

# Practice and Procedure

## Jurisdiction

Since European settlement Aboriginal people have been subject to Australian criminal law. For many Aboriginal accused, language and cultural barriers have made criminal proceedings 'alien and incomprehensible'.<sup>1</sup> In some cases it has been argued that Australian courts do not have the power to try an Aboriginal accused.<sup>2</sup> In *Walker v The State of New South Wales*<sup>3</sup> Mason CJ rejected the plaintiff's argument that the criminal laws of New South Wales only applied to Aboriginal people to the extent to which they accepted those laws or consented to them. Mason CJ further stated that Aboriginal customary law had been extinguished by the passage of criminal legislation. Accordingly the criminal laws of each Australian state apply equally to Aboriginal and non-Aboriginal people.<sup>4</sup> The Commission agrees that the protection of all Australians, including Aboriginal Australians, requires that all people are bound by the criminal law. Nonetheless, there are procedures within the criminal justice system that may operate unfairly against Aboriginal people and fail to adequately recognise Aboriginal customary law. In this section the Commission considers improvements to the practices and procedures of criminal justice.

## Juries

The fundamental principle underlying a jury trial is the right of an accused to be judged by his or her peers.

Therefore, a jury should consist of people who are representative of the general community.<sup>5</sup> Because jurors are selected at random there is no way of ensuring that when an Aboriginal person faces trial there will be Aboriginal people on the jury.<sup>6</sup> Aboriginal people have been and continue to be under-represented as jurors. It has been observed that:

The blind refusal to acknowledge the fact that Aboriginal people rarely sit as jurors is one of the curiosities of Australian law.<sup>7</sup>

Some possible reasons for this under-representation are that there are less Aboriginal people on electoral rolls; there are problems associated with the service of jury notices; and there are long distances between remote areas and the local court.<sup>8</sup> The view of one Aboriginal commentator is that even if he was selected as a juror he 'would seek to be excused' because of his distrust and alienation from the entire criminal justice system.<sup>9</sup> It has also been noted that persons are not eligible to be jurors if they cannot understand English.<sup>10</sup> In addition, Aboriginal people may also be excluded because they are challenged by lawyers who want a non-Aboriginal jury.<sup>11</sup>

As a consequence of the under-representation of Aboriginal people on juries some accused have challenged the composition of the jury. This is known as a 'challenge to the array' and is based upon an argument that the officials have chosen an unrepresentative jury.<sup>12</sup> It has been observed that,

1. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 258.
2. *Ibid.*
3. (1994) 182 CLR 45.
4. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 1 (December 2003) 9. In 2005 it was again unsuccessfully argued before the High Court that Australian courts had no jurisdiction over Aboriginal people: see *Buzzacott v The Queen* [2005] HCA Trans 161.
5. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Carlton: The Australian Institute of Judicial Administration, 2002) [7.3.2].
6. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 38.
7. Eames G, 'Aboriginal Homicide: Customary law defences or customary lawyers' defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, prevention and control* (Canberra: Australian Institute of Criminology, 1993) 155.
8. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Carlton: The Australian Institute of Judicial Administration, 2002) [7.3.5].
9. Frankland R, 'Mr Neal is Entitled to Be an Agitator: Indigenous people put upon their country' in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (Perth: University of Western Australia, 2004) 50–57.
10. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [589]. Section 5 of the *Juries Act 1957* (WA) provides that to be eligible as a juror a person must be enrolled on the electoral roll. If a person does not understand English or has certain criminal convictions he or she will be ineligible. During the consultations it was suggested that the electoral role for ATSCIC (now disbanded) should be used to select juries: see LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 16.
11. LRCWA, *Thematic Summaries of Consultations – Aboriginal Legal Service*, 29 July 2003, 4. See also McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 260.
12. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 260.

failing some defect in the process of summoning the jury pool, there is limited scope for any successful argument based on the lack of Aboriginal jurors.<sup>13</sup>

## Jury Trials and Aboriginal People

The ALRC considered whether trial by jury is appropriate for traditional Aboriginal people.<sup>14</sup> After reviewing early literature, which contended that Aboriginal people should not be subject to a trial before a jury, it concluded that there was no evidence to suggest that juries returned unfair verdicts to Aboriginal people.<sup>15</sup> The Commission agrees with this view. It would be discriminatory to prevent an Aboriginal accused from exercising his or her right to a trial by jury. Where prejudice is a concern an Aboriginal person may seek a change of venue for the trial or apply for a trial by judge alone.<sup>16</sup> In Western Australia an accused has the right to apply for a trial by judge alone and a court has the power to make such an order if it is in the interests of justice.<sup>17</sup>

## Gender-Restricted Evidence

Gender-restricted evidence under Aboriginal customary law can cause problems for courts. Some matters under customary law can only be heard by men and some can only be heard by women.<sup>18</sup> If, during a trial, relevant evidence concerned such restricted matters a mixed jury may preclude either the prosecution or the accused from calling evidence of that kind. In Western Australia the prosecution and the accused each have five peremptory challenges. After these challenges have been exhausted either party can challenge a juror on the basis that he or she is not qualified to act as a juror or is in some way biased.<sup>19</sup> It would be virtually impossible for these challenges to result in a jury comprised of one gender.<sup>20</sup> There are two known cases

concerning gender-restricted evidence and customary law. In both cases the jury was comprised entirely of men; however, this was achieved by agreement between the prosecution and the defence.<sup>21</sup> A court has no power to order that a jury is to be comprised of one gender.<sup>22</sup>

The ALRC concluded that a court should have the discretion to empanel a jury of a particular gender provided that it was necessary to allow all relevant evidence to be heard.<sup>23</sup> The Commission agrees that where it is necessary for the proper conduct of the trial the court should have the power to order a jury to be comprised of a specific gender.

### Proposal 34

That the *Criminal Procedure Act 2004 (WA)* be amended by inserting s 104A as follows:

- (1) A court may order, upon an application by the accused or the prosecution, that the jury be comprised of one gender.
- (2) The court may only make an order under s 104A (1) if satisfied that evidence that is gender-restricted under Aboriginal customary law is relevant to the determination of the case and necessary in the interests of justice.

## Fitness to Plead

Once a person is charged with an offence a preliminary issue may be whether the person is fit to stand trial. A person may be unfit to stand trial because of mental incapacity, physical incapacity or language difficulties.<sup>24</sup> Some Aboriginal people face cultural, language and communication barriers within the criminal justice system.<sup>25</sup> As a consequence an Aboriginal accused may

13. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [592]. See *R v Grant and Lovett* [1972] VR 423; *R v Walker* (1989) 2 Qd R 79.

14. ALRC, *ibid* [586].

15. *Ibid* [588].

16. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 260. Although not related to the composition of a jury, the venue of a trial has apparently been changed because of Aboriginal customary law considerations: see Malcolm CJ 'Aboriginal People and the Criminal Justice System' (Paper presented to the Aboriginal Pre-Law Program at the University of Western Australia Law School, 1995) 12.

17. *Criminal Procedure Act 1994 (WA)* s 118.

18. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [595].

19. *Criminal Procedure Act 2004 (WA)* s 104.

20. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 38. Although a one-gender jury has been achieved through the use of challenges: see McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 261.

21. See *R v Sydney Williams* (1976) 14 SASR 1; *R v Gudabi* (Unreported, Northern Territory Supreme Court, SCC No 85/82, Forster CJ, 30 May 1983).

22. *R v A Judge of the District Courts and Shelley, Ex Parte Attorney-General* (1991) 1 Qd R 170.

23. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [595]. Philip Vincent in his background paper for this project also recommended that the *Juries Act 1957 (WA)* should be amended to permit a judge to order that a jury be comprised of persons of a particular gender: see Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 39.

24. *Eastman v The Queen* [2000] HCA 29, [59] (Gaudron J).

25. See discussion under 'Alienation from the Criminal Justice System', above pp 99–100.

not understand the proceedings, the nature of the charge or the consequences of a plea.

In *Ngatayi v The Queen*<sup>26</sup> the accused, who was charged with wilful murder, was described as a traditional Aboriginal man. It was argued that the accused was not fit to stand trial because he was incapable of understanding the proceedings and making a proper defence. The application was made pursuant to s 631 of the *Criminal Code* (WA) (now repealed). The accused wished to enter a plea of guilty and he did not understand the advice from his lawyer that because he was drunk at the time of the offence the prosecution may not be able to prove that he had an intention to kill. It was argued on behalf of the accused that in 'his law a man who kills is always guilty and there is no amelioration'.<sup>27</sup>

The majority of the High Court held that the trial judge was correct to conclude that the accused was fit to stand trial. The majority referred to two situations that may cause an accused to lack capacity to understand the proceedings. Firstly, if the accused does not understand English then an interpreter may provide the remedy. Secondly, if the accused does not understand the relevant law—provided that he or she is able to understand the evidence and provide instructions to his or her lawyer—the presence of a legal representative would suffice.<sup>28</sup>

In *Ngatayi v The Queen* the judge refused to accept the plea of guilty under s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) because the accused did not understand the consequences of a plea of guilty. The majority of the High Court considered that s 631 of the *Criminal Code* (WA) and s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) operated as a two-stage process. Before a plea was entered it must be determined whether the accused was fit to stand trial. If the accused was considered capable to stand trial and entered a plea of guilty, then s 49 came into operation.<sup>29</sup> Both of these provisions have now been repealed. It is therefore necessary to examine the current legislative provisions to determine whether

there is adequate protection for Aboriginal people who may be disadvantaged because of language and cultural barriers.

## Fitness to Plead on the Basis of Mental Impairment

The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) replaced s 631 of the *Criminal Code* (WA). This legislation only applies where an accused is unfit to stand trial by reason of mental impairment.<sup>30</sup> If the evidence suggests that the accused is not likely to be fit to stand trial within six months the accused may be kept in custody until released by the Governor.<sup>31</sup> The ALRC considered that legislative provisions designed for the mentally impaired should not be used for Aboriginal people who do not understand the proceedings because of language or cultural barriers. It concluded that a plea of guilty should not be accepted if an Aboriginal accused is not fluent in the English language unless the court is satisfied that the accused understands the effect of the plea and the nature of the proceedings.<sup>32</sup>

## Fitness to Plead Because of Cultural or Language Barriers

Section 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) operated as a protective measure to overcome difficulties that may be experienced by Aboriginal people in terms of language and communication. It provided that, for an offence punishable by imprisonment, the court must refuse to accept a plea of guilty or a confession if satisfied that the accused was Aboriginal and did not understand the nature of the proceedings or the nature of the plea or confession. If the court decided that a plea of guilty could not be accepted then a plea of not guilty would be entered.<sup>33</sup> An examination was required under s 49 if the circumstances suggested the accused might be of Aboriginal descent and might lack the relevant understanding.<sup>34</sup>

26. (1980) 30 ALR 27.

27. *Ibid* 29 (Gibbs, Mason & Wilson JJ).

28. *Ibid* 33.

29. *Ibid* 34.

30. Pursuant to s 8 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) mental impairment is defined as intellectual disability, mental illness, brain damage or senility.

31. Where an accused is found unfit to stand trial the court has a discretion to dismiss the charge or make a custody order, see *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) ss 16(5) & 19(4).

32. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [585].

33. *Ngatayi v The Queen* (1980) 30 ALR 27. 34 (Gibbs, Mason & Wilson JJ).

34. *Green v The Queen* [2001] WASCA 162 [85] (Wheeler J), [58] (Wallwork J).



Section 49 was repealed in 2004. The relevant provisions are now contained in the *Criminal Procedure Act 2004* (WA). Unlike the previous section the provisions under the *Criminal Procedure Act* are not Aboriginal-specific. For matters dealt with in the Magistrates Court (either simple offences or indictable offences dealt with summarily) the court must be satisfied before requiring an accused to enter a plea that he or she understands the charge and the purpose of the proceedings.<sup>35</sup> As Philip Vincent observes in his background paper, there is no direction as to what the court should do if the accused does not understand the charge or the purpose of the proceedings.<sup>36</sup> For superior courts Vincent suggests that the power to stay a prosecution permanently, if it is in the interests of justice to do so, could be used where the accused is not fit to stand trial or to enter a plea.<sup>37</sup>

In addition, s 129 of the *Criminal Procedure Act* sets out the procedure where an accused enters a plea of guilty. The provision applies to a Magistrates Court (dealing with a simple offence or an indictable offence that is to be dealt with summarily) and for any matter in a superior court. It does not apply to a plea of guilty entered in a Magistrates Court to a charge that must later be dealt with by a superior court.<sup>38</sup> A court must not accept the plea of guilty unless the accused is represented by a lawyer or if not represented the court is satisfied the accused understands the plea and its consequences. Vincent questions whether this new provision provides adequate protection for Aboriginal

people who are disadvantaged within the criminal justice system.<sup>39</sup> One important difference is that s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) covered pleas of guilty as well as an admission or confession made to police. The effect of this and the general issues concerning police interviews with Aboriginal people are dealt with below.<sup>40</sup>

The potential problem arising from the new section is that because of its broad coverage specific cultural and language issues may be overlooked. On the other hand, the previous section had the potential to be viewed as offensive by inferring that only Aboriginal people were likely to have difficulties in understanding the court process. The current provision hinges upon whether a person is legally represented. Language and communication issues do not necessarily disappear because the accused has a lawyer. Where an accused is represented by a lawyer but appears to have language, cultural or communication difficulties one solution is the use of an interpreter.<sup>41</sup> Where an accused is unrepresented the court could adjourn the matter until the accused can be represented and have access to the services of an interpreter. This matter is further discussed in Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure'.<sup>42</sup>

The Commission considers that the provision should be amended in order to direct courts to consider the reasons why Aboriginal people, as well as other ethnic or cultural groups, may not properly understand the nature and consequences of a plea of guilty.

### Proposal 35

That s 129 of the *Criminal Procedure Act 2004* (WA) be amended by providing that for all accused persons:

The court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences.

35. *Criminal Procedure Act 2004* (WA) s 59 (2).

36. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 36.

37. *Ibid.* See *Criminal Procedure Act 2004* (WA) s 90.

38. This is presumably because once the accused appears in the superior court a further plea is entered. The superior court also has the power to refuse to accept a plea of guilty in this situation if satisfied that the plea that was made in the Magistrates Court was made under a 'material misunderstanding as to the charge, the plea or the purpose of the proceedings': see *Criminal Procedure Act 2004* (WA) s 99(5)(b).

39. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 36.

40. See discussion under 'Police Interrogations', below pp 244–50.

41. See discussion on Aboriginal language interpreters under Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–407.

42. *Ibid.*