federal Court commented that the Anunga Guidelines are not rules of law, breach of which, or compliance with which, will be determinative of the admissibility of an admission or confession. Woodward, Sheppard and Neaves JJ emphasised that the legal question at issue remains whether the confession was voluntary according to ordinary principles of law²³⁵. Moreover, their Honours pointed out that the application of the Anunga Guidelines, formulated in 1976 in a social climate markedly different from that obtaining in 1984, must be dynamic:

"...while the basic principles underlying the Anunga guidelines remain valid, their application must reflect changes in society."²³⁶

Their Honours also emphasised that the choice of a "prisoner's friend" must be left entirely to the choice of the person to be interviewed, that person having been told that the role of the prisoner's friend is that of support or help.

7.5.3 The Application of the Anunga Guidelines in Western Australia

Authorities:

- *Gibson v Brooking*²³⁷;
- *Brooking v Dunlop*²³⁸;
- *R v Williams*²³⁹;
- *Webb v R*²⁴⁰;
- *R v Nandoo*²⁴¹;
- *R v Njana*²⁴².

In *Gibson v Brooking* Wallace J stated:

"[The Anunga Guidelines] are not law in the State of Western Australia and are not absolute in any event."²⁴³

In *Brooking v Dunlop* an Aboriginal youth appealed against his conviction in the Derby Children's Court of a charge of rape. The main ground of appeal was that the magistrate had erred in law, and in the exercise of his discretion, by admitting into evidence certain confessional statements. The appellant had not had the benefit of

²³⁴ *Coulthard v Steer*, n 228, at 17.

²³⁵ *Gudabi v R*, n 229, at 199.

²³⁶ *Gudabi v R*, n 229, at 199. See also *inter alia R v Toby Martin* (1991) 105 FLR 22; *R v Weetra* (1993) 93 NTR 8; *R v Mangaraka* (Unrep. Sup Ct NT, Martin J, No 29 of 1993, 9 June 1995); *R v Echo* (1997) 136 FLR 451.

²³⁷ [1983] WAR 70.

²³⁸ Unrep., Sup Ct WA, Pidgeon J, Appeal No. 365 of 1982.

²³⁹ (1992) 8 WAR 265.

²⁴⁰ (1994) 13 WAR 257.

²⁴¹ Unrep., Sup Ct WA, Owen J, No 130 of 1996.

²⁴² (1998) 99 A Crim R 273.

²⁴³ *Gibson v Brooking*, n 237, at 75.

a "prisoner's friend" while being questioned. Pidgeon J considered that the relevant consideration was s 49 *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPAA) rather than the Anunga Guidelines:

"In my view it would not have been correct for His Worship to apply the "Anunga" guidelines as though they were a set of rules having some force of law in this State. The law to be applied in this case is s 49 [Aboriginal Affairs Planning Authority Act 1972 (WA)] which sets out a specific requirement in addition to the common law rules...."²⁴⁴

However, His Honour considered that in applying s 49 AAPAA, guidance might be obtained from the Anunga Guidelines:

"[Section 49 AAPAA]... was enacted before the Anunga case but it aims at the same result as that considered by Forster J and the giving effect to it, in certain cases, may require similar principles to be considered. However, so long as s 49 is considered and given effect to, it would not matter in what way it was done and the circumstances of the particular case would be a determining factor to decide what way it ought to be done. Some of the guidelines expressed in the Anunga case may be of assistance in deciding, in a particular case, whether the evidence is admissible or whether there is unfairness. Circumstances surrounding an accused person may in a particular case may make it necessary, if practical, to have present a "prisoner's friend" in order to establish that the confession was voluntary."²⁴⁵

[Note that the operation of s 49 AAPAA is discussed in 7.2, above.]

In *R v Williams* (discussed above at 7.2) the Crown appealed against a decision of the trial judge not to admit into evidence the confession of the respondent, an Aboriginal man who had been charged with the wilful murder of his de facto wife. It appeared that at the time of the killing, the respondent, who had a low IQ, and suffered from brain damage, had been drinking heavily. The trial judge had ruled that the confession had been made voluntarily, but had excluded it in the exercise of his discretion. On appeal, Rowland and Owen JJ indicated that the Anunga Guidelines may form a useful yardstick in considering the fairness of using an accused's confessional statement against him:

"Most of the cases in the area, including *R v Lee*...*McDermott v The King*...*Cleland v The Queen*...and *Van der Meer v The Queen*...involve a challenge to the propriety of the methods employed by the police in obtaining the confession, using the term 'propriety' in the sense of 'procured by unlawful or improper conduct'. Typical of such challenges is an allegation of threat or inducement made by the interviewing officers or something akin to a departure from the *Judges' Rules* or the *Anunga Rules*."²⁴⁶

Rowland and Owen JJ stated that where a confessional statement is found to be reliable, the onus of establishing unfairness, of necessity, is high²⁴⁷. Their Honours examined the circumstances in which the interrogation had taken place, and concluded *inter alia* that since the interviewing officers had not known the respondent, they were not aware of his cognitive dysfunction or how he usually behaved. It appeared that the officers were not aware that the respondent had been drinking, notwithstanding their noticing his erratic behaviours such as head-banging.

²⁴⁴ *Brooking v Dunlop*, n 238, at 5-7.

²⁴⁵ *Brooking v Dunlop*, n 238, at 7-8.

²⁴⁶ *R v Williams*, n 220, at 239.

²⁴⁷ *R v Williams*, n 239, at 274.

Moreover, their Honours held that the fact that the accused was an Aboriginal person should have made the officers especially vigilant in the interviewing process:

"Counsel referred to the fact that the respondent had a low IQ compounded by brain damage and the evidence of the psychologist that this and alcohol could affect both memory and thought processes and, as well, the fact that the accused was an Aboriginal whose confessional statements should usually be received with some vigilance by persons endeavouring to obtain statements which might incriminate him."²⁴⁸

Rowland and Owen JJ also expressed the view that cultural factors and the accused's background are considerations which may be taken into account in considering the fairness of admitting into evidence of a confessional statement made voluntarily. Their Honours also referred to the statutory requirements of s 49 AAPAA:

That the cultural circumstances and antecedents of the respondent could be relevant factors to be taken into account is implicit in the dicta of the High Court in *R v Lee* [1950] 82 CLR 133] (at 159) and in s 49 of the *Aboriginal Affairs Planning Authority Act 1972* as amended."²⁴⁹

Their Honours noted that the police had failed to take a blood test from the respondent at the time of the interview. Their Honours found that, as a result of this failure, the respondent had been deprived of evidence that which might have been relevant at his trial concerning his physical condition at the time that the confessional statements were taken. That disadvantage was exacerbated by matters including *inter alia* the respondent's low IQ and brain damage.

By majority, the Court of Criminal Appeal dismissed the Crown's appeal. Franklyn J (who dissented from that finding) agreed with Rowland and Owen JJ that cultural disadvantages and antecedents may be taken into account in considering the fairness of admitting a confessional statement which has been made voluntarily:

"I do not quarrel with the proposition enunciated by the majority that the cultural circumstances and antecedents of a respondent may be relevant factors when determining the issue of 'unfairness' and that a person may be Aboriginal and/or affected by drink or other causes may be consequently relevant. However, as I understand the law they do not lead to a presumption of unfairness. They are matters to be weighed in the consideration of all of the evidence relevant to the question."²⁵⁰

The question of the admission of a confessional statement and the applicability of the Anunga Guidelines was also considered in *Webb v R* (also discussed above at 7.2). In that case the appellant, an Aboriginal male of low intelligence, who was vision-impaired, had been convicted of aggravated sexual assault. At trial the appellant's counsel had informed the presiding Commissioner that he intended to challenge an oral admission, and a confession in a written record of interview, which the Crown was seeking to admit into evidence. A voir dire was held, after which the Commissioner ruled that that the confessional evidence was admissible. However, no reasons were given for that ruling. On appeal it was argued *inter alia* that the Commissioner had failed to consider the voluntariness of the confession and

²⁴⁸ *R v Williams*, n 239, at 275.

²⁴⁹ *R v Williams*, n 239, at 275.

²⁵⁰ *R v Williams*, n 239, at 284.

whether, in all the circumstances, the admission of the confession was unfair to the appellant²⁵¹.

Malcolm CJ approved the statements of Rowland and Owen JJ in *R v Williams* as to the applicability of the Anunga Guidelines:

"In determining the issues which were before him I consider that the learned Commissioner should have taken into account the guidelines (sometimes referred to as the *Anunga* rules) contained in the judgment of Forster J in *R v Anunga*.... In this respect, as Wallace J remarked in *Gibson v Brooking* [1983] WAR 70 at 75, I agree that the *Anunga* rules do not have the force of law in Western Australia and are not absolute. They are essentially guidelines indicating what is required by way of fairness when a person of Aboriginal descent is being questioned by police."²⁵²

In *R v Nandoo* (a case involving the alleged commission of a sexual offence by an Aboriginal person at the Mowanjum community near Derby) Owen J reiterated that although the Anunga Guidelines do not constitute binding law, they remain important:

"[The Anunga Rules] have the stated object of encouraging complete and mutual understanding between the police and Aboriginal persons in an interview situation. The purpose of the requirements laid down in *R v Anunga*....is to attempt to ensure that any confessional material is obtained fairly, and as a result of the accused person's choice to speak or to remain silent. For that reason they are certainly regarded as a very convenient and desirable guide when looking to the circumstances in which confessional material is obtained."²⁵³

In *R v Njana* counsel for the accused sought to exclude two videotaped confessions from evidence. The accused, an Aboriginal man, was alleged to have wilfully murdered his partner at Balgo Hills after engaging in petrol-sniffing. Scott J found that although the accused was a person from a traditional community, he had been "well assimilated" into Western culture and had an adequate working knowledge of English²⁵⁴. Scott J discussed the operation of the Anunga Guidelines and commented:

"In my opinion, the Anunga Rules need to be administered, having regard to the particular circumstances and they are not intended to be a rigid set of guidelines to be enforced according to their tenor. The circumstances in which tribal Aboriginal people are liable to be interrogated will vary considerably and from place to place and time to time and provided the police are conscious of their overriding obligation as to fairness, a rigid compliance with the Anunga Rules is unnecessary."²⁵⁵

Scott J stated, further:

"I agree that the Anunga Rules should be used as guidelines within the flexibility dictated by commonsense and should be adhered to where practicable. In administering those rules it is important to bear in mind the obligations of the police with respect to the investigation of crime."²⁵⁶

²⁵¹ A further ground was non-compliance with the requirements of s 49(1) AAPAA.

²⁵² *Webb v R*, n 240, at 259. See also at 266 per Ipp J.

²⁵³ *R v Nandoo*, n 241, at 7.

²⁵⁴ *R v Njana*, n 242, at 276.

²⁵⁵ *R v Njana*, n 242, at 279.

²⁵⁶ *R v Njana*, n 242, at 280.

His Honour found that although the accused was a person from a traditional community, he had assimilated into Western culture and had an adequate working knowledge of English. He was aware of the nature and the significance of the admissions which he had made at the first interview. Accordingly, it was not necessary to exclude admissions made during the course of that interview. However, evidence of the second interview was excluded, as the accused had indicated his desire not to speak to the police at that point.

NOTE: The Anunga Guidelines have been incorporated into the Western Australian Police Commissioner's Orders and Procedures Manual and are taught and reinforced at all levels of the Police Service²⁵⁷.

²⁵⁷ Those levels include recruit level (Recruit Training Package), In-Service Promotional Packages; the General Investigator Course; the Detective Training Course. The Guidelines are also taught in Police Confessional Evidence Training programs: Electronic communication from Sgt Bill McInerney, Aboriginal Affairs Directorate, Police Services, 31 May 2001.

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