

APPENDIX TO CHAPTER SEVEN

Criminal Proceedings

1. Criminal Proceedings: Comments by the Hon Justice KennedyA7:1
2. Criminal Proceedings: Comments by the Hon Justice MurrayA7:1
3. Criminal Proceedings: Comments by the Hon Justice Templeman.....A7:2
4. Criminal Proceedings: Comment by the Hon Justice Hasluck...A7:3
5. Directions to Jury: Her Honour Judge YeatsA7:4
6. Directions to Jury: Queensland Criminal Justice CommissionA7:6
7. Report from the Director of Public Prosecutions for WA.....A7:9
8. Aboriginal Legal Service of WA (Inc.): Submissions.....A7:11

Criminal Proceedings

1. Criminal Proceedings: Comments by the Hon Justice Kennedy

“[I suggest] that there are occasions where it would be beneficial for an accused Aboriginal to have a relative sit with him or her in the dock. I did experience some time ago a situation where an Aboriginal youth spent the whole of a three-day trial without lifting his eyes from the floor of the dock. I am sure it would have been helpful for him to have had support close by. In my experience Aboriginal persons very rarely give instructions to their counsel as to factual matters arising in their trial, but it can sometimes be of great importance in the conduct of the trial for them to provide their counsel with information which may challenge the evidence put forward by the Crown. This may be assisted by having the suggested support.”

2. Criminal Proceedings: Comments by the Hon Justice Murray

“[A need exists] for care in relation to such things as interpretation of evidence, culturally sensitive areas of fact (particularly references to deceased persons) and the need in a variety of circumstances to take care that the communication process in the courtroom does not result in misunderstandings. I have in mind, of course, such things as the expression of distance in terms of time and matters of that kind.

In my court, of course, these matters generally arise in cases which involve juries and in my experience they may be effectively handled when the prosecutor, defence counsel and/or a knowledgeable field officer, and the trial judge are fully acquainted with the potential problem and ensure that the jury understands the difficulty. There can, as you will know, be difficulties in that the communication process between a witness and the court may be impeded, not only by the incapacity to speak of certain matters in the presence of particular individuals who may be in court, perhaps in the public gallery, members of the opposite sex, or members of particular skin groups, but also by simple shyness.

Further, difficulties may arise in respect of the manner in which questions are framed, particularly in cross-examination if a rather aggressive form of putting propositions of fact to the witness for agreement is used. Again, that is a problem which may be avoided by the skill of the advocate, but if the judge detects that a problem has arisen, he may draw it to counsel's attention and ask that the questions be re-framed in a more non-leading manner.”

3. Criminal Proceedings: Comments by the Hon Justice Templeman

[In respect of the practical operation of s 49 *Aboriginal Affairs Planning Authority Act 1972* and of juries in circuit courts]:

“[A] practical difficulty..... arose when a young Aboriginal woman charged with murdering her mother indicated through her counsel that she intended to plead guilty to manslaughter at the commencement of the trial. This was a plea which the Crown was prepared to accept.

When the accused was brought into court under the scrutiny of a jury panel, counsel and judge, she was apparently overcome by the proceedings and remained mute. She would not answer any question which I asked of her in an attempt to establish understanding of the significance of the plea of guilty.

Faced with that difficulty, I explained to the jury panel the extent of my obligation under s 49 and said that I proposed to adjourn to my Chambers with the accused, counsel for the defence and prosecution and my Associate, in order to question the accused person in a less formal situation – at least without our wigs on.

Even then, it took a considerable time for me to be satisfied that the accused understood what was going on. I then adjourned back into Court where I explained what had happened, took the plea of guilty to manslaughter and discharged the panel.

My concern in all of this was not the time it took to ensure compliance with s 49. It was that I had a jury panel of some 40 persons wasting their time in court in a circuit town when most of them had much better things to be doing.

Secondly, had I not been satisfied under s 49, it would have been necessary for the accused to stand trial for murder..... I could not then have conducted the trial with a jury drawn from the panel. That is because they would have known at least that the accused had been advised to plead guilty to manslaughter. The result would therefore have been an inevitable delay until the next circuit with the accused spending a further period in custody on remand.

The lesson in all this, is to ensure that an Aboriginal person who has pleaded not guilty should receive advice at the earliest opportunity so that if there is to be a change of plea it can be dealt with without the need to assemble a jury panel. Apart from the cost of so doing, the inconvenience to people in a circuit town is, as I have noted above, quite considerable.

There is also the point, made to me quite forcefully by the Clerk of the Circuit Court, that when trials are aborted, for whatever reason, it reflects very badly on the judicial system. Potential jurors in country districts are much more likely to be co-operative if they think that the system is working efficiently. All too frequently, they perceive a waste of time and money.”

4. Criminal Proceedings: Comment by the Hon Justice Hasluck

“[As] President of the Equal Opportunity Tribunal for 10 years...[I] had occasion to observe the impact of legal procedures upon Aboriginal complainants and witnesses.

[M]ost of my observations would simply confirm what is, presumably, well-known to you from your previous inquiries, namely, that Aboriginal witnesses are often discomforted by the process of giving formal testimony, especially while under cross-examination.

I was always of the belief that the comparatively informal setting at the Equal Opportunity Tribunal, whereby the parties and their witnesses simply sat around an oval-shaped table, went some way to ameliorating the inhibitions which might otherwise have deterred an Aboriginal witness from speaking frankly. Members of the tribunal were also seated at the table on the same level as the participants and, again, with a view to creating an informal mood, we endeavoured to ensure that all exchanges were conducted in a conversational tone.

I would like to see something of this credo reflected in the more formal setting of the higher courts and in a benchbook of the kind you are presently working on, but do not have any specific recommendations as to how this thought is to be carried into effect. One has to recognise that in the higher courts, where the allegations are more serious, and there is generally more at stake, the processes are necessarily of a different kind and the courtrooms have to be laid out with an eye to security and the requirements of the various participants, including jurors.”

5. Directions to Jury: Her Honour Judge Yeats

[These are my directions to a jury considering aggravated burglary charges against an Aboriginal woman. None of the jurors appeared to be of Aboriginal descent. The accused woman was acquitted.]

Finally, ladies and gentlemen, there is a very important aspect of your duty. You must act with complete impartiality, without letting matters of prejudice or sympathy affect your judgment. We are all human beings and all of us have prejudices and all of us have sympathies. What is asked of you as a juror is to recognise those prejudices and sympathies and put them aside during your deliberations. We know that in Western Australia, in Perth, there is prejudice against Aboriginal people among some parts of the population. I think we all know of that. You may find that some of the evidence in this case touches issues that may give rise to prejudice. You have had evidence of violence towards Aboriginal women and you have had police evidence that the accused woman's defacto partner pleaded guilty to committing this burglary. You are judging an Aboriginal woman and not a member of the non-Aboriginal community. There are no Aboriginal persons on your jury. The twelve of you who are not of Aboriginal descent are going to be making judgments in a cultural area that you are not familiar with. It is a fact that Aboriginal culture is different in some ways and you must be careful not to let any prejudices you may have about Aboriginal people intrude in an objective assessment of the evidence. It's not an easy thing, ladies and gentlemen, but I think if you recognise your own prejudices, and we know we all have them, then you can ensure that those prejudices do not interfere with your objective assessment of the evidence.

There is also of course the issue of sympathy. You have heard evidence of 10 or 11 years of violence that you may find this accused woman has suffered at the hands of [X]. I think domestic violence is something we know may occur in all parts of the community. You are asked to put aside any sympathy you may naturally feel for a person in the accused woman's position. You needed to know about this violence because it relates to her defence but you must look at her defence objectively and not just say, 'Well, the poor woman has been bashed up for 10 years and therefore I won't convict her of this offence.' You must objectively consider the evidence as it has unfolded and consider all the evidence and not let either prejudice or sympathy interfere with a proper verdict. That is not an easy thing but that is what is asked of you as jurors.

The community does expect that the twelve of you will use your commonsense when you sit as jurors. Among the twelve of you there is a wealth of life experience. You have lived longer and shorter periods. You have done different things. You have had experience with different people. Some of you may have had close experiences with Aboriginal people. Your life experience, your commonsense, those are things that you bring to bear and that give you a special wisdom that we rely on when you sit as a juror.

Her Honour Judge Yeats:

[The publicity surrounding the Gordon Inquiry into Aboriginal violence against children has had the potential of affecting jury deliberations. In a recent trial in Perth of an Aboriginal man charged with digitally penetrating a 19 month old Aboriginal child in Armadale I gave this warning to the jury: In this case two of the twelve jurors appeared to be of Aboriginal descent.]

Ladies and gentlemen, it is your duty to act with complete impartiality, complete detachment, without letting matters of sympathy, prejudice, sentiment or emotion play any part. There is an area of particular concern in this case. You are sitting in judgment on a person of Aboriginal descent. Over the past 6 months there has been a considerable amount of publicity in the newspapers in Western Australia about allegations of sexual abuse in regard to Aboriginal communities and children in those communities. Much of that publicity centred on an area quite removed from Armadale but, nonetheless, you must ensure that you do not allow any of that publicity to prejudice your judgment in this case. It is obvious that the facts in this case are very different from the highly publicised case involving a teenage girl. You must ensure that you put aside any prejudices that you may have about sexual offending by Aboriginal men. The accused man is entitled to be judged entirely on the evidence presented in this trial and on that alone and you must not allow any prejudices to sway your judgment.

6. Directions to Jury Concerning Aboriginal Witnesses (Speakers of Aboriginal English): Queensland Criminal Justice Commission

Introduction

1. I understand that the Crown intends to call a number of witnesses in this case who are Aboriginal. I understand that the accused is also Aboriginal, and that the Crown intends to lead evidence of a video-recorded record of interview which the accused had with the police.
2. You are the judges of fact in this case, it is therefore your function to decide which evidence you accept, and which evidence you reject. You, and you alone, are the judges of the facts, and anything I may later say to you about the facts is not binding upon you. However, you may be assisted by what I am about to tell you, when it comes to the Aboriginal witnesses.

Aboriginal English

3. Many Aboriginal people in North Queensland, including Aboriginal people of mixed descent, do not speak English as their first language. And many, in all parts of the State, who do speak English as their first language have learnt to speak English in a manner which is different from other speakers of English in Australia: they are speakers of Aboriginal English.
4. Aboriginal English is not the same all over the State: It ranges from "heavy" Aboriginal English to "light" Aboriginal English. Heavy Aboriginal English is harder for non- Aboriginal people to understand fully, but even with speakers of light Aboriginal English there are some important things you should be aware of. And remember that speakers of heavy and light Aboriginal English are found all over the State, even in Brisbane and even with people you may think do not look distinctively Aboriginal.

Word Meaning, Grammar and Accent

5. It is important that you listen carefully to the context in which words are used in order to prevent misunderstanding as far as possible. Sometimes ordinary English words are used by Aboriginal English speakers differently than in Standard English. Counsel will do their best to ensure that this becomes clear to you as the evidence unfolds, but you can often realise this for yourselves if you listen carefully to the context.
6. There are a number of grammatical differences between Aboriginal English and other kinds of English. For example, the verb "to be" may not be used in sentences, and all the verbs may be in the present tense, even though the context shows that is in the past or the future that is being talked about. You may also notice that pronouns, such as "he", "she" and "you", are used differently at times. Counsel will do their best to make sure that you understand what is being said, but if you are having any difficulty, please let us know immediately through the foreman that you are unsure of what the witness has been saying and counsel will try to clarify it for you.

7. Many Aboriginal people have trouble with some of the consonants used in the English language, especially *f*, *v* and *th*. *F* and *v* are often replaced with *p* or *b*, so the word 'fight' might sound like 'pight' or 'bight', and so on, and this can give rise to misunderstanding. Once again, if you have any difficulty understanding, and it is not cleared up, please put your hand up, and get the foreman's attention and tell him or her what is wrong so that we can see if the matter can be remedied.

Ways of Communicating

8. Aboriginal English speakers may also have different cultural values which affect the way they speak and behave. The things I will tell you about now are common with a wide range of speakers of Aboriginal English, even among many who speak light Aboriginal English. Remember that skin colour is not a reliable indicator of the way that an Aboriginal person communicates. Many Aboriginal cultural values and ways of communicating are strong even in places like Brisbane.
9. It is very common for Aboriginal people to avoid direct eye contact with those speaking to them, because it is considered to be impolite in Aboriginal societies to stare. On the other hand, in most non-Aboriginal societies people who behave like this might be regarded as shifty, suspicious or guilty. You should be very careful not to jump to conclusions about the demeanour of an Aboriginal witness on the basis of the avoidance of eye contact, as it cannot be taken as an indicator of the Aboriginal witness's truthfulness.
10. It is customary among many speakers of Aboriginal English to have long lapses of silence from time to time, even in everyday speech. You should be careful not to jump to the conclusion that a witness who is doing this is being evasive or untruthful about the matter he or she is being asked about. Many Aboriginal English speakers are not used to direct questioning in the way in which it is used in the courtroom, and they are used to having the chance to think carefully before talking about serious matters, so it may take time for them to adjust to this method of imparting information.
11. It is very common for witnesses to be asked questions in a form in which the answer to the question is suggested by the question itself. Lawyers call this type of question a 'leading question'. An example of such a question is one like this: 'You saw the red car hit the blue car, didn't you?' Many Aboriginal English speakers will answer 'yes' to this type of question, even if they do not agree with the proposition being put to them in the question, and even if they do not understand the question. The same applies if the proposition is put in a negative question which is a leading question. For example, if the question was 'You didn't see the red car hit the blue car, did you?', they will often answer 'no' in the same way. Such an answer should not always be taken to mean 'I agree with what you have just put to me'. This communication pattern in Aboriginal English has been documented by scholars, and it can sometimes cause difficulties, especially in the cross-examination of some Aboriginal witnesses. I will be doing my best to ensure that counsel do not exploit this cultural difference, and for this reason I may disallow some questions.
12. Similarly the answers 'I don't know' and 'I don't remember' do not always refer directly to the Aboriginal English speaker's knowledge of memory. They can be responses to the length of the interview, or to the length of the question, or to the difficulty which a number of Aboriginal people have in adjusting to the use of repeated questioning.

13. You should also be aware that many Aboriginal English speakers use gestures which are often very slight and quick movements of the eyes, head or lips to indicate location or direction.
14. Some concepts, such as time and number, are understood by Aboriginal English speakers very differently from Standard English speakers. Hopefully witnesses who do not use numbers and measurements the same way you are used to using them, will not be asked questions by counsel about those sort of things. The necessary information can be elicited in a different way. However, it may be that a witness will say that it was five o'clock, for example, or that there were six other people present at the time, and if this happens you should be aware that this may not be very reliable. I would expect counsel will try to make this clearer to you with further questioning, should this kind of thing occur.

Hearing Problems

15. Many Aboriginal people suffer from hearing problems. It has been estimated that hearing loss is as high as 40 per cent in some Aboriginal communities. It may be that if a witness has a hearing difficulty, he or she may have problems understanding questions put to them. In such a situation the witness may answer inappropriately or may ask for the question to be repeated.
16. Sometimes Aboriginal people speak very softly and are hard to hear, even with a microphone. If you are having trouble hearing the evidence, please let me know at once. Usually what happens is that counsel, who is used to this, will repeat the witness's answer, and I will do my best, as will counsel for the other side, to ensure that the witness's evidence has been repeated to you accurately.

Conclusion (Optional)

17. Aboriginal English can differ in many important ways from other kinds of English. It is not a witness's physical appearance which is relevant to the use of Aboriginal English, but the way that the witness was brought up, and the kinds of successful communication experienced by the person. I hope that this outline of some important features of Aboriginal English can help you to realise that, even if an Aboriginal person's language sounds like English, we, can't always make the same assumptions about their meaning¹.

¹ Queensland Criminal Justice Commission *Aboriginal Witnesses in Queensland's Criminal Courts*, June 1996: Appendix 4, pp A9 – A 11.

7. Report from the Office of the Director of Public Prosecutions for Western Australia, Robert Cock QC²

Jurors

This office does not have direct contact with jurors. However, it is apparent that Aboriginal people are under-represented on juries, even in country towns. So to the extent that a jury is supposed to be a cross-section of society, the Aboriginal component of society is not being proportionately reflected in juries.

Witnesses

There are significant problems with tribal Aboriginal people as witnesses. This is because they are giving evidence in an environment with which they are completely unfamiliar, so that even if they have been given a detailed explanation of court processes before they come to court, it is doubtful that they fully understand what is happening. A senior Crown prosecutor related the story of an Aboriginal woman who was to give evidence for the Crown. Although the Crown prosecutor had carefully explained what was to happen, when the witness was asked to swear the oath, she simply said "Guilty". This is a stark indication that many Aboriginal people associate the court room with pleading guilty and going to gaol.

Leading evidence from Aboriginal witnesses is often difficult because they are shy and lack self confidence with the unfamiliar court environment. Cross-examination is difficult because Aboriginal witnesses generally do not like arguing. They do not have the resources to respond to intimidating cross-examination, and so they will often simply agree with the cross-examiner. Thus, good evidence which has been led in examination-in-chief can end up being entirely undermined in cross-examination simply because the witness does not want to engage in a confrontation. These considerations apply whether the witness is a Crown witness or a defence witness.

There is a need for more suitably qualified, trained interpreters who speak the correct dialect for the particular witness, especially in the Kimberley and the Central Desert. Aboriginal witnesses should not be expected to speak English if they are not fluent in English. It seems that the Interpreter Services can provide competent interpreters for any language except traditional Aboriginal languages.

There can also be cultural problems in dealing with Aboriginal witnesses. For example, a male Crown prosecutor said that, on one occasion, after proofing a female Aboriginal witness, the female witness was reprimanded by her husband for speaking alone with another man.

² This Report was provided to the writer by the Office of the Director of Public Prosecutions for Western Australia on 10 February 2001.

Accused Persons

Again, this office does not deal directly with accused persons. However, it is apparent that in many instances not enough care is taken by police to ensure that Aboriginal accused persons understand the caution given to them in the course of video records of interview.

**A useful reference which discusses many of the issues raised above is Diana Eades, "Cross-examination of Aboriginal Children: The Pinkenba Case" (1995) 75(3) Aboriginal Law Bulletin 10. A copy is attached.*

**A useful reference on communicating effectively with Aboriginal witnesses is the Queensland Government publication, Department of Justice and Attorney- General and Department of Aboriginal and Torres Strait Islander Policy and Development, *Aboriginal English in the Courts: a handbook*, ISBN 0-7242-8071-5.*

8. Aboriginal Legal Service of WA (Inc.): Submissions

Western Australia continues to imprison Aboriginal people at an alarming rate and has the dubious honour of the highest rate of Aboriginal imprisonment in the entire country³. In 1999 an Aboriginal person was approximately 21 times more likely to be imprisoned than a non-Aboriginal person⁴ and approximately 42% of the prison population was Aboriginal⁵.

There are a great many causes for this continuing problem and a number of those causes are completely outside the scope of the criminal justice system. The ALSWA also recognises that a number of the causes are related to matters which come within the ambit of Parliament, police, prosecuting authorities and the Ministry of Justice.

However, the ALSWA submits that the courts have a legitimate role to play in reducing the rate of Aboriginal imprisonment. Any decisions of the court will of course be subject to the requirements of legislation and precedent.

There are a number of matters which effect or relate to Aboriginal people which have an impact on the court process and in particular the Aboriginal defendant's ability to have a fair hearing or trial. These matters can be broadly described as:

1. Language difficulties;
2. Cultural issues;
3. Social issues.

What is important is the need for those involved in the criminal justice system to consider these issues in every case where there is an Aboriginal person involved.

The ALSWA submits that these matters are well known and have been well researched in the past. Therefore, in its submissions for the Benchbook the ALSWA does not intend to refer to those matters and expects that they will be adequately set out in the Benchbook.

One of the most important areas where the judiciary now have exclusive control is in the recognition of Aboriginal customary law. The review by the Law Reform Commission of WA into Aboriginal customary law is welcomed and may hopefully lead to greater recognition of Aboriginal customary law.

It seems clear that the mainstream criminal justice system has been unable to adequately deal with the high incarceration rate of Aboriginal people. The ALSWA believes that it is time to try something else and there is clear case precedent to allow for the continued and greater recognition of Aboriginal customary law in the sentencing process in Western Australia.

³ Ferrante, AM, Fernandez, JA, Loh, NSN, "Crime and Justice Statistics for Western Australia: 1999" Crime Research Centre, December 2000, 138.

⁴ Ibid.

⁵ Ibid, 139-141.

Most of the case precedents consider the question of “tribal” or traditional punishment in the form of physical punishment such as spearing⁶ and when there is clear evidence that such a punishment has or will occur the courts acknowledge the principle of double punishment and allow some reduction in the punishment.

However, the consideration of non-physical forms of traditional punishment or customary law are seldom referred to or considered by the courts. There is clear precedent for such a course of action. In *Miyatatawuy* (1996) 87 A Crim R 574 the fact that an offender and her partner (who was the victim) were banished and remained at a dry community for a significant period and thereby complied with the customary law punishment imposed by the elders of that community, was taken into account as mitigation.

There is also authority for the proposition that the wishes of the community to which the offender belongs is a relevant consideration to be taken into account in the sentencing process⁷.

The ALSWA submits that the judiciary in Western Australia should consider and take into account evidence of any customary law which is relevant to an offender as well as the wishes of the community to which the offender (and the victim) may belong. On some occasions it may be impractical or cost prohibitive to hear oral evidence from some Aboriginal persons, especially those from remote areas. In *Munugurr* (1994) 4 NTLR 63 it was suggested that to overcome this problem such evidence could be presented by way of affidavit or statutory declaration. These documents could then be served on the Crown and the witnesses only called if the Crown required them for cross-examination.

The consideration of Aboriginal customary law as well as the sentencing principles which were formulated in *Fernando* (1992) 76 A Crim R are often overlooked for Aboriginal offenders in semi-urban or urban areas. It has been suggested that the principles outlined in *Fernando* are equally applicable to Aboriginal people in urban areas although the application of those principles may vary in each individual case⁸.

The ALSWA submits that there should be an increased focus on cultural and customary law matters which relate to a particular Aboriginal defendant who is before the court. This focus should not be limited to Aboriginal defendants from remote or country locations and should include those Aboriginal defendants who come from towns and the metropolitan area.

⁶ See for example *Minor* (1992) 59 A Crim R 227; *Wilson* (1995) 81 A Crim R 270; *Gordon* [2000] WASCA 401.

⁷ See *Munungarr* (1994) 4 NTLR 63 and *Mamarika* (1982) 5 A Crim R 354.

⁸ Nicholson, J “The Sentencing of Aboriginal Offenders” (1999) 23 *Criminal Law Journal* 5.