

PART IX

Aboriginal Customary Law in the Courtroom: Evidence and Procedure

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Evidence

Evidence is the term used to describe the information upon which a court bases its decision. Evidence of a fact is something that will satisfy a court that the fact exists. Evidence can take many forms; for example, the court may be told by a witness that the fact exists, or be shown a document which records the fact. This information will only become evidence if it is properly proved. Evidence that is properly proved is described as 'admissible'. Information that cannot be taken into account by the court (because of the operation of the rules of evidence or the *Evidence Act*) is described as 'inadmissible'. When the court makes a decision it can only take into account information that has become evidence; that is, it has been proved in accordance with the rules of evidence.

In Western Australia the common law (or judge-made) rules of evidence and the *Evidence Act 1906* (WA) govern the way in which information can be admitted into evidence. The *Evidence Act* is not a code of laws¹ setting out the manner in which courts in Western Australia must receive evidence; rather, it is a collection of miscellaneous provisions that have been enacted from time to time to deal with specific circumstances. The provisions of the *Evidence Act* do not replace the common law rules of evidence; they operate in addition to them.² If Aboriginal customary law is to be recognised and taken into account by the Western Australian legal system, then careful consideration must be given to the manner in which customary law is proved to ensure that it may be received as evidence by the courts.

Proof of Customary Law

In order to consider the manner in which Aboriginal customary law is proved, it is not necessary to define customary law.³ Throughout the consultations for this reference it was repeatedly stressed that there is no single system of customary law that applies to all Aboriginal people.⁴ It will therefore be necessary for the courts to hear information about customary law considerations on a case-by-case basis. Thus, in most matters in which a party seeks to have the court take customary law into account it will be necessary for evidence about customary law to be presented to the court,⁵ either through witnesses or documents. In the consultations in Broome it was observed that 'there is problem for the courts in informing themselves' about Aboriginal customary law.⁶ The reason for this problem is that the present rules governing evidence are not well suited to the provision of information about Aboriginal customary law.

Clash of cultures

When considering the way in which information about customary law can be provided to the courts it becomes apparent that there is a clash of cultures between the Australian legal system and Aboriginal systems of knowledge. Former National Native Title Tribunal member, Peter Gray, illustrates this clash of cultures in the context of proving a native title claim by adopting the 'mirror world approach'. He urges those considering this question to

1. By contrast the Commonwealth has enacted the *Evidence Act 1995* (Cth) (part of the uniform Evidence Acts initiative), which attempts to codify the rules of evidence applicable to proceedings in courts exercising federal jurisdiction. For a fuller discussion, see Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [46,050]–[46,070].
2. The *Evidence Act 1906* (WA) provides in section 5 that the provisions of the Act are in addition to, and not in derogation of, any powers, rights or rules of evidence existing at common law.
3. Definitional matters relating to Aboriginal customary law are considered in Part III 'Recognition of Aboriginal Customary Law', above pp 55–64.
4. See Part III 'Recognition of Aboriginal Customary Law', above pp 55–64. See also Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 18; *Rockingham*, 9 December 2002, 35; *Broome*, 17–19 August 2003, 21, 23 & 24.
5. It is important to note that sentencing is an exception to this. By section 15 of the *Sentencing Act 1995* (WA) the court can 'inform itself in any way it thinks fit' and is therefore not bound by the rules of evidence. The courts have, however, stated that even in sentencing proper material must be presented to the court. See Part V 'Evidence of Aboriginal Customary Law in Sentencing', above pp 221–24.
6. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.

picture a situation in which a number of pastoral leaseholders are required to prove their title to land. They are required to do so before a group of old Aboriginal people who are sitting around on the ground. As evidence, the pastoral leaseholders produce their title documents. The old Aboriginal people say these are no good. They say, 'Where are your songs? Where are your stories? Where are your dances? Where are your body paintings? We don't recognise these pieces of paper.' The pastoral leaseholders object. They say, 'But by our legal system, these prove that we hold leases over this land.' The Aboriginal people respond, 'Well they do not by ours. Sorry, but you have no rights to this land.'⁷

While Aboriginal law is based on an oral tradition,⁸ the Australian legal system is based on laws and rules posited in written form.⁹ This creates a difficulty for Aboriginal people seeking to prove information about their law within that system because rather than being contained in documents, their information may be recorded in stories, paintings and dance. Lisa Strelein argues that the ways of assessing truth in the Australian legal system are unable to do justice to the testimony of those who do not share the same traditions of thought.¹⁰ She notes that a significant problem facing the reception of evidence of Aboriginal people is the reluctance of members of the judiciary to view the evidence from a perspective outside their own. And the consequent 'failure to acknowledge the cultural bias of legal processes and reliance upon the myth of an objective, neutral, universal law is coupled with a conscious or unconscious stereotyping of indigenous society'.¹¹ Strelein asserts that the first step in reducing these barriers to the reception of evidence is to acknowledge that the law is a cultural institution and to introduce new laws to allow for the admission of Aboriginal people's cultural evidence.¹²

Present Situation

The courts in Western Australia have had regard to customary law in a wide variety of matters.¹³ In her background paper to this reference Victoria Williams describes the way in which evidence of customary law has been taken into account around Australia, and states that the view has been expressed that expert or credible evidence is required in order for consideration of customary law to be taken into account.¹⁴ The cases illustrate that there are variety of ways in which the court can hear information about customary law. These include by oral testimony from witnesses and through written statements given to the court. Written statements are helpful because they avoid the difficulties associated with Aboriginal witnesses giving evidence.¹⁵ In addition, they can be prepared (and perhaps agreed) prior to a hearing and therefore may obviate the need for witnesses to travel to court.¹⁶ However, it could be quite difficult from a practical point of view to prepare such a document, particularly where potential witnesses may not speak English, or are illiterate or live in remote communities without ready access to telephones or legal advisers. Thus, it is likely that in most matters when information is to be provided to the court about customary law, it will be by way of oral testimony. The problems associated with such testimony are considered below.

Problems with the Status Quo

It was noted in the consultations in Fitzroy Crossing that there is no consistent mechanism for ensuring that knowledge of Aboriginal customary law is relayed to the courts.¹⁷ The lack of appropriate means to receive evidence about Aboriginal customary law is

7. Gray P, 'Do the Walls Have Ears' [2000] *Australian Indigenous Law Reporter* 1.

8. Ibid. Gray cautions against the blanket stereotype of Aboriginal cultures as 'oral' and non-Aboriginal culture as 'literate'; however, he does conclude that it is possible to generalise that Aboriginal people think differently to non-Aboriginal people and that Aboriginal people focus on different concepts and express ideas differently to non-Aboriginal people. The ways in which these differences impact on evidence in court are discussed below in the section dealing with procedure.

9. Rowse T, *After Mabo: Interpreting Indigenous traditions* (1993) 5, cited in Gray, *ibid*.

10. Strelein L, 'The "Courts of the Conqueror": The judicial system and the assertion of Indigenous people's rights' [2000] *Australian Indigenous Law Reporter* 22.

11. Ibid.

12. Ibid.

13. Aboriginal customary law has been considered by courts in a wide range of matters: see discussion under Part III 'Common Law or Judicial Recognition', above pp 61–62. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003).

14. Williams, *ibid* 9.

15. These difficulties are discussed under 'Procedure – Difficulties Faced by Aboriginal Witnesses', below pp 396–401.

16. Travelling to court was identified as a significant problem for some Aboriginal people during the Commission's consultations: LRCWA, Project No 94, *Thematic Summary of Prison Consultations*, October 2004, 5.

17. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 41. The Commission has made a proposal to encourage more appropriate and reliable information about customary law in sentencing proceedings in Part V of this Discussion Paper.

“Where are your songs? Where are your stories? Where are your dances? . . . We don't recognise these pieces of paper.”

problematic.¹⁸ Although many judicial officers have exercised their discretion to hear evidence of customary law, there are undoubtedly cases where evidence of customary law may have assisted the court and the court has not received this evidence.¹⁹ A further concern is that unreliable evidence of customary laws may be received by the court. The issue of false claims about Aboriginal customary law being made was raised in a number of the consultations.²⁰ The ALRC noted in their 1986 report that decisions based on assertions or assumptions about Aboriginal customary laws which are unproven may lead to mistaken or ill-informed decisions.²¹

At present different judges take different approaches: the reception of information about Aboriginal customary law relies largely on discretion. This creates an undesirable dependence by Aboriginal people on the discretion of the courts.²² In the consultations in Geraldton the view was expressed that the court should be required to recognise Aboriginal customary law, not simply be given discretion to do so.²³ A less obvious problem is that even where a judge is prepared to admit material as evidence where it is strictly inadmissible this may influence the assessment of its reliability. The information may be deemed relevant and admitted into evidence, but accorded little weight due to the manner in which it has been adduced. It is, of course, undesirable to dictate what use a judge may make of information about customary law; however, it is the Commission's view that it is necessary to try to overcome some of the problems encountered in proving customary law.

Problems Caused by the Common Law Rules of Evidence

Ensuring that the court is provided with reliable information about customary law in making its decisions is difficult. As stated above, in order for the court to take account of information about customary law it must be properly proved. The first test that is applied to any evidence is whether it is relevant to the proceedings. This test is not usually a problem when considering customary law. The ALRC has asserted that the main problem for evidence of customary law arises from the distinction drawn by the common law between matters of opinion and matters of fact.²⁴ This distinction is crucial to the rules of evidence: opinion evidence can only be given by a suitably qualified expert (the 'opinion rule'), and factual evidence only by someone with first-hand knowledge of the fact (the 'rule against hearsay'). Even where customary law is relevant, it may be inadmissible if it offends the opinion rule or the rule against hearsay. The ALRC observed that 'if the common law rules were to be strictly applied to the proof of oral traditions and customs (which are usually classified as matters of opinion rather than fact) then it could be that the evidence of Aborigines initiated into and familiar with their laws and traditions would be inadmissible'.²⁵ In the past a compounding difficulty has been the mistrust in the Australian legal system of the spoken word.²⁶ Each of these hurdles—the operation of the opinion rule, the rule against hearsay, and the overriding preference for written rather than oral evidence—is discussed below.

18. The courts in Western Australia have not been consistent in their requirement for proof of customary law. For example, in relation to sentencing, some judges have been prepared to accept submissions from the bar table about traditional punishment, and others have not. In *R v Gordan* [2000] WASCA 401 the sentencing judge had taken into account the fact that there was a strong possibility that the defendant would face traditional punishment, but no evidence was adduced about it. In the Court of Appeal Wheeler J stated that as there was no evidence of the nature of the traditional punishment the defendant would face she did not take it into account in determining the appropriate sentence.

19. Whether because it was prevented by the operation of the rules of evidence, because an Aboriginal witness did not feel able to express themselves in court, or because lawyers involved in the matter did not know how to prove evidence of customary law.

20. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 27 March 2003, 27; *Pilbara* 6–11 April 2003, 8; *Geraldton*, 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 23–24.

21. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [614].

22. Patrick Dodson states that 'Aboriginal people have for too long been dependant on discretions. In my Commission's view, they should not have to approach police and courts as supplicants for recognition of their customary law': see Royal Commission into Aboriginal Deaths in Custody (RCIADIC), 'Regional Report of Inquiry into Underlying Issues in Western Australia' (Vol 1, 1991) [5.11].

23. LRCWA, Project No 94 *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 14.

24. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [615].

25. *Ibid.*

26. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

Preference for Written Records Over Oral Records

A long-held view in the Western legal system is that a documentary record is more reliable than an oral record. The reason for this is that a written record is said to accurately record an event as seen at the time the record was written, and no subsequent event (or narrator) can change it. This has been contrasted with oral histories, which may be influenced or changed in successive narrations. However, recently, the High Court has indicated that it should not be assumed that written evidence about a subject is 'inherently better or more reliable than oral testimony on the same subject'.²⁷ It has been noted by anthropologist Peter Sutton that 'there should be no automatic high respect for documents or automatic skepticism about oral evidence; reliability and weight have to be established for both'.²⁸ Gray has suggested that the reasoning of courts in Australia and elsewhere in the world may be undergoing a fundamental shift on this issue, towards more ready acceptance of Aboriginal oral records.²⁹ The general preference for documentary evidence must be addressed if information about customary law is to be given due consideration by the court.

Hearsay

The rule against hearsay is one of the oldest and most complex of the common law rules of evidence.³⁰ The rule states that only evidence given by a witness appearing in court can be accepted as evidence of the truth of what is said. For example, if a witness says 'X told me that it was raining' this statement (described as an 'out of court' statement) is admissible only as evidence that it was said, not as evidence of the truth of that statement. A judge cannot rely on that statement to decide that it was, in fact, raining. There are many theories as to the reason for the existence

of the rule; the enduring reason for the maintenance of the rule is that for evidence to be reliable the person who is asserting the truth of a particular fact must be present to be cross-examined about that assertion.³¹

Aboriginal people have a culture of oral history: information about customary law is passed down the generations through storytelling. The Aboriginal view is that words can constitute truth if they can be backed by the appropriate claim to authority, such as 'this is what my father told me' or 'this is what my old people told me'.³² The authority of the statement is therefore derived from a person, in the same way that in the Australian legal system deference is shown to material derived from a text. What this means for witnesses seeking to provide proof of Aboriginal customary law is that they are required, in the process of explaining to the court about customary law, to tell the court what another person has told them. These oral records are by their very nature 'out of court' statements³³ and offend the rule against hearsay, so that even if the information is heard in court (that is, deemed relevant to the circumstances of the case) the decision-maker cannot rely on the truth of it when making their decision.

The clash between this rule and the Aboriginal way of maintaining tradition is obvious. Aboriginal society is based on the reliability of stories told to each successive generation. In *Mabo*,³⁴ Eddie Mabo gave evidence-in-chief over 10 days and his evidence as to his people's title over the subject land attracted 289 objections based on it being hearsay from counsel for Queensland alone.³⁵ The trial judge was prepared to admit the evidence on the basis that it was relevant; however he did not accept that it was admissible as evidence of the truth of what had been said.³⁶

Despite the operation of the rule against hearsay, much evidence of a strictly hearsay nature has been heard

27. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, [63] (Gleeson, Gummow and Hayne J). See also Graham Neate, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 66.

28. Quoted in Byrne J, 'The Perpetuation of Oral Evidence in Native Title Claims' (National Native Title Tribunal Occasional Papers Series, No 3/2002, October 2002) 6.

29. Peter Gray notes that it is only relatively recently that anthropology as a discipline has begun to struggle with the criticism that it is based on the false notion of 'objective' ethnographic accounts and that biases inherent in many of the classic ethnographies have been analysed. It could be argued that the law post-*Mabo* is taking a similar path and giving consideration to the basis of previously unquestioned assumptions about the foundations of the legal system. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1, 10.

30. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [31001].

31. There is a more relaxed version of the rule against hearsay found in s 59 of the *Evidence Act 1995* (Cth).

32. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

33. *Ibid.*

34. *Mabo v Queensland* [1992] 1 Qd R 78.

35. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1, quoting Keon-Cohen BA, 'Some Problems of Proof: The admissibility of traditional evidence' in Stephenson MA & Ratnapala S (eds), *Mabo: A Judicial Revolution* (Brisbane: University of Queensland Press, 1993) 192, 200.

36. [1992] 1 Qd R 78, 87 (Moynihan J).

Aboriginal people have a culture of oral history: information about customary law is passed down the generations through storytelling.

and relied upon by courts hearing matters relating to Aboriginal customary law. In a submission made to the ALRC on the reform of the uniform Evidence Acts³⁷ a Federal Court judge suggested that the experience of judges in native title proceedings is that while initially the hearsay evidence of Aboriginal witnesses is often objected to, ruled inadmissible or limited as to use: 'after a time, the parties resisting the making of a determination that native title exists seem to cease objecting, and a vast body of first-, second- and third-hand hearsay comes to be admitted'.³⁸ The judge submitted that the effective conduct of native title proceedings is dependent on the commonsense of the lawyers who practice in this area: 'the simple fact is that a practical course must be, and is found, and in one way or another, the indigenous witnesses manage to tell their story'.³⁹

Exceptions to the rule against hearsay

Evidence about customary law is sometimes made to fit within one of the exceptions to the hearsay rule. There are a number of exceptions to the rule against hearsay at common law.⁴⁰ The *Evidence Act 1995* (Cth) also expressly provides some exceptions.⁴¹ One of the exceptions that has been relied upon to allow the court to consider hearsay evidence in cases involving aboriginal claims to land⁴² relates to statements made by deceased people about matters of general or public rights. This exception allows the court to be told what a person who is now deceased has said about rights that belong to either an entire population (known as public rights) or a class of persons (known as general rights). The reason for this exception is that a person

who is now dead (and who did not know about the court proceedings at the time of making the statement) is considered by the courts to be a trustworthy source of information about matters that are generally known – that is why evidence of this nature is sometimes referred to as 'reputation' evidence.

For example, it would be possible for a witness to give evidence that a person (now deceased) had told them that it was the custom of a particular community to use a section of a riverbank as a landing place. On the face of it such information would be deemed inadmissible by the court as it is hearsay, but because the information is about a general right and the person who made it is now deceased, the witness could tell the court what had been said about the custom of landing at that place, and the court could rely on that statement as evidence of the fact the right to land there existed. This exception will only be of limited use in allowing for information about customary law to be provided to the court⁴³ as it only relates to rights which can be characterised as general or public (which not all information about customary law could be) and must be framed as something said by a now deceased person.

Opinion

As a general proposition, a court only requires witnesses to provide evidence of facts. Any inferences to be drawn from those facts are to be drawn by the decision-maker. An inference drawn from a fact is an opinion, and witnesses are only permitted to express opinions

37. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) Appendix 3. The 'uniform Evidence Acts' means the *Evidence Act 1995* (Cth) and the Evidence Acts of New South Wales, Tasmania and Norfolk Island. When the *Evidence Act 1995* (Cth) was passed there were hopes that this would lead to uniform legislation throughout Australia, but this has not occurred. Federal courts and courts in the Australian Capital Territory apply the law found in the *Evidence Act 1995* (Cth). In addition, New South Wales, Tasmania and Norfolk Island have passed mirror legislation. These statutes are substantially the same as the Commonwealth legislation, but not identical. In New South Wales and Tasmania, state courts exercising federal or state jurisdiction and some tribunals apply the law found in the mirror legislation.

38. Ibid [17.51].

39. Ibid [17.52].

40. See Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) ch 17.

41. Section 73 allows for evidence of reputation concerning family relationships to be admitted as evidence and s 74 allows the admission of evidence of the reputation of the existence or extent of a public or general right. A more general exception is found in s 60, which allows hearsay to be adduced for a purpose other than as proof of the fact asserted.

42. In *Milirrpum v Nabalco* [1971] 17 FCR 141 Blackburn J received evidence about what deceased Aboriginal people said about their rights to land pursuant to this exception to the rule against hearsay.

43. This has been recognised by the ALRC in *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [17.20].

in limited circumstances. The common law allows opinions to be admitted into evidence only when they are expressed by an expert, such as when a doctor gives evidence about the effect of an injury. The basis of this fundamental rule is that the law recognises that so far as matters calling for special expertise are concerned, judges and jurors are not necessarily properly equipped to draw the proper inferences from facts stated by a witness.⁴⁴ Evidence from an Aboriginal person about customary law is generally held to be a matter of opinion.⁴⁵ This creates problems for the reception of evidence about customary law because of the rules about the admissibility of opinion (or expert) evidence.

The 'opinion rule' is an exclusionary rule; that is, it operates to exclude otherwise relevant evidence. The conditions for admissibility according to this rule are that:

- it is in a field of specialised knowledge;
- the witness is an expert in that field by reason of training, study or experience;
- the opinion is based on that expert knowledge;
- the facts upon which the opinion is based are identified and proved;
- the facts upon which the opinion is based are a proper basis for it; and
- the expert must explain how the field of specialised knowledge applies to the facts assumed or observed so as to produce the opinion propounded.⁴⁶

The aspects of this rule relevant to expert evidence about customary law are discussed below.

Elsewhere in this Discussion Paper a variety of different kinds of proceedings have been identified in which the court could be assisted by the provision of expert evidence about Aboriginal customary law. This information is most likely to come from two sources: Elders of a particular community who have knowledge of the relevant customary law; or through expert testimony from authorities such as anthropologists. In the consultations it was often said that it is necessary to the recognition of customary law in the Western Australian justice system that Elders become more

involved in court proceedings involving Aboriginal people. Due to the importance of the kinds of evidence that can be given by Elders (and because the sort of testimony that could be given by anthropologists fits more easily into a conventional model of evidence) the discussion in this section relates mainly to the way in which the opinion rule may limit the court's ability to hear evidence from Elders. The principal problems are that:

- the court can only receive opinion evidence from qualified experts;
- an expert cannot give evidence about the issue to be determined by the decision-maker (the 'ultimate issue' rule); and
- the expert opinion must be based on admissible evidence (the 'basis' rule).

A further complication for opinion evidence about customary law is the way in which knowledge about Aboriginal customary law is held and passed down through the generations.

Who is a qualified expert?

If it is proposed that the court hear the opinion of an expert, the question for a court in determining the admissibility of the opinion is whether there is an organised branch of knowledge in which the witness is an expert.⁴⁷ There are two aspects to this question. First, that the field must be one in which it is appropriate for an expert to be called; and second, that the witness must be an expert in that field.⁴⁸

In relation to the first requirement, the rule provides that evidence will not be admitted if the ordinary person is capable of forming a correct view on the evidence, or if the field of expertise is not based on an organised body of knowledge or experience such that it is of assistance to the court.⁴⁹ The court has recently held that anthropological evidence about the language difficulties bearing on the ability of Aboriginal witnesses to give reliable evidence is such a field.⁵⁰ If the proposed witness is an Elder, it is likely that customary law is a sufficiently recognised body of knowledge to satisfy this test. As Graham Neate, President of the Native Title Tribunal, has observed 'it would be strange to

44. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29010].

45. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [614].

46. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29045].

47. *Ibid* [29055].

48. Finding the right expert can be problematic: LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 11.

49. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29050].

50. *Jango v Northern Territory* [2004] FCA 1539.

think of senior Aboriginal men and women as 'inexpert' in their customary law while accepting as 'expert' opinion the views of non-Aboriginal observers'.⁵¹ The courts have expressed a preference for the evidence of Aboriginal people themselves in cases involving land rights. Owen J in *Ejai and Ors v The Commonwealth*⁵² stated:

[T]he best evidence lies in the hearts and minds of the people most intimately connected to Aboriginal culture, namely the Aboriginal people themselves. Expert evidence from anthropologists and others is of significance and due regard must, and will, be accorded to it. However, it seems to me that the full story lies in the hearts and minds of the people. It is from there that it must be extracted.⁵³

The requirement that the evidence be about a 'field of study' once meant that those who had attained expertise without formal qualifications do not qualify as experts; however, the rule has been relaxed to include qualification by experience.⁵⁴ Obviously, customary law is in the class of fields in which a witness need not derive expertise from scholastic studies, but rather from practical experience. The relaxation of this rule is perhaps not well known. In consultations in Kalgoorlie it was said that experience should be recognised as qualification as an expert.⁵⁵ Section 79 of the Commonwealth *Evidence Act 1995* (Cth) states that someone can qualify as an expert through a recognised field of study, or 'by experience'.⁵⁶ For example, in *R v Harris*⁵⁷ the Northern Territory Supreme Court decided that an Aboriginal tracker who had learned to identify animal and human footprints from his grandparents, and had many years experience in doing so, was a suitably qualified expert.

The basis rule

The facts upon which an opinion is based must be available for scrutiny; the reason for this is that the court must be satisfied that the opinion expressed by an expert is based on admissible evidence. This is known as the 'basis rule'. If an expert opinion is based entirely on inadmissible evidence then it is inadmissible. If the expert opinion is based on a combination of



admissible evidence and inadmissible evidence and it is impossible to determine which conclusions are based on which kind of evidence, then the expert opinion is inadmissible. Expert opinion that is based only partly on inadmissible material that can be easily ascertained is admissible, although the fact of it being based in part on inadmissible evidence will go to weight.⁵⁸

The basis rule: the interplay between hearsay and opinion

If an Aboriginal person gives evidence about customary law on the basis of their experience of that law, and the authority for that knowledge is hearsay, then the evidence may not be admissible. Further, if an expert—such as an anthropologist—seeks to provide their opinion about customary law based on what they have been told by Aboriginal people, then it is also prima facie inadmissible. The strict application of this rule would mean that opinion evidence in this area would rarely be admissible. The difficulties presented by this issue are presently overcome by concessions by counsel and flexibility in the courts.⁵⁹

The evidence of anthropologists based on hearsay was addressed by Blackburn J in *Milirrpum* who decided that there was no good reason to distinguish between the evidence of an expert in a field of study based on

51. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 60.

52. (Unreported, Supreme Court of Western Australia, No 1744/1993, 18 March 1994). See also *Andrews v Northern Territory* (2002) 170 FLR 138, 171.

53. *Ibid* 9.

54. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29050].

55. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27.

56. *Evidence Act 1995* (Cth) s 79.

57. (1997) 7 NTLR 1.

58. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29065] & [31001].

59. *Ibid* [29150].

scientific observation (chemistry, for example) and anthropology, where the subject being observed is human society. His Honour said that it was natural that in the course of the study of human society some hearsay would be adverted to when providing an expert opinion in that area.⁶⁰

In practice, this rule may be avoided to some extent by the exchange of written expert evidence prior to a hearing so as to enable a party to indicate if there is any matter of which they require strict proof. However, in matters where Aboriginal customary law is relevant the restrictions of time and resources may make this exchange unrealistic. It is suggested in *Cross on Evidence* that there is much to be said for the relaxation of the rule of hearsay generally in its application to the giving of opinion evidence.⁶¹

The ultimate issue rule

The 'ultimate issue' rule states that the court cannot receive evidence about precisely the issue that it has to decide. This rule is based on the undesirability of experts becoming involved in the decision-making process. For example, it is arguable that an expert could not give evidence in a family law matter about whether a couple are traditionally married if that is what the court is required to decide. There is some dispute about whether an objection on this basis will always be upheld⁶² and the rule is relied on irregularly in practice (particularly where the evidence is necessary, and therefore arguably not restricted by the rule). In many cases the operation of the rule is a question of semantics, and can usually be overcome by expert evidence that is properly presented so that the expert does not express an opinion in the precise terms in which the court will be required to make a finding.⁶³ However, this rule does present an extra barrier to the presentation of evidence about Aboriginal customary law, particularly to witnesses whose first language is not English or who are not well-experienced in giving evidence. Section 80 of the Commonwealth *Evidence Act 1995* provides that opinion evidence is not inadmissible simply because it is about a fact in issue.

The Nature of Aboriginal Knowledge Traditions

The way that knowledge is retained by Aboriginal societies can also present a difficulty to those seeking to adduce evidence about it. Knowledge sometimes rests with a number of people: there is not one person who knows everything.⁶⁴ It may not be simply a matter of one Elder giving evidence about all of the customary law issues in a particular matter. Evidence may be required from several individuals, perhaps even a group.⁶⁵ Evidence may also be required from witnesses of both genders. The Commission's proposals are designed to provide practical measures to try to overcome some of these issues.

Can the Difficulties Caused by the Rules of Evidence be Overcome?

It is clearly not satisfactory that in order to get evidence of customary law before the court it is necessary to rely on counsel for the other side not objecting, or the evidence being forced into one of the limited exceptions to the rules of evidence discussed above.⁶⁶ Given what is known about the way that Aboriginal people retain knowledge of their customary law, the question arises, how can the regime governing evidence in Western Australia be made to operate so that the court can receive information about customary law? The ALRC asserted that the best evidence was a combination of Aboriginal testimony about customary laws, within a framework provided by expert evidence, such as anthropological opinion. These comments were made in the context of their report which encompassed an examination of land title claims.⁶⁷ As a generalisation, expert testimony from persons such as anthropologists may be more readily available (along with the resources to obtain it) in claims of that nature. The intention of this Discussion Paper is to introduce proposals that may allow evidence of Aboriginal customary law to be adduced in the broad range of circumstances in which

60. *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 161.

61. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29160].

62. *Ibid* [29105].

63. In *Cross on Evidence* [29125] the comments of Giles J in *R W Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129, 130–131 are said to be 'substantially accurate': 'the rule is now only applied so that an expert may not give an opinion on an ultimate issue where that involves the application of a legal standard.'

64. Gray comments that it is very difficult to choose one expert when knowledge is spread throughout a community. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

65. See discussion under 'Group Evidence', below p 410 and accompanying proposal. In *R v Wilson* (1995) 81 A Crim R 270, 275 Kearney J of the Northern Territory Supreme Court commented that it was preferable that evidence came from a representative group, rather than from one person.

66. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [642].

67. *Ibid* [638], [642].

It is unacceptable to maintain within a fundamental structure of the legal system rules that are so clearly alien to one particular group in Australian society.

it may be relevant, in a clear and cost effective manner.⁶⁸ The Commission is of the view that it is undesirable to continue to exclude what Aboriginal people themselves say about their customary law without their evidence being confirmed by an expert from outside the community.

The ALRC's 1986 recommendation

In its 1986 report into the recognition of Aboriginal customary laws in Australia, the ALRC considered the different ways in which evidence of customary law could be received by the courts. One way, examined by the ALRC, was to exclude the operation of the rules of evidence in respect of Aboriginal customary law. However, the ALRC found that the rules provide valuable assistance to the court in determining the best evidence of a fact⁶⁹ and that

only if the existing rules, however modified to assist with proof of Aboriginal customary laws, can be shown to be wholly unsuitable for present purposes, would their wholesale exclusion be appropriate.⁷⁰

Instead, the ALRC recommended that legislation be enacted to deal with evidence of customary law with the following effect:

Evidence given by a person as to the existence or content of Aboriginal customary laws or traditions is not inadmissible merely because it is hearsay or opinion evidence, if the person giving the evidence:

- has special knowledge or experience of the customary laws of the community in relation to that matter; or
- would be likely to have such knowledge or experience if such laws existed.⁷¹

The ALRC concluded that this provision would also deal with the problems of 'experiential' evidence, as well as objections based on the 'ultimate issue' and 'basis' rules referred to above. Such a provision has never been enacted. The introduction of the uniform Evidence Acts (in New South Wales, Tasmania, Norfolk Island and the Commonwealth) dealt with some of these issues, by relaxing the hearsay rule and allowing expert testimony despite the operation of the 'ultimate issue' and 'basis' rules. It is important to note that the ALRC report pre-dated native title legislation.⁷² When it was introduced, that legislation excluded the operation of the rules of evidence; however, the act was amended in 1998 to state that the court *is* bound by the rules of evidence 'except to the extent that the court otherwise orders'.⁷³ In its *Review of the Uniform Evidence Acts* discussion paper (Discussion Paper 69) the ALRC indicates their view that s 82 is not operating efficiently and that it should be reviewed, but that such a review is outside the scope of their reference.⁷⁴ Discussion Paper 69 does, however, recommend that the *Evidence Act 1995* (Cth) be amended to provide an exception to the hearsay and opinion rules for evidence relevant to Aboriginal customary law.⁷⁵

The Evolution of the Common Law in Australia and Canada

The question arises whether Western Australia should exclude the rules of evidence as they apply to evidence of Aboriginal customary law by providing for it in the *Evidence Act 1906* (WA) or by other specific legislation. To do so would answer the criticism that it is unacceptable to maintain within a fundamental structure of the legal system rules that are so clearly

68. In practice this means not requiring that Aboriginal people seek potentially expensive expert testimony on issues that are well-known to them.

69. The report stated that the laws of evidence are intended to facilitate rather than hamper the process of trial by allowing relevant material to be placed before the court and excluding material which is likely to be unreliable or excessively prejudicial. They are also intended to make the trial process more efficient, by saving time and cost.

70. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [627].

71. *Ibid* [642].

72. For recent discussion about native title and evidence, see ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [17.15]–[17.23].

73. Section 82 of the *Native Title Act 1993* (Cth) states: 'Concerns of Aboriginal peoples and Torres Strait Islanders: In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.'

74. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [17.71].

75. *Ibid* proposal 17.1.

alien to one particular group in Australian society. Michael Black, Chief Justice of the Federal Court, has commented that despite the more flexible provisions that are found in the uniform Evidence Acts there remains:

A serious question as to whether it is appropriate for the legal system to treat evidence of this nature as prima facie inadmissible and to only admit it by way of an exception to an exclusionary rule when such evidence is in precisely the form by which law and custom are maintained under indigenous traditions.⁷⁶

Gray suggests recent decisions in Australia and overseas may herald a new approach to evidence of oral tradition,⁷⁷ and that eventually the common law may recognise a specific exception to the rule against hearsay for evidence of such traditions.⁷⁸ In Canada the Supreme Court has taken steps in that direction. *Delgamuukw v British Columbia*⁷⁹ considered the admissibility and weight to be given to the oral histories of the Gitksan and Wet'suwet'en people in a land claim. The trial judge found that oral histories could not be relied upon as evidence of the history of the peoples and accorded them no weight. The Supreme Court of Canada decided that the trial judge's approach was incorrect. They recognised the difficulty inherent in the evidence of Aboriginal peoples, Lamer CJ said:

The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in Aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of Aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system.⁸⁰

In Australia, the approach to the admissibility of oral histories has been varied.⁸¹ A progressive approach has been adopted by a number of judges, notably Lee J in the Federal Court. In *Ward v Western Australia*⁸² his Honour observed:

Of particular importance ... is the disadvantage faced by Aboriginal people as participants in a trial system

structured for, and by, a literate society when they have no written records and depend on oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work a substantial injustice.⁸³

Legislative Regimes: The Overseas Experience

In other parts of the world legislation has been enacted to relax the rules of evidence when dealing with proof of Aboriginal customary law. There is a detailed examination in the ALRC's 1986 inquiry into the recognition of Aboriginal customary law of the situation in other common law countries such as India, Commonwealth African countries and Papua New Guinea.⁸⁴ The legislative regimes in these countries are of interest because they have all grappled with reconciling the need to prove indigenous or local customs with the common law rules of evidence. It is not necessary to reproduce here the details of the legislative regimes, save to recognise that they informed the ALRC's suggested framework for the recognition of Aboriginal customary law. The outcome of the ALRC's examination of the overseas experience was their conclusion that it appears necessary to modify the common law in order to take account of evidence of customary law.⁸⁵ Indeed, ss 48 and 49 of the *Indian Evidence Act (1872)*—which allows people to give evidence about local customs who are not formally qualified experts, but who are persons who would be likely to know of the existence of a custom such as members of a tribe or family—appear to have formed the basis for the ALRC's proposed legislation to recognise Aboriginal customary laws.⁸⁶

Some of the countries discussed in the ALRC's 1986 report have legislated to allow the courts to make their own investigations about the existence of customary law.⁸⁷ A number have also enshrined a policy of judicial notice:⁸⁸ after a particular customary law has been

76. Black M, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13(1) *Public Law Review* 16, 22, referred to in ALRC, *ibid* [17.63].

77. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

78. *Ibid*. Gray speculates about this in relation to evidence of land tenure systems (and entitlements under them) in oral cultures.

79. (1997) 153 DLR (4th) 193.

80. *Ibid* 236.

81. Lisa Strelein has observed that the same criticisms could be made of Olney J's approach to the evidence in *Yorta Yorta*: see Strelein L, 'The Courts of the Conqueror': The judicial system and the assertion of Indigenous people's rights [2000] *Australian Indigenous Law Reporter* 22. (1998) 159 ALR 483.

83. *Ibid* 504.

84. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [617]–[621].

85. *Ibid* [642].

86. *Ibid* [638].

87. *Ibid* [619] Botswana and [620]–[621] Papua New Guinea.

88. *Ibid* [618] India and [619] Nigeria.

proved in court a number of times the court is deemed to know about it in the future. The reason for this is that a fact can become part of the ordinary knowledge of the judge, in the same way that the courts can take into account the way to drive a car, without requiring expert opinion about it. The ALRC recognised the inappropriateness of these kinds of measures in Australia: investing the courts with this kind of ‘law-developing’ role risks Aboriginal people losing control over their own laws.⁸⁹ Judicial notice was said to be not applicable for a number of reasons, including the variability of Aboriginal customary law and its differing application depending on specific circumstances.⁹⁰

The ALRC’s 2005 Proposal

The ALRC now believes that the recommendation it made in 1986 to remedy the evidentiary problems associated with customary law was too narrow. In Discussion Paper 69 they suggested the following amendments to the uniform Evidence Acts:

73A Exception: Aboriginal or Torres Strait Islander customary laws

The hearsay rule does not apply to a previous representation relevant to the existence or non-existence, or the content, of the customary laws of an Aboriginal or Torres Strait Islander community.

...

79A Exception: Aboriginal or Torres Strait Islander customary laws

If a person has specialised knowledge of the existence or non-existence, or the content, of the customary laws of an Aboriginal or Torres Strait Islander community, the opinion rule does not apply to evidence of an opinion of that person relevant to those matters that is wholly or substantially based on that knowledge.⁹¹

The Commission’s View

The common law does not provide a coordinated and consistent recognition of Aboriginal customary law.

Despite the shift towards recognition of oral traditions by the common law and the efforts of a number of judges, at present the rules of evidence operating in Western Australia do not adequately provide for information about Aboriginal customary law to be received as evidence which can be relied upon by a court. The Commission does not wish to stifle the exercise of judicial discretion by proscribing the circumstances and manner in which Aboriginal customary law can be taken into account; however, it proposes legislation to assist the courts to receive information about customary law in a consistent manner.

The Commission supports the recommendation contained in Discussion Paper 69 set out above. At a federal level this suggestion would operate in conjunction with the uniform Evidence Acts, in particular s 79 of the Commonwealth *Evidence Act* which provides that experience is sufficient to qualify a witness to provide opinion evidence. As there is no express provision to that effect in the Western Australian *Evidence Act*, it is proposed that qualification by experience be expressly provided for by amendment.

Proposal 77

That the *Evidence Act 1906 (WA)* be amended to provide that:

- The hearsay rule be excluded in relation to out of court statements which go to prove the existence or non-existence, or the content, of Aboriginal customary law.
- If a person has specialised knowledge, whether based on experience or otherwise, of Aboriginal customary law, then that person may give opinion evidence in relation to that matter where the opinion is wholly or substantially based on that knowledge.

89. Ibid [614].

90. Ibid [622]. The other matters referred to were the court’s incapacity directly to develop or control customary laws, the need for flexibility, and the fact that customary laws are generally not recorded in writing.

91. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) Appendix 1.

Difficulties Faced by Aboriginal Witnesses

It is widely recognised that the court process operates unfairly for Aboriginal witnesses because the process is so far outside their cultural experience.¹ In order for Aboriginal customary law to be taken into account properly by the Western Australian legal system the system must be made more accessible for Aboriginal witnesses who are providing information to the court about customary law. The proposals contained in this section are not only designed to assist those Aboriginal witnesses giving evidence about customary law, but are relevant to all Aboriginal people who come into contact with the courts.

During the Commission's consultations for this reference much was said about the difficulties people had encountered in appearing in court, and dealing with the court system generally. The comments in the consultations focused on two broad areas: difficulty in understanding the court process; and the fact that the requirements of the court clash with the requirements of customary law.

Difficulty with the Court Process

Many Aboriginal people who give evidence in court feel alienated and confused by the experience.² These problems have been the subject of an increasing amount of judicial and academic writing, notably since the introduction of native title legislation. In addition, reports have been commissioned over the past two decades which attempt to address this problem: the ALRC

devoted five chapters to matters of evidence in their 1986 report,³ and since then a number of state bodies have considered the problems faced by Aboriginal witnesses in detail.⁴ Solutions have ranged from those directed to change at a policy level, to practical suggestions for judges and others involved in the justice system.

Problems Associated with Language

Aboriginal languages

It is not possible to make broad statements about the language use of Aboriginal people in Western Australia: it is extremely diverse.⁵ Recently, important research has been conducted into Aboriginal language use in Australia and observations made which impact on the ability of Aboriginal people to give evidence in court effectively.⁶ It is important to recognise that in some parts of Western Australia Aboriginal people are bilingual or multilingual; many Aboriginal people in remote areas do not speak English as their first or second language.⁷ There are a range of languages used; some Aboriginal people speak only Aboriginal language, some speak only English, and many speak languages that are somewhere between the two. These rule-governed varieties of non-Standard English are sufficiently different to Standard English so as to prevent the speaker of Standard English reliably understanding them. In Western Australia, Aboriginal English and Kriol are widely spoken.⁸ Of course, not only does the speaker of Standard English have trouble understanding them, but the speaker of these languages has trouble understanding Standard English: particularly the sometimes complex version of it spoken in court.⁹

1. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 12.
2. See for example, the comments made by people in Laverton about a native title hearing. LRCWA, Project No 94 *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13.
3. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) Chapters 22–26.
4. See, for example, Queensland Criminal Justice Commission (QCJC), *Aboriginal Witnesses in Queensland's Criminal Courts* (June 1996); Northern Territory Law Reform Committee (NTRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003).
5. See 'Tindale's Tribal Boundaries' in Appendix E to this Discussion Paper. Anthropologist Norman Tindale's studies indicated that over 120 language groups or tribes existed in Western Australia in the 1950s and 1960s.
6. Note in particular the work of Dr Diana Eades and Dr Michael Cooke.
7. Figures from the 1996 census reveal that 17 per cent of Indigenous people spoke an Indigenous language at home and that this figure rose to 51 per cent in some rural areas.
8. Cooke M, *Caught in the Middle: Indigenous Interpreters and Customary Law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4. These forms of non-Standard English—including Aboriginal English (which is often spoken in urban areas), Pidgin English, Northern Territory Kriol and Learner's English—are explained in Cooke M, *Indigenous Interpreting Issues for the Courts*, ALJA, 2002, 3.
9. LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 9.

Many Aboriginal people who give evidence in court feel alienated and confused by the experience.

Aboriginal English

Thus the problem is not simply one of not speaking English: the problem is compounded by the form of English spoken.¹⁰ Aboriginal English is the term used for the English spoken by Aboriginal people from both urban and rural backgrounds, it shares most of its vocabulary with Standard English, but there are crucial differences in grammar, style, pronunciation and usage that can create serious misunderstandings.¹¹ Dr Diana Eades has conducted research into the interplay between Aboriginal language and the courts¹² and contends that the failure in the justice system to appreciate the differences between standard and Aboriginal English has resulted in misunderstandings and misinterpretations of evidence. As Cooke has stated, whilst many Aboriginal people from remote regions do not speak English as their first language,¹³ 'they usually have enough to "get by"'.¹⁴ This has led to misunderstandings about their competency in Standard English, and to Aboriginal people without adequate English being required to participate in court proceedings.¹⁵ Dagmar Dixon, Coordinator of interpreter programs at Central Metropolitan TAFE, has observed that an Aboriginal person's ability to speak English should not be confused with his or her capacity to fully comprehend what is being said.¹⁶ Moreover, Aboriginal people (like non-Aboriginal people) may experience

considerable difficulty in understanding professional or bureaucratic jargon. A frequent sentiment in the consultations was 'I felt I wasn't heard'.¹⁷ The importance of this issue cannot be overstated. To speak other than the language of the dominant culture is, in itself, inherently disadvantageous;¹⁸ combine that with the unfamiliarity of the court process, and the result is a system which cannot be understood. Although the language problems for Aboriginal people seeking to give evidence have been referred to by the courts,¹⁹ not enough is being done to address the problem.²⁰

Verbal misunderstandings between Aboriginal and non-Aboriginal people can occur because of words that are shared between Aboriginal English and Standard English with different meanings:²¹ some of these differences are easier to detect than others and in some instances phrases can have quite different usages. Gray has described how the answer 'don't know' provided by an Aboriginal witness (in the context of a native title claim) could conceal a number of different propositions:

- This is not my country, so I cannot speak about it.
- Although this is my country, it is not appropriate for me to speak about it when someone more senior is present.
- Although this is my country, it is not appropriate for me to speak about it, but someone else should be approached for the information.

10. Neate has commented that the 'courts may fare better in establishing a climate of mutual understanding and effective communication where it is clear that an Indigenous person does not comprehend or speak English than when they simply appear to': Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 17.

11. *Ibid* 15.

12. Eades' handbook for lawyers is the seminal work in this field: *Aboriginal English and the Law: Communicating with Aboriginal English speaking clients: A handbook for legal practitioners*, (Queensland Law Society, Brisbane, 1992).

13. Figures from the 1996 census reveal that 17 per cent of Indigenous people spoke an Indigenous language at home and that this figure rose to 51 per cent in some rural areas.

14. Cooke M, *Caught in the Middle: Indigenous Interpreters and Customary Law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4.

15. For example, in Wiluna it was noted that 'Many people appear before the bench and they don't have a clue why they are there': LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.

16. Quoted in Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.5].

17. LRCWA, Project No 94, *Thematic Summary of Prison Consultations*, October 2004, 14.

18. Byrne J, 'Indigenous Witnesses and the Native Title Act 1993 (Cth)' (National Native Title Tribunal Occasional Papers Series No.2 of 2003) June 2003.

19. See, for example, the comments of Lee J in *Ward v Western Australia* (1998) 159 ALR 483, 504.

20. The Commission acknowledges that courts in Western Australia have made an effort to address these issues through measures such as the appointment of Aboriginal Liaison Officers and the publication of the *Aboriginal Benchbook for Western Australian Courts*. Nonetheless, significant problems remain. The aim of the proposals in this Part is to build on, and formalise, the progress that has been made informally by courts in this area.

21. For example, it is now well recognised that 'to kill' in Aboriginal English does not mean to cause death; rather, it means to injure. Less well-known examples were provided to the author of the *Aboriginal Benchbook for the Western Australia Courts* by Ms Dagmar Dixon: 'cheeky' means 'hot' (as in food) and 'camp' means 'to live': see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002).

- This is not a matter which I can't speak about in front of people who are present, eg women or men or children.
- I cannot say the name because it is the name of someone recently deceased.
- I cannot say the name because it is the name of my sibling of the opposite sex.
- I don't know.²²

An additional problem is where there is no Aboriginal equivalent concept to the one being discussed in court.²³

Problems Caused by Advocacy Techniques

Language problems are compounded by the manner in which witnesses are required to provide evidence to the court. When a witness gives evidence in court they are first asked questions by the lawyer representing the party that has called them as a witness. This is called evidence-in-chief. The witness is then asked questions by the lawyer acting for the opposing party. This is called cross-examination. Different rules apply to the kinds of questions that can be asked in each kind of questioning. The reason for this is that the lawyer acting for the party that called the witness should not be able to suggest answers to their witnesses, and also that the lawyer acting for the opposing party ought to be able to test the truth of the witness's evidence, without too many restrictions being placed on the manner of their questioning. A number of different techniques that lawyers use in questioning witnesses (particularly in cross-examination) can be seen to be problematic for some Aboriginal witnesses.

Question-and-answer

The directness with which questions are asked and answers demanded in court is foreign to many Aboriginal people, whose communication style is more indirect and emphasises narrative. This method of communication is learned in childhood, and research suggests that unless the question-and-answer convention is taught from an early age it is difficult to adapt to it.²⁴ For Aboriginal people this method of communication is 'at best unfamiliar and at worst socially distressing'.²⁵ The direct, and sometimes aggressive, manner in which questions are asked and answers demanded is unknown in Aboriginal communication²⁶ and may result in Aboriginal witnesses feeling unable to provide the court with the evidence they may have to give, or giving evidence in such a way that it is not taken into account properly by the decision-maker.²⁷

Leading questions

A particular problem is caused by the kind of question that can be used in cross-examination known as a leading question. Leading questions are questions in which the lawyer puts a proposition to the witness and asks them to agree or disagree with it. They are often phrased as a statement, with a question tacked on the end as in, 'You were at the park: weren't you?' The concern with leading questions is that they can suggest an answer to the witness, and that because they only require either 'yes' or 'no' as a response, it is not apparent from the witness's answer whether they have understood the question. It has been recognised that Aboriginal witnesses have a propensity to answer leading questions in the way that they think the questioner wants them to answer. Such questions—which are often used during police interviews, as well as in cross-examination—have been identified as leading to the gratuitous concurrence²⁸ of the witness so that

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22. Gray P, 'Taking Evidence of Traditional Aboriginal Rights to Land' (Paper presented at the Supreme Court and Federal Court Judges Conference, Adelaide, January 1995) quoted in Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 23. Some of these issues, which relate to the impact of customary law on evidence, are discussed below.
 23. For example, Ms Dagmar Dixon advised the author of the *Aboriginal Benchbook for Western Australian Courts* that Aboriginal languages do not contain the concept of 'understanding' as in 'comprehension'; the nearest is that of 'knowing' (as in 'being aware of'): see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.5].
 24. Byrne J, 'Indigenous Witnesses and the *Native Title Act 1993* (Cth)' (National Native Title Tribunal Occasional Papers Series No.2 of 2003) June 2003, 5.
 25. *Ibid* 4.
 26. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.2], quotes Dr Eades who advises that thoughts and feelings may comprise the only real area of personal privacy for Aboriginal people, many of whom live in close physical proximity with one another and spend significant time maintaining family and social relationships.
 27. Fryer-Smith, *ibid* [5.3.2]. See also Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 28. He has noted that many Aboriginal witnesses react to aggressive questioning by remaining silent, providing evasive answers or responding with 'I don't know'.
 28. Gratuitous concurrence is a socio-linguistic characteristic that has been recognised as feature of police and courtroom interviews with Aboriginal people: it describes the tendency of Aboriginal interviewees to answer yes/no questions in the affirmative. See Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4. This has been recognised by the courts for some time: *R v Anunga* (1976) 11 ALR 412, 414–15.

Conventional methods of questioning witnesses can be fraught with difficulty for Aboriginal witnesses and cause unreliability not related to the veracity of their evidence.

rather than providing the court with their evidence, the witness simply agrees with the propositions put to them by counsel. Eades has described this phenomenon amongst speakers of Aboriginal English:

Aboriginal English speakers often agree to a question even if they do not understand it. That is when Aboriginal people say 'yes' in answer to a question it often does not mean 'I agree with what you are asking me.' Instead, it often means 'I think that if I say "yes" you will see that I am obliging, and socially amenable and you will think well of me, and things will work out well between us'.²⁹

This is a particular problem when the person asking the question is (or appears to be) in authority.³⁰ This passive approach to interrogation can also lead to 'verbal scaffolding' which occurs when an interviewer or examiner provides language assistance (such as by finishing an interviewee's hesitant or incomplete answers, or by prompting with suggested answers in the face of long silences) and is another way in which the insufficiency of an Aboriginal person's English is masked in interview or court situations.³¹ These issues are of great concern as they lead inevitably to the witness's true account not being provided to the court, and to the evidence of the witness not being afforded sufficient weight. In *Milirrpum* Blackburn J stated that he had

learned from other experience in this Court, not to place too much reliance on cross-examination of Aboriginal witnesses in which the questions are expressed in terms anything less than the most extreme precision.³²

Quantitative speculation

Aboriginal languages do not contain formal systems of quantification; rather, matters are specified or described in terms of geographical, climatic or social events or situations.³³ Thus it can be difficult for an Aboriginal witness to answer questions requiring a response in mathematical terms, or for them to specify 'where' or 'how many'. It is common for Aboriginal witnesses to be vague when providing quantitative estimates.³⁴

Repetitious questioning

The kind of repetitious questioning that is common in cross-examination is also alien to the Aboriginal way of communication. A common response is for the Aboriginal witness to feel that they must alter their evidence in order to provide an 'acceptable' version.³⁵ The cross-examiner is therefore able to extract inconsistencies from the witness, and the reliability of the witness's account is thereby diminished.³⁶



29. Eades D, *Aboriginal English and the Law* (Brisbane: Queensland Law Society, 1992) 26.

30. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.2].

31. See Cooke M, *Caught in the Middle: Indigenous Interpreters and Customary Law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4.

32. *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 171.

33. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.4]. At [5.1.1] an example is given of the Ngaanyatjarra language in which numerical concepts consist only of 'one', 'two', 'three' or 'a few' and 'many'.

34. This concept is also known as 'quantitative vagueness': Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 15.

35. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 27.

36. *Ibid.* Neate recites a quote from a Darwin Magistrate who says that Aboriginal people tell their stories honestly in evidence in chief, but miss out on cross-examination because they do not understand its functions.

Each of the above illustrates the ways in which conventional methods of questioning witnesses can be fraught with difficulty for Aboriginal witnesses and cause unreliability not related to the veracity of their evidence. That these phenomena have been observable over many years is illustrative of the fact that the court system has been slow to attempt to address these innate problems for Aboriginal witnesses.

Problems Caused by Demeanour

A further difficulty for the Aboriginal witness is that aspects of their demeanour are sometimes misunderstood and have been described as barriers to effective evidence.³⁷ Communication is not simply about words and language, there are other ways in which we communicate that dictate acceptable modes of social interaction and play a pivotal role in compromising effective communication.³⁸ Two significant examples of the way in which the demeanour of an Aboriginal witness may reflect a culturally different way of communicating are the use of eye contact and silence.

Eye contact

In Aboriginal society making eye contact is thought to be rude or offensive³⁹ and avoidance of eye contact is a mark of respect.⁴⁰ By contrast, eye contact in non-Aboriginal society is thought to indicate confidence, and a lack of eye contact may be interpreted as a sign of dishonesty.⁴¹ Eades recounts that in the *Pinkenba* case⁴² this cultural practice was misinterpreted by at least one of the cross-examining counsel who repeatedly insisted that one of the Aboriginal child

witnesses look at him when he was answering questions.⁴³ Thus eye contact (or lack thereof) may be misconstrued when a witness's credibility is being assessed by a decision-maker unfamiliar with this aspect of Aboriginal culture.

Silence

Similarly silence plays a different role in communication in Aboriginal and non-Aboriginal society. Silence in non-Aboriginal society tends to be negatively valued,⁴⁴ especially in response to a question asked in court, and can be construed as a failure to cooperate. In Aboriginal communication that there are at least two possible reasons for silence: that the witness is not permitted to for reasons of customary law to provide the answer;⁴⁵ or that the witness requires time to think before answering the question.⁴⁶ Silence, even long silence, is a positive, normal and accepted characteristic of Aboriginal communication.⁴⁷ The transcript of the *Pinkenba* case also provides an example of how silence can be interpreted:

Well, why did you lie to me and tell me you'd just stolen a pair of jeans from a shop? I'd suggest the reason to you, because you don't want everyone to know the little criminal that you are, do you?

That's the reason, isn't it? Isn't it? Isn't it?

Your silence probably answers it, but I'll have an answer from you. That's the reason isn't it?

Bench: ... I'm asking you to answer the question. Ask the question again please Mr ...

Isn't that right? ... Yes.⁴⁸

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37. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3].
 38. Byrne J, 'Indigenous Witnesses and the Native Title Act 1993 (Cth)' (National Native Title Tribunal Occasional Papers Series No.2 of 2003) June 2003, 4.
 39. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 15.
 40. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.2.2].
 41. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 16.
 42. A trial which took place in the Brisbane Magistrate's Court in February 1995 in which six police officers were charged with the deprivation of liberty of three Aboriginal boys. Eades was present for the boys' evidence and makes observations about the way in which their language and communication norms affected their evidence in her article: see Eades D 'Cross-examination of Aboriginal Children: The Pinkenba case' (1995) *Aboriginal Law Bulletin* 46.
 43. *Ibid.*
 44. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.2.3].
 45. A suggested reason for silence is fear of what may happen in accordance with customary law if the question is answered: Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 16. See the discussion on silence and the impact of customary law on Aboriginal witnesses, below p 407.
 46. Mildren, *ibid.*
 47. Eades D, 'Cross Examination of Aboriginal Children: The Pinkenba case' (1995) *Aboriginal Law Bulletin*, 46. In his article (*Ibid*, 17) Dean Mildren makes some practical suggestions about what a judge can do if a witness becomes silent: adjourn the matter until later in the day (effective if the witness simply needed time to think), or return to the question after a time, or ask the witness if there is someone in the room they are afraid of. He further argues that use should be made of special witness provisions such as screening, closed circuit television, having a relative or friend in the witness box, a closed court or a suitable combination of these. See Mildren, *ibid.*
 48. *Ibid.* This is also an example of gratuitous concurrence. It is noteworthy that this case, and the public and media attention it received, prompted the Queensland Criminal Justice Commission (QCJC) to undertake investigations that lead to the publication of their report *Aboriginal Witnesses in Queensland's Criminal Courts* (June 1996).

Response to stress

The communication difficulties noted above are exacerbated by stress. It has been recognised that Aboriginal cultural responses to confrontation and stress include loss of linguistic ability, avoidance of eye contact and apparent contradiction in their responses to questioning; and that these reactions are often misinterpreted by lawyers and others as lying or covering up the truth.⁴⁹ This response is not confined to Aboriginal people, there is evidence that a person's competency in a second language decreases markedly under stress.⁵⁰

These responses, along with the other aspects of an Aboriginal witness's demeanour set out above, can place the Aboriginal witness at a cultural disadvantage,⁵¹ and may be misinterpreted as a sign of dishonesty, insecurity, evasion, ignorance and or guilt.⁵²

Overcoming Difficulties of Aboriginal Witnesses in the Court Process

It is clearly in the interests of justice that witnesses appearing before the courts are given a reasonable opportunity to give their evidence in such a way that they are able to properly provide the information they have to impart.⁵³ Thus the problems identified above facing Aboriginal witnesses must be addressed and overcome, principally in the interest of fairness, but also if Aboriginal customary law is to be effectively taken into account in the Western Australia legal system.

The Need for Aboriginal Language Interpreters

The need for interpreters in courts was stressed by Aboriginal people in the Commission's consultations.⁵⁴

Language used in court doesn't make any sense to us. Aboriginal language should be used ... One of our countrymen translating is important. Aboriginal language should be brought into court.⁵⁵

If a witness does not properly understand the language used in court, then the obvious solution is to say that they must be provided with the services of an interpreter. But the equation is not that simple. For a number of reasons interpreters have been hard to find, and the courts slow to use them.⁵⁶

Reluctance to use interpreters

Historically, the linguistic characteristics identified above have led to the assumption that many Aboriginal people are able to properly understand court proceedings without the use of an interpreter. In addition to that assumption there has been unwillingness on the part of those hearing evidence from Aboriginal witnesses (and calling them as witnesses) to use the services of interpreters. This is in part due to a pervasive belief about the role that interpreters play that has led to judges, lawyers and police officers being reluctant (for varying reasons) to hear evidence through interpreters. There is a misconception that the presence of the interpreter makes the witness's evidence less, rather than more, clear. One judge has commented that:

Experience has shown that the tribunal of fact can make a better assessment of a witness if there is no interpreter transposed between it and the witness.⁵⁷

The Commonwealth Attorney General's Department has noted this reluctance and questioned the underlying basis of it:

This reflects the primary consideration...that a witness with some understanding of English should not obtain an unfair advantage ... Less attention has been given to the real risk that a witness with insufficient knowledge of English may not be able to adequately understand the questions put and convey the meaning he or she wishes to express.⁵⁸

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49. Kerr S, 'Gratuitous Justice: A Review of the Queensland Criminal Justice Commission's Report into Aboriginal Witnesses in Criminal Courts' (1996) 25 *Indigenous Law Bulletin* 1.
50. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [6.4.2], quoting Ethnic Affairs Commission, *Use of Interpreters In Domestic Violence and Sexual Assault Cases: A guide for interpreters* (Sydney, 1995).
51. Eades D, 'Cross Examination of Aboriginal Children: The Pinkenba case' (1995) *Aboriginal Law Bulletin* 46.
52. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 16.
53. *De Rose v South Australia* [2002] FCA 1342, [252].
54. See for example, LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy*, 3 March 2003, 3; *Laverton*, 6 March 2003, 13; *Carnarvon*, 30–31 July 2003, 5; *Wiluna*, 27 August 2003, 24; *Mirrabooka*, 18 November 2003, 14; *Albany*, 18 November 2003, 20.
55. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 20.
56. Graeme Neate comments that it is a feature of native title cases that interpreters are rarely used: Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 34.
57. *R v Johnson* (1987) 25 A Crim R 433, 422 (Williams J).
58. *Access to Interpreters in the Australian Legal System* (1991) 33.3 (44), quoted in Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 12.

This misconception is compounded by the view that is held by some lawyers that the use of an interpreter is a tactical matter⁵⁹ to be employed,⁶⁰ or decried,⁶¹ depending on the circumstances. This reluctance is also found amongst the police; Cooke interviewed a police officer who, in his almost 30 years of policing experience in Indigenous contexts in Western Australia, stated that he had never had the opportunity to call for the services of an interpreter.⁶² It appears that there is an identifiable bias against the use of interpreters in criminal trials; this can be contrasted with the position in native title matters, according to the representative of the Kimberley Interpreting Service (KIS).⁶³ The Queensland Criminal Justice Commission (QCJC) contends that this attitude is based on the curious proposition that ‘even badly spoken and understood English makes for more effective communication than proper and competent interpretation from one language to another’.⁶⁴

Scarcity of interpreters

A further aspect of this problem is that even if a decision is made to use an interpreter, for a number of reasons there may be no interpreters to use.⁶⁵ The *Aboriginal Benchbook for Western Australian Courts* notes the lack of trained interpreters and the fact that very few Aboriginal interpreters have attained the minimum National Accreditation Authority for Translators and Interpreters (NAATI) standard for interpreting in court proceedings.⁶⁶ The Translating and Interpreting Service (TIS) which provides a free interpreting service to those appearing before the courts in Western Australia does not have Aboriginal language interpreters. The practice of using untrained—and unpaid—interpreters was seen to be problem in the consultations.⁶⁷

It is clear that the problems with Aboriginal language use will continue until significant steps are taken to provide Aboriginal people adequate language assistance in court. The first priority must be to train more interpreters.

Proposal 78

That adequate funding be provided for the training of Aboriginal interpreters.

That consideration be given to an accreditation system for Aboriginal language interpreters, in particular to a structure that enables more Aboriginal people to attain the requisite accreditation.

Right to an interpreter

There is no statutory right to an interpreter in Western Australia.⁶⁸ At common law an accused person who does not understand the language of the court is entitled to an interpreter;⁶⁹ however, witnesses may only give evidence through an interpreter with the leave of the court.⁷⁰ Article 14(3) of the *International Covenant on Civil and Political Rights* guarantees the right to have ‘the free assistance of an interpreter if [an accused] cannot understand or speak the language used in court’.⁷¹ Thus it is the Commission’s view that the right for a witness to give evidence through an interpreter should be provided in legislation.

Proposal 79

That the *Evidence Act 1906* (WA) provide that a person has the right to give evidence through an interpreter, unless it can be established that they are sufficiently able to understand and speak English.

59. Ibid 13.

60. The lawyer interviewed by Dr Cooke in his investigations commented that: ‘I never use an interpreter unless its really serious and using an interpreter is to my advantage in getting an acquittal’. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 48.

61. See, for example, the comments of one lawyer ‘... in my submission he should be required to answer the final question ... by himself, unaided with the support of an interpreter to try and dream up some explanation for it ...’ contained in an excerpt of transcript from a coronial inquiry reproduced in Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 21.

62. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 49.

63. Ibid 50.

64. QCJC, *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996) 63, quoting Law Reform Commission of Canada, *Interpreters Report* (1991) 46–47.

65. See comments by Broome-based magistrate in Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 45.

66. This level requires the undertaking of a three-year university degree: Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [6.4.2]. In Western Australia TAFE provides a one-year Diploma of Interpreting Aboriginal Languages course, which gives graduates a ‘paraprofessional’ accreditation.

67. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 9.

68. There is a statutory right to an interpreter in South Australia pursuant to s 14 *Evidence Act 1929* (SA). There is also a statutory right to an interpreter when appearing before the Immigration Review Tribunal and the Refugee Review Tribunal. The Canadian Charter of Rights guarantees, by s 14, an interpreter to any person who does not understand the language of the proceedings.

69. *Lee Kun* [1916] 1KB 337.

70. *Dairy Farmer’s Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464.

71. Mildren D, ‘Redressing the Imbalance Against Aboriginals in the Criminal Justice System’ (1997) 21(1) *Criminal Law Journal* 7, 18.

That a defendant in criminal proceedings who cannot sufficiently understand English shall be entitled to the services of an interpreter throughout the proceedings, whether or not they elect to give evidence.

That where the court has any reason to doubt the proficiency of a witness to either understand or speak English then the proceedings should not continue until an interpreter is provided.

That funding be made available to cover the cost of interpreters where required for witnesses and defendants in criminal proceedings.

How should the need for an interpreter be assessed?

The burden of assessing the need for an interpreter should not rest solely with judges. Gray contends that judges usually 'lack the ability to assess language skills'.⁷² In the Northern Territory there are three ways that the need for an interpreter can be confirmed: by self-assessment (with the assistance of a recorded advice in Aboriginal language); after an assessment by a lawyer (with the assistance of a specially designed test); and after assessment by an expert (using a standardised measure of proficiency).⁷³ It is recommended that a suitably qualified linguist be requested to formulate similar aids for use in Western Australia.

Proposal 80

That a qualified linguist be engaged by the Department of Justice to formulate tests to assist courts to determine when a particular witness or defendant requires the services of an interpreter.

Inherent difficulties in interpreting for Aboriginal witnesses

There are some inherent difficulties with the use of interpreters for Aboriginal witnesses. The principal concern is whether they should be required to translate literally (that is, word-for-word) or whether it is permissible that concepts be explained. Mildren contends that there needs to be a greater understanding by both judges and lawyers that

interpreters 'are not mere translators, and somehow the interpreter must convey not only the words spoken but the meaning intended.'⁷⁴ As noted above, it is often not possible to simply find equivalent words in English and Aboriginal languages.⁷⁵ Properly trained interpreters are therefore crucial in dealing with this problem, in order to combat the suspicion of counsel when a question or answer takes longer to interpret than they think it should. In a paper published by the AIJA Cooke quotes transcript from a coronial inquiry in which this suspicion was evident:

Counsel: Why are you now saying that they came from your left?

(Witness turns to speak through an interpreter)

Counsel: You don't need to ask Mr Cooke with you there. Why are you now saying...

Interpreter: He's not asking.

Witness: Well I didn't know – I didn't know...

Counsel: Your worship, in cross examination, particularly on a point where a witness has been demonstrably contradictory and unreliable, as he has here, particularly when he's been answering all the questions up to that stage by himself, in my submission he should be required to answer the final question ... by himself, unaided with support of an interpreter to try and dream up some explanation for it ...

Coroner: It's utterly impertinent to suggest that the interpreter is going to help him dream up some explanation.

Counsel: ...well, I'll withdraw that your Worship...⁷⁶

The Commission has made a proposal in Part V that the government provide adequate resources for cultural awareness training for lawyers (see Proposal 7). Bearing in mind the problems identified in this section, the Commission suggests that these programs should specifically include training for lawyers to assist them in working with interpreters. The Commission is of the view that the Law Society of Western Australia would be the most appropriate organisation to provide cultural awareness programs for lawyers. In addition, the Commission suggests that it would be extremely useful if the Law Society of Western Australia engaged a suitably qualified linguist to prepare a publication for Western Australia similar

72. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

73. Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 34.

74. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 18.

75. *Ibid.* This may be due to language or cultural differences.

76. Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 21.

to that prepared for the Queensland Law Society by Diana Eades.⁷⁷

Challenges Facing Aboriginal Language Interpreters

For his Background Paper to this reference Cooke conducted a field-based investigation into the work of Aboriginal language interpreters based on interviews with a range of people who have experience or knowledge of the challenges facing Aboriginal language interpreters.⁷⁸ He observed that customary law impacts upon the work and welfare of the interpreter.⁷⁹ The conclusions expressed in his paper are grouped into two sections: 'Misunderstandings about the Legal Interpreter's Role' and 'Implications of Customary Law on the Code of Ethics for Interpreters'.⁸⁰

Misunderstandings about the interpreter's role

The fact that Aboriginal interpreters are so little used has meant that the role of the interpreter is not well understood amongst Aboriginal communities; as a result it may be assumed that the interpreter is 'taking sides'.⁸¹ Cooke was told that on occasion interpreters have been blamed for the outcome of proceedings. The concern expressed in the consultations about interpreters being unpaid no doubt contributes to this problem. These issues are concerning on two levels; first, they are indicative of a misunderstanding by the community about the operation of the court system, and second, they serve to dissuade others from becoming interpreters. Cooke has made suggestions designed to overcome the misunderstandings he identified by taking steps to explain the role of the interpreter to Aboriginal communities.⁸² The Commission endorses those recommendations.

Proposal 81

That the Department of Justice, in conjunction with Aboriginal communities, provide education about the role of interpreters through:

- community education broadcasts; and
- the development of information videos to be distributed in communities and accessible at police stations, prisons and courts.⁸³

Problems faced by interpreters as a result of customary law

Cooke also considered the ways in which customary law can impact on the role of the interpreter.⁸⁴ He discusses the impact on three areas:

- **Impartiality:** an Aboriginal interpreter will often know or be related to the witness, which can create a conflict of interest for the interpreter.⁸⁵
- **Confidentiality:** an Aboriginal interpreter may feel considerable pressure to divulge knowledge gained in the course of their interpreting work.⁸⁶
- **Accuracy:** language restrictions imposed by customary law mean that the interpreter must tailor their speaking style according to whom they are addressing and also to whom they are referring.⁸⁷

Consideration must therefore be given to the ways in which the courts and the Department of Justice can assist Aboriginal interpreters who face difficulty in their role as interpreter for reasons associated with customary law. In his Background Paper, Cooke made specific recommendations which are directed to those problems. The key change needed is for both courts and interpreters to be aware of, and able to

77. Eades D, *Aboriginal English and the Law* (Brisbane: Queensland Law Society, 1992).

78. These people included experienced Indigenous interpreters, non-Indigenous interpreters of Indigenous languages for the purpose of contrast, trainers of Indigenous interpreters and lawyers, police, and a Magistrate with extensive dealings with Aboriginal people of a non-English speaking background.

79. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 1.

80. *Ibid* 2.

81. Cooke was advised of a situation where an Aboriginal Court officer who had performed the function of an interpreter for an accused person in a police interview had been assumed by the Community to be 'aligning' himself with the accused and had been ostracised. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 47.

82. The Law Society of Western Australia has also endorsed the recommendations made by Dr Cooke: see Submission from the Law Society Western Australia in relation to Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004).

83. It is noted that the Kimberley Interpreting Service has applied for a grant from the Public Purposes Trust to make two videos to impart that information – one for lawyers, the courts and police, and one for Aboriginal communities. See Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 43.

84. *Ibid* 56.

85. *Ibid*.

86. *Ibid* 57.

87. *Ibid* 58.

deal with, the problems that arise. Properly trained interpreters are essential to this process. Not only can they identify the problems, but they can also communicate with the court about the best way to solve them. In addition, some practical steps can be taken to avoid conflicts of interest.

Proposal 82

That guidelines be developed for the use by the Department of Justice in dealing with interpreters of Aboriginal languages, including:

- Using only trained interpreters.
- Establishing a pool of male and female interpreters from different family or skin groups and different communities.
- Providing information (such as the name of the parties and witnesses in a case and a brief outline of the subject matter) to the interpreter prior to the hearing to enable them to assess if there is a conflict under customary law.

It is clear that the role of the interpreter is not well understood, and that there are some practical problems with the way that Aboriginal interpreters have been used in court. With this in mind the Commission invites submissions to inform the development of protocols to provide practical assistance to courts, witnesses, parties, lawyers and interpreters.⁸⁸

Invitation to Submit 17

The Commission invites submissions to inform the development of protocols to assist witnesses, lawyers, parties and court officers when using the services of an interpreter.

Evidence Given in 'Narrative Form'

Another possible development is to depart altogether from the traditional question-and-answer form of examining a witness. An alternative way for a witness to provide information to the court is by way of a narrative;⁸⁹ that is, by telling their story uninterrupted, not by responding to questions. Research cited by the ALRC shows that allowing a witness to give a free account of events as a narrative may give a significantly more accurate version and that answering questions may distort and limit testimony.⁹⁰ The concern with this form of evidence is that inadmissible material may be included by the witness in their narrative; however, Neate has commented that this is a 'price worth paying if it is the only means to allow the truth to be told'.⁹¹ ALRC Discussion Paper 69 sets out the view of those who provided submissions on this point, with most detractors concerned about the admission of extraneous or inadmissible material and the effect that such material may have on the decision-maker (particularly a jury).⁹² Neate suggests that one way of overcoming this problem—and assisting the witness to give a coherent account—is to have the narrative evidence prepared in written form and have the witness read the statement at the hearing. This approach has been adopted in New Zealand.⁹³ This is, of course, not a startling proposition: almost all evidence in commercial litigation is prepared in exactly this fashion.⁹⁴ From a practical point of view, it remains likely the majority of Aboriginal witnesses giving evidence in court will not be appearing in matters which have sufficient allocation of time and resources to allow for the preparation of such documents. The question therefore is whether legislative reform is necessary to provide evidence to be given in this manner.

The uniform Evidence Acts provide by section 29(2) that a witness can give evidence in narrative form with the leave of the court. This section reflects the common

88. Such protocols might include the suggestions made by Cooke (which are endorsed by the Law Society) designed to overcome the misunderstanding about the role of the interpreter: see Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004).

89. Suggested in Eades D, *Aboriginal English and the Law* (Brisbane: Queensland Law Society, 1992) 83.

90. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [607]–[609]; ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.7].

91. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 30.

92. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.13]–[5.23].

93. Neate G, 'Land Law and Language: Some Issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 30.

94. This is acknowledged by Neate, *ibid*, who quotes Heerey: 'beneath the seamless, persuasive flow of narrative, helpfully signposted by sub-headings, there lie the hidden (and expensive) labours of solicitors and counsel'. See Heerey P, 'Storytelling, Postmodernism and the Law' (Paper presented at the Supreme Court and Federal Court Judge's conference, Canberra, January 2000) 16.

law position.⁹⁵ The QCJC recommended that provision be made in their Evidence Act for evidence to be given in narrative form, without the requirement that leave be granted;⁹⁶ however, this has never been enacted.

In the consultations a preference was expressed for evidence given in this manner.⁹⁷ The Commission is of the preliminary view that the common law position adequately provides for the giving of evidence in narrative form and that no legislative amendments are necessary, however the Commission is unaware of the extent to which courts allow Aboriginal witnesses to present their evidence in narrative form and therefore seeks submissions from interested parties (in particular, judges, lawyers and witness groups) on this point.

Invitation to Submit 18

The Commission invites submissions as to whether it is necessary for amendments to be made to the *Evidence Act 1906* (WA) to allow for evidence to be given in narrative form, and to provide for regulation of that form of evidence.

Limitations on Questions

A further way in which the negative effects of traditional methods of asking questions of Aboriginal witnesses may be removed is by the exercise of the court's discretion to limit cross-examination. This is one of the proposals put forward by Mildren in the article referred to earlier.⁹⁸ He states that there is no right to cross-examine (contrary to what may be thought) and that more use should be made of the trial judge's right to prevent questions being put unfairly to Aboriginal witnesses. This would also have the effect of guarding against their evidence being afforded little weight.⁹⁹ He goes further and asserts that the cross-examiner of an Aboriginal witness should not be permitted to

put leading questions to such a witness except by the leave of the trial judge.¹⁰⁰

The limitation of leading questions, and its effect on the fairness of a criminal trial, was recently discussed by the Court of Appeal in Western Australia in *Stack v The State of Western Australia*.¹⁰¹ In *Stack* the trial judge ruled that defence counsel could not use leading questions in his cross-examination of one of the principal prosecution witnesses in a murder trial.¹⁰² The Court of Appeal confirmed that the trial judge had the power to limit cross-examination, but urged great caution in the exercise of this power.¹⁰³ There must be a sufficient basis, reflecting on the fairness of the trial, to justify the step being taken.¹⁰⁴ The Commission is of the view that the circumstances of this matter are illustrative of the tension between the problems for Aboriginal witnesses that have been identified above the competing interest of allowing parties to properly test evidence in an adversarial system. In *Stack* the trial judge formed the view that the witness in question was placed at a disadvantage by the manner of questioning; counsel for the accused was likewise disadvantaged by the ruling which prevented him from freely questioning an important prosecution witness where his client faced life imprisonment.

In the report of the QCJC it was stated that the cultural awareness training that they proposed would assist this issue by promoting understanding amongst lawyers and judges about the kinds of problems faced by Aboriginal witnesses. However, they stated that there should be legislation affirming this position and that in determining whether cross-examination should be limited the court should have regard to (among other things) the extent to which the witness's cultural background or use of language may affect their answers.¹⁰⁵

The Commission is of the view that at present judges in Western Australia have sufficient power under the

95. In *R v Butera* (1987) 164 CLR 180, referring to evidence given by charts or explanatory materials, the High Court stated that in waiving the general rules regarding the giving of evidence, the court must consider whether there is a risk that an altered form of giving evidence might give it undue weight.

96. QCJC, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Recommendation 4.1. In their report the QCJC comments where a witness gives evidence in narrative form the operation of the rules of evidence, the skill of counsel and the court's discretionary power to control proceedings should be sufficient to control the introduction of inadmissible material: 50.

97. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13.

98. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7.

99. Note the comments of Blackburn J in *Millirrpum v Nabalco Pty Ltd* (1971) FLR 141, 179 that his Honour does not place weight on the cross-examination of Aboriginal witnesses.

100. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 16.

101. [2004] WASCA 300.

102. *Ibid*. The appellant in this matter was convicted after trial of manslaughter and appealed against his conviction.

103. *Ibid* 117.

104. *Ibid* 124.

105. QCJC, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Recommendation 4.2.



common law (as is demonstrated by *Stack*) to control proceedings in an appropriate way. Further, the Commission believes that its proposal for cultural awareness training at the end of this Part will be directed to raising awareness among judges about the ways that they can exercise their discretion to ensure that a witness is treated fairly in all circumstances.

The Impact of Customary Law on Aboriginal Witnesses

It was reported during the consultations that for some witnesses their obligations under Aboriginal customary law have clashed with the requirements of the court.¹⁰⁶ For example, Aboriginal customary law can affect a witness's ability to give evidence where:

- a witness does not have authority to speak on the subject they are being asked about: either because

they are not entitled to the knowledge, or because they cannot speak about it in the circumstances of the hearing;

- there is a speech ban or taboo in place;
- information which may be relevant to the proceedings is secret, or cannot be publicly disseminated; or
- knowledge of information which may be relevant to the proceedings is restricted to one gender only.

This list is not exhaustive: the kinds of restrictions that can impact upon a witness's evidence are as diverse as customary law itself. Nonetheless, it is important to recognise the types of issues that can arise in order to determine the best way of dealing with them. The examples above, along with some suggested solutions to the difficulties they present for courts attempting to receive evidence about Aboriginal customary law, are examined below.

Authority to speak

Not every person in an Aboriginal community is able or willing to speak about aspects of their culture. As discussed above, the Aboriginal knowledge tradition differs greatly from the non-Aboriginal system, and knowledge is 'rarely freely open or freely available'.¹⁰⁷ Some matters may only be spoken of in certain places: this has been identified as being of particular importance in native title matters, and is one of the reasons that the Federal Court has gone out to Aboriginal communities to hear evidence 'on country'.¹⁰⁸

Speech bans and taboos

It is well documented that at certain times, and after certain events, many Aboriginal communities impose speech bans that may relate to particular words.¹⁰⁹ In many Aboriginal communities it is offensive or inappropriate to refer to the name of a deceased person, especially a recently deceased person.¹¹⁰ This may constitute a violation of customary law.¹¹¹ In criminal

106. LRCWA, Project No 94 *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13; *Pilbara*, 6–11 April 2003, 12.

107. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 18.

108. Byrne J, 'The Perpetuation of Oral Evidence in Native Title Claims' (National Native Title Tribunal Occasional Papers Series, No 3/2002, October 2002) 6.

109. A well-known example is that after a person has died their name must not be spoken. For further discussion of these taboos, see Part VI 'Funerary Practices – Aboriginal Funerary Rites', above pp 310–11.

110. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA Project No 94, Background Paper No 15 (June 2005) 40. Philip Vincent also states that other matters such as the publication of details about a person who is going through the law may be prohibited by customary law. See also Neate G, 'Land, Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the Conference of the International Association of Forensic Linguists, Sydney, 2003) 52.

111. NTLRC, 'Aboriginal Communities and Aboriginal Law in the Northern Territory', Background Paper No 1, *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003) 30.

proceedings, particularly in cases of homicide where the deceased is Aboriginal, it may be difficult not to name the deceased. This may occur during oral evidence or the name may be referred to for procedural purposes such as reading the charge to the accused. There can be numerous constraints on the use of language by an Aboriginal witness—such as age, kinship, and ceremonial considerations—and these constraints may be carried over to the courtroom.¹¹² Counsel have exhibited varying degrees of understanding of such matters. In *Cubillo & Gunner v The Commonwealth*¹¹³ the following exchanges took place:

Counsel for the Applicants:

... where was Lorna Cubillo born?

Interpreter:

She is asking how she is going to talk because where she is born is avoidance for Kathleen to say that place name.¹¹⁴

...

Counsel for the Commonwealth:

Who did you marry there?

Counsel for the Applicants:

Your Honour, this is one of the matters that was raised yesterday and there's difficulty about asking the...witness to speak the name of her deceased husband. But if that difficulty can be overcome, and there are means to do so...

Counsel for the Commonwealth:

But, really, your Honour, I can understand her being sensitive to a number of matters, but it can't be allowed to intrude on the process of being able to get evidence out. It's a very straightforward matter as to who someone married, even if that person may have later died. It places an intolerable burden if, every time I ask her about a name, it turns out that person may have died ...¹¹⁵

Secret knowledge

Other matters of Aboriginal knowledge should not be spoken about at all, or only among certain people. It

was reported in the consultations at Laverton that at a recent native title hearing, evidence of customary law had been broadcast outside the courtroom, causing great distress to the community.¹¹⁶ Secrecy can take precedence over other important matters: in Broome it was said that 'a wrong was committed in the name of traditional law, where the claim was false, but the matter was shrouded by a code of silence'.¹¹⁷

Avoidance relationships

Concern was also expressed in the consultations about a lack of respect in the legal system for 'avoidance relationships': which mean that certain family members should not be in court together, or that some witnesses will not be able to talk of some matters in front of certain other members of the community.¹¹⁸ In Wiluna it was noted that sometimes the court breaks Aboriginal law because people are required to speak in front of those they are not supposed to; the example was given that a mother-in-law to a defendant or witness might be in court, preventing them from speaking in front of her.¹¹⁹ In another example, two Warburton Elders were in the same court and they could not talk to each other directly, but only by making particular noises 'from their throats'. The Magistrate said 'stop making those noises'. It was said 'he should have respected those men, instead he shamed them'.¹²⁰

Gender restricted information

There are strict delineations in Aboriginal culture about knowledge that is appropriate for men, and knowledge that is appropriate for women.¹²¹ A female witness will not be able to speak about certain topics in front of men, and vice versa.¹²² In relation to native title it has been said that the gender restricted nature of aspects of Aboriginal knowledge has resulted in discrimination against Aboriginal women who have not been able to provide their evidence in land claims because of the male-dominated nature of the legal system.¹²³

112. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2, (March 2004) 10–15.

113. [1999] FCA 518.

114. Transcript of hearing (26 August 1999) 1858, as cited in Flynn M & Stanton S, 'Trial by Ordeal: The stolen generation in court' (2000) 25(2) *Alternative Law Journal* 75, 77.

115. *Ibid* 1869.

116. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13.

117. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 24.

118. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 August 2003, 13: 'people coming into court with avoidance relationships are forced to sit or stand with each other'

119. LRCWA, Project No 94 *Thematic Summaries of Consultations – Wiluna*, 27 August 2004, 24.

120. *Ibid*.

121. Keely A, 'Women and the Land: The problems Aboriginal women face in providing gender restricted evidence' [1996] *Indigenous Law Bulletin* 35.

122. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2004, 24.

123. Keely A, 'Women and the Land: The problems Aboriginal women face in providing gender restricted evidence' [1996] *Indigenous Law Bulletin* 35.

There are strict delineations in Aboriginal culture about knowledge that is appropriate for men, and knowledge that is appropriate for women.



Finding Procedural Solutions to the Problems Caused by the Impact of Customary Law on Aboriginal Witnesses

A difficult decision

An Aboriginal witness who finds that their obligations in court come into conflict with their obligations under Aboriginal customary law has two choices: to not give their evidence, the effect of which may be that the court fails to hear material that is potentially crucial to the matter being tried;¹²⁴ or to comply with the obligations placed on them by the Australian legal system, and thereby break customary law and perhaps face punishment. However, there is an important middle

ground; that is, that a witness may give evidence but feel obliged to self-censure. The result then is that all the relevant evidence is perhaps not provided to the Court, but the Court is not aware of it. The seriousness with which Aboriginal people regard breaches of their customary law should not be underestimated. In Wuggubun the Commission was advised that 'Much law is secret. I could be killed for telling you how it runs.'¹²⁵ It has also been noted that 'each and every breach of Aboriginal customary law is a serious matter; it is not, as some non-Aboriginal people seem to assume, that further breaches are less serious than [an] initial one'.¹²⁶

Private versus public interests

The question for the Commission is whether any reform to court procedure or methods of giving evidence can be implemented that will assist Aboriginal witnesses to give necessary evidence by removing the conflict with customary law. This question has been seen to be essentially one of weighing up the private interests of the individual witness, against the public interests that govern procedural fairness. Looking at the examples above it seems that it is possible to either:

1. empower Aboriginal witnesses to give evidence, either by allowing them to remain silent about certain matters (such as banned words) in the course of their evidence or making changes to the courtroom to make them feel more comfortable; or
2. allow Aboriginal witnesses to give evidence in circumstances where only certain people could have access to that evidence, for reasons of secrecy or gender restriction.

Each of the above measures carries quite different weight when balancing the interests of justice. The former is unremarkable, and analogous to the kinds of

124. Keely, *ibid*, has set out this choice in relation to Aboriginal women and gender restricted evidence, but it applies equally to any person faced with a possible breach of customary law.

125. In this context the word 'killed' might be interpreted as 'subject to customary law punishment'. LRCWA, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 34.

126. Keely A, 'Women and the Land: The problems Aboriginal women face in providing gender restricted evidence' [1996] *Indigenous Law Bulletin* 35.

measures that are currently in place to assist vulnerable witnesses. The second goes against the fundamental principle of transparency upon which the administration of justice is based.¹²⁷ Nonetheless, it highlights the very significant implications of an increased recognition of Aboriginal customary law, and the importance of reforms which facilitate that recognition. Reforming court procedure to allow for this recognition is a difficult exercise; the proposals set out below concern fundamental principles to both the Australian legal system and Aboriginal customary law. It is the Commission's view that the recognition of Aboriginal customary law is of such importance in some situations that consideration must be given to recognising the competing interests, not as balancing public and private interests, but giving weight to the recognition of Aboriginal customary law as a valid public interest.

Privilege against self-incrimination under customary law

One way in which the law could be changed to address the impact of Aboriginal customary law on witnesses when giving evidence to a court, is to extend a category of privilege to witnesses in that situation. This means that the witness would not be required to answer a question if to do so would breach customary law. The question whether there should be such category of privilege was considered by the ALRC in their 1986 report, and the conclusion was reached that an absolute category of privilege should not be recognised in this area.¹²⁸ The ALRC is presently reconsidering whether a privilege against self-incrimination under Aboriginal customary law should be recognised as part of their reference reviewing the uniform Evidence Acts. Discussion Paper 69 asks the question whether the uniform Evidence Acts should be amended to allow the courts to excuse a witness from answering a question that tends to incriminate the witness under customary law, and if so what should be the applicable criteria.¹²⁹ The Commission understands that the ALRC's final report on this topic will be published shortly and considers it inappropriate to formulate a proposal on that issue prior to the release of that report.

Rather than look to extending categories of privilege, the Commission instead proposes practical procedural solutions to give the courts flexibility when dealing with Aboriginal witnesses who are reluctant to give evidence because of the considerations of customary law. These measures are set out below.

Vulnerable witness provisions

For reasons of customary law it may not be possible for an Aboriginal witness to give evidence because of the presence of a particular person in court. The provisions of the *Evidence Act 1906* (WA) contain a range of measures which are intended to assist vulnerable witnesses¹³⁰ and a set of guidelines are in place to facilitate their operation.¹³¹ A witness is able to give evidence with a support person, in a remote room or by special video-taped hearing if they are declared to be a 'special witnesses', defined as someone who:

In the court's view 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...¹³²

It is suggested that a provision analogous to this one be introduced to make it clear that where for reasons of customary law a witness is not able to give evidence in the ordinary way they may apply to use one of the measures described.

Proposal 83

That the *Evidence Act 1906* (WA) be amended to include a provision that if for reasons of customary law a witness is not able to give evidence in the normal manner then the witness may be declared a special witness and be able to give evidence using the protective measures set out in ss 106A to 106T on the application of the witness, or on the initiative of the court.

Group evidence

Another way to assist Aboriginal witnesses to feel able to give evidence is to enable them to do so in groups.

127. *Re an Application for a Writ of Certiorari against ROBINS, Stipendiary Magistrate in the Court of Petty Sessions, Perth; ex parte Western Australian Newspapers Ltd* [1999] WASCA 16, [5] & [10] (Ipp J; Pidgeon J and Steytler J concurring).

128. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [614]. The ALRC recommended that courts be given power to hear the evidence of two or more members of an Aboriginal community.

129. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) Question 17.2.

130. *Evidence Act 1906* (WA) ss 106A–106T.

131. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.4.4].

132. *Evidence Act 1906* (WA) s 106R.

In native title cases the Federal Court has heard evidence from groups of witnesses.¹³³ This method of hearing evidence recognises the way in which knowledge is shared in Aboriginal culture.¹³⁴ Black CJ has said that it is done ‘in recognition of the fact that within many Aboriginal communities not every person is able or willing to speak about their country, and to do so without authority from others may be very wrong’.¹³⁵ It is suggested that if evidence about Aboriginal customary law is to be heard in matters in Western Australia then consideration must be given to allowing witnesses to give evidence in groups. Order 78 rule 34 of the *Federal Court Rules* provides that group evidence may be admitted in native title matters. It is suggested that the *Evidence Act 1906* (WA) be amended to include a similar provision.

Proposal 84

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be given by witnesses in groups.

Evidence taken ‘on country’

If a witness is reluctant to give evidence because of factors related to the courtroom environment itself, then an option is to have the court take the evidence where the witness is most comfortable. Another method employed in native title hearings is for the court to travel to Aboriginal communities to hear evidence ‘on country’.¹³⁶ This has obvious benefits in land claims, but may also be useful, and indeed respectful, in other matters in which evidence of customary law must be heard. Not every kind of matter would be appropriately held ‘on country’;¹³⁷ however,

it is suggested that the *Evidence Act 1906* (WA) could be amended to allow for it to occur on the application of a party. The legislation should be flexible, and allow for only some evidence to be heard in that manner, so that a hearing may be heard in part in court, and in part on country.

Proposal 85

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be taken on country.

Single gender courts

The issue of gender restricted evidence is not a simple one. In order to accommodate the restrictions of customary law, evidence of a gender restricted nature¹³⁸ may be required to be heard before a female Judge (with a female Associate and other court staff) before a female jury¹³⁹ (where applicable), with the matter argued by female lawyers, and with the assistance of all female experts such as interpreters or anthropologists. Not long ago, many court hearings would have featured men in all of these positions. It has been asserted that the Australian legal system must attempt to accommodate Aboriginal witnesses in this regard:

It is not the women who should be forced to compromise, but rather the hearing should be structured in such a way that women feel comfortable to discuss a wide range of matters and to demonstrate their competence and knowledge.¹⁴⁰

In *Ward v Western Australia*,¹⁴¹ a native title matter involving evidence of a restricted nature, Lee J made orders that placed restrictions on the taking, recording and dissemination of evidence to a particular gender.¹⁴²

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133. Neate G, ‘Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia’ (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 31
134. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [645] & [648].
135. *Ibid*, quoting The Hon M Black AC, Chief Justice of the Federal Court of Australia, ‘Developments in Practice and Procedure In Native Title Cases’ (2002) 13 *Public Law Review* 16, 22.
136. Discussed in Byrne J, *The Perpetuation of Oral Evidence in Native Title Claims*, Native Title Tribunal Occasional Papers Series No 3 (2002) 33.
137. For example, criminal trials require certain infrastructure such as cells, jury room etc that may be more difficult to accommodate.
138. The discussion here uses evidence restricted to women as an example; but the comments apply equally to evidence restricted to men. Fryer-Smith states that in traditional Aboriginal communities men and women possess knowledge which may not be divulged to members of the opposite sex by reason of the operation of customary law: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002).
139. See discussion under Part V ‘Practice and Procedure – Gender restricted evidence’, above p 232 and Proposal 34.
140. Bell D, ‘Aboriginal Women and the Land: Learning from the Northern Territory experience’ (Paper presented to the Perth Workshop on Aboriginal Land Rights, University of Western Australia, 1983) 11, quoted in Keely A, ‘Women and the Land: The problems Aboriginal women face in providing gender restricted evidence’ [1996] *Indigenous Law Bulletin* 35.
141. (1997) 76 FCR 492. The decision was upheld by the Full Court of the Federal Court on appeal. The Full Court held that the court was entitled to prevent counsel (of a particular gender) representing a party for the purposes of protecting the integrity of the judicial process and ensuring that justice be done. The High Court declined to allow special leave on the point.
142. Neate G, ‘Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia’ (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 48.

The orders allowed for the parties to apply for evidence to be restricted, and for objections to be heard. The orders limited the parties to 'no more than two lawyers of the same sex as the witness' to be present while evidence was being given. Importantly, the transcript of the restricted evidence could only be disseminated to certain persons, such persons also being of the same gender as the witness, except with the leave of the court. These orders were made pursuant to s 50 of the *Federal Court of Australia Act 1976* (Cth) which empowers the court to make orders necessary to 'prevent prejudice in the administration of justice'.¹⁴³

Section 171(4) of the *Criminal Procedure Act 2004* (WA) provides that the court may exclude certain persons or a class of persons from court and restrict publication of evidence where it is in the interest of justice to do so. Arguably, this section could be used to exclude one gender from a court hearing. Further, at common law a judge has the inherent power to ensure the fairness of proceedings, which could extend to the making of orders which restrict the taking and publication of evidence to a particular gender.¹⁴⁴ This power can also only be exercised when it is in the interests of justice to do so.

Whether it could be said to be in the interests of justice to make arrangements for a single gender hearing is a difficult question. This exercise requires the balancing of the competing interests of the particular witness (or party) who seeks to give gender restricted evidence and the administration of justice. Any restriction on evidence is likely to conflict with one of the fundamental principles of the Australian legal system; that is that the proceedings be public and that they be able to be openly scrutinised. It is therefore a very high threshold to require Aboriginal witnesses to establish that it is in the interests of justice that the evidence be restricted. If a witness would not give evidence without the restriction being in place, could that justify the restrictions in the interests of justice? The answer to this question will vary according to the nature of the evidence to be adduced in each case; however, it is likely that in many cases where customary law is relevant that it could not be established that it was the interests

of justice to take the far-reaching step of restricting the evidence to persons of one gender.

Lee J's orders in *Ward* were the subject of an appeal to the Full Court of the Federal Court which decided that, on the evidence, the trial judge could be satisfied that the cultural concerns of the private interests of the Aboriginal witnesses outweighed the public interest in the open administration of justice.¹⁴⁵ In each case it will depend on the evidence that the party seeking to impose the restrictions can adduce in support of its claim to a significant interest. As the author of the casenote observed, this could be somewhat counterproductive: providing this type of evidence in detail could compromise the very evidence that was sought to be restricted.¹⁴⁶

From a practical point of view, restricting evidence to persons of one gender is fraught with difficulties. Even if in a criminal trial it were possible to have a female judge, associate, lawyers and jury, what would happen if the matter were appealed? What power would a court have to undertake that a section of transcript could never be shown to a member of the opposite gender? Also, while it could be argued in a criminal trial that the state must use a lawyer of the appropriate gender, in a civil matter, could the interests of justice allow a plaintiff to dictate to a defendant the gender of their representation? In view of these practical



143. This decision has been much criticised, and since then the native title legislation has been amended to make it, arguably, more stringent on such points. For a full discussion of the gender restricted evidence in the Federal court in the context of native title claims, see Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 49–52.

144. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.4.9].

145. Case note: 'Gender Restricted Evidence: *State of Western Australia v Ben Ward*; unreported WAG 57 of 1997', [1998] *Indigenous Law Bulletin* 20. Special leave to appeal was refused by the High Court on 20 October 1997.

146. *Ibid.*

problems the Commission's view is that the convening of single gender courts is not a realistic option. Further, most gender restricted material (in matters that do not pertain to native title) is likely to be of a more limited nature, and therefore conducive to protection by other measures proposed in this part. Allowances could be made—through suppression orders and orders not requiring witnesses to speak—for witnesses to reveal in their evidence only information that will not breach their customary law. Nonetheless, in recognition of the difficulties that could be posed by the working out of such orders it is proposed that in appropriate cases a judge of the appropriate gender could be assigned to a matter.

Proposal 86

That amendments be made to the rules governing procedure to allow an application to be made to the Chief Justice of the Supreme Court, the Chief Justice of Family Court, the Chief Judge of the District Court or the Chief Magistrate for a judge or magistrate of a particular gender to be assigned to a matter in which gender restricted evidence is likely to be heard.

Not speaking about certain matters

In some circumstances customary law may prevent a witness from saying certain words, for example the name of recently deceased person, or someone going through the law.¹⁴⁷ Taking a practical approach, the court can often work around such matters; for example, some judicial officers in Western Australia avoid mentioning the name of a deceased Aboriginal person in court.¹⁴⁸

There are two considerations here. The first is that it may be prohibited for a witness to say certain things in court and that may be a barrier to them giving evidence. In those circumstances, the court can exercise its discretion to allow the witness to remain silent on that point, on the basis that they are therefore not providing evidence upon which the court can rely. The question

is whether others in the hearing should also be prevented from using the word or name, bearing in mind that it may be offensive to Aboriginal people. Neate has observed that in native title hearings it is sometimes possible to refer to a deceased person, not by name but by reference to that person's relationship to another.¹⁴⁹ The Commission considers that out of respect for Aboriginal people a court should have the power to prohibit any reference to offensive matters during the court proceedings, provided that to do so does not unduly interfere with the administration of justice.

Proposal 87

That the *Criminal Procedure Act 2004 (WA)* be amended to provide that a court may order that certain information not be referred to in proceedings if the court is satisfied that reference to that information would be offensive to an Aboriginal person or community because of Aboriginal customary law, provided that to do so is not contrary to the administration of justice.

Suppression of information

The second consideration is the prevention of publication of the material outside the court. Where a practical course has been adopted to take account of the customary law consideration inside the courtroom, does the court have power to order that secret information not be published, or otherwise disseminated? Section 171(5) of the *Criminal Procedure Act 2004 (WA)* permits a court to restrict the publication of anything that may lead to the identification of the victim, and it is suggested that this provision could be employed to protect the name of a deceased person.¹⁵⁰ However, this section is not of wide enough application to restrict publication of other culturally sensitive information. Section 57 of the *Evidence Act 1939 (NT)* provides that a court has the power to prohibit the publication of the name of a party or a witness if publication would be likely to offend against public decency. In *R v B*¹⁵¹ this section was relied upon to

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

148. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 9. The Commission notes that in many of the sentencing cases where the deceased victim was Aboriginal the sentencing judge would generally refer to the victim as 'the deceased'. However, it is still common for the name of the deceased to be used when reading out the charge or when the prosecution read out a statement of material facts.

149. Neate G, 'Land, Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the Conference of the International Association of Forensic Linguists, Sydney, 2003) 53.

150. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA Project No 94, Background Paper No 15 (June 2005) 40.

151. (1992) 111 FLR 463 (Mildren J).

prohibit the publication of the name of a deceased Aboriginal male who was the victim of a homicide. The court considered that, due to the high number of Aboriginal people living in the Northern Territory, publication of the victim's name would offend a large section of the public.

The Commission considers that a court should have the power to restrict the publication of culturally sensitive matters. Of course, there may be cases where publication of culturally sensitive material is necessary in the interests of justice. The court would be required to balance the need to ensure that the interests of justice are met; that the courts are open to the public; and that consideration is given to material that may be offensive to a person or community.

Proposal 88

That the following sub-sections be added to s 171(4) of the *Criminal Procedure Act 2004 (WA)*:

- (d) On an application by a party or on its own initiative, a court may make an order that prohibits the publication of any evidence if the court is satisfied that publication of, or reference to, the evidence would be offensive to an Aboriginal person or community by reason of matters concerned with Aboriginal customary law.
- (e) The court must not make such an order if it is satisfied that publication of, or reference to, the evidence is required in the interests of justice.

Protocols

It is suggested that the development of protocols for lawyers working with Aboriginal witnesses and clients could go a long way to assisting with many of the problems outlined above. As observed in Part V above, the Northern Territory has developed such protocols which are designed to avoid problems arising from miscommunication between non-Indigenous lawyers and their Indigenous clients. There are three main

protocols: a test to determine whether the client requires the services of an interpreter; an obligation on the lawyers to fully explain their role; and a requirement to use plain English. The protocols also contain information about cultural differences and aspects of Aboriginal customary law. The Law Society of Western Australia is in the process of adapting these protocols for use in this state.¹⁵² It is suggested that these protocols would be directed not only to those seeking to lead evidence from Aboriginal witnesses, but also to encourage counsel to object to questions asked of an Aboriginal witness that, because of the witness's linguistic and cultural background, are inappropriate.¹⁵³

Writing about the manner in which evidence was elicited from Aboriginal witnesses in the Stolen Generation Case,¹⁵⁴ Martin Flynn and Sue Stanton asserted that there is a need for protocols to be developed that would govern the way that evidence is received, and that it may be appropriate for the court to become involved in the process. They proposed that a 'reconciliatory approach' to litigation be adopted based on expert techniques for ensuring that Aboriginal evidence can be adduced in a manner that 'comes with the rules of evidence, is fair to the witness and does not prejudice the interests of parties to the legislation'.¹⁵⁵

Facilitators

Many comments made to the Commission in the course of the consultations concerned the fact that Aboriginal people coming before the courts wanted more information about the court process. It is accepted that the present resources of the Aboriginal Legal Service do not permit the kind of time-consuming assistance that was sought. In Armadale it was said that children appearing in court did not understand appropriate dress, manners, stance and other matters of demeanour and deportment which made their appearances in court unnecessarily difficult.¹⁵⁶ Aboriginal people said they need more help to understand how the court system works.¹⁵⁷ It appears that some of the assistance being sought from (and provided by) many interpreters is of this nature. It is suggested that

152. Telephone communication with Alison Gaines, Executive Director of the Law Society of Western Australia, 6 October 2005. See also discussion on interpreters under 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', above pp 401–406.

153. QCJC, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Recommendation 4.3.

154. *Cubillo & Gunner v The Commonwealth* [1999] FCA 518.

155. Flynn M & Stanton S, 'Trial by Ordeal: The stolen generation in court' (2000) 25(2) *Alternative Law Journal* 75, 77.

156. LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 25

157. LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 37; *Fitzroy Crossing*, 3 March 2004, 45; *Pilbara*, 6–11 April 2003, 15.

facilitators whose specific task is to explain court procedure would be of assistance not just in performing that function, but also in alleviating some of the burden on interpreters.

In Discussion Paper 69 the ALRC proposed that 'facilitators' be employed to provide assistance to Aboriginal people to understand the court process:

[I]nterpreters and court facilitators [should] be used to overcome the difficulties experienced by Aboriginal [people] in giving evidence. The facilitators would assist the [people] in giving their evidence and understanding the proceedings, and would assist the court in understanding Aboriginal [people's] demeanor and behaviour in court.¹⁵⁸

At present there is not a sufficient number of Aboriginal Liaison Officers employed by Western Australian courts¹⁵⁹ to carry out this kind of day-to-day role.

If the Commission's proposal for the establishment of community justice groups (discussed in Part V)¹⁶⁰ is accepted, then part of their role might be to provide assistance to Aboriginal witnesses and to ensure that any customary law considerations applicable to a matter in court are respected and brought to the attention of the court. If community justice groups are not established, or are not established in a particular location, then the Commission is of the view that specialised court facilitators should be trained to assist witnesses in metropolitan and country courts.

Proposal 89

That the Department of Justice employ court facilitators to work with the Aboriginal Liaison Officer to the Courts to provide assistance to Aboriginal people giving evidence in court and to ensure that regard is given to issues of customary law in court proceedings.

Cultural Awareness Training for Judicial Officers

During the consultations there were numerous suggestions for regular or improved cultural awareness training for judicial officers.¹⁶¹ It was suggested that understanding of Aboriginal customary law could be enhanced by visits to Aboriginal communities¹⁶² and that cultural awareness training should be delivered by local Aboriginal people.¹⁶³ During the Pilbara consultations it was thought that there should be a 'bush meeting' with Elders and judges.¹⁶⁴ In Mirrabooka it was stated that Elders should be involved in cultural awareness training.¹⁶⁵

The need for adequate cultural awareness training for judicial officers has been recognised by various other inquiries.¹⁶⁶ Natalie Siegel has suggested that the level of cultural awareness in Magistrates Courts is currently dependent upon the willingness of individual magistrates to inform themselves of local issues. She reported that one magistrate in Western Australia allegedly refused an invitation from an Aboriginal community to visit and learn about their culture.¹⁶⁷ Siegel recommended that cultural awareness training about the particular community, and undertaken by members of that community, is imperative.¹⁶⁸

In Western Australia the Chief Magistrate is responsible for the training and education of all magistrates.¹⁶⁹ The Commission has been advised that Aboriginal people have been involved in conducting presentations to magistrates about relevant issues concerning Aboriginal people at the annual Magistrates Conference as well as other conferences.¹⁷⁰ Similarly, in the District Court there have been cultural awareness courses presented by Aboriginal people.¹⁷¹ The Supreme Court of Western Australia initiated Aboriginal cultural awareness training in 1993 in conjunction with the Australian Institute of Judicial Administration.¹⁷² The Commission understands

158. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.28].

159. The Commission notes that the Family Court is currently in the process of employing an Aboriginal Liaison Officer for that jurisdiction.

160. See Part V 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

161. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 9; *Geraldton*, 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 21–22; *Bunbury*, 28–29 October 2003, 11; *Albany*, 18 November 2003, 19.

162. LRCWA, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 16; *Kalgoorlie*, 25 March 2003, 27.

163. LRCWA, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 11.

164. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 2.

165. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 9.

166. See NTLRC, *Report of the Committee of inquiry into Aboriginal Customary Law* (2003) 4, Recommendation 1; RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [22.4.27] Recommendation 96.

167. Siegel N, 'Bush Courts of Remote Australia' (2002) 76 *Alternative Law Journal* 640, 649.

168. *Ibid* 651.

169. *Magistrates Court Act 2004* (WA) s 24(4).

170. Letter to the LRCWA from the Chief Magistrate of Western Australia, 15 November 2005.

171. Letter to the LRCWA from the Chief Judge of the District Court of Western Australia, 16 November 2005.

172. Letter to the LRCWA from the Chief Justice of the Supreme Court of Western Australia, 5 December 2005. The pilot program introduced in 1993 in the Supreme Court of Western Australia has been used as a model for other courts and judicial officers. In addition the Supreme Court employs an

that where possible, programs are presented by local Aboriginal people. Judicial officers in the Supreme Court are strongly encouraged to attend. The Commission notes that the *Aboriginal Benchbook for Western Australian Courts*, which is an extremely useful resource, is made available to all magistrates and judges.¹⁷³ The Commission would hope that this Discussion Paper would also be made available to all judicial officers in Western Australia.

The Family Court of Western Australia has advised the Commission that currently there is no cultural awareness program for judicial officers in the Family Court. Some judicial officers do attend external cultural awareness courses.¹⁷⁴ The Family Court of Western Australia is presently considering the appointment of Aboriginal liaison officers to work in the court.¹⁷⁵ Although the details of this proposed scheme are yet to be finalised, the Commission supports the involvement of Aboriginal people in the Family Court. As far as the Commission is aware there is no cultural awareness training yet available for members of the State Administrative Tribunal.

The Commission is of the view that all judicial officers in Western Australia (including justices of the peace) should undertake cultural awareness training. This training should include aspects of Aboriginal customary law that are relevant to the particular jurisdiction of the court and those matters that Aboriginal people consider it is appropriate to discuss. Because of the diversity in customary law and other cultural issues between Aboriginal communities it is necessary for judicial officers to be made aware of the particular local cultural practices and conditions and courses should reflect this.

The cultural awareness training should include specific reference to the kinds of difficulties faced by Aboriginal witnesses set out above, and to the procedural measures that can be put in place to assist with those problems. In particular it should include:

- familiarising participants with the different thought system and knowledge tradition of Aboriginal people;
- raising awareness of language issues, in particular the use of Aboriginal English and the fact that it does not equate to Standard English or mean that a witness can understand Standard English;
- emphasising the benefits of and issues associated with witnesses giving evidence in groups;
- emphasising the benefits of and issues associated with taking evidence on country; and
- providing information about gender restricted evidence and the ways in which hearings can be structured to allow such evidence to be heard.

In making this proposal the Commission recognises that adequate resources must be provided, not only to engage Aboriginal presenters and design effective courses but also to ensure that there is proper provision for judicial officers to have time to engage in the process without detriment to the function of the courts in each relevant jurisdiction.

Proposal 90

That all Western Australian courts (including the State Administrative Tribunal) implement Aboriginal cultural awareness training.

That the Western Australian government provide adequate resources to implement this proposal by ensuring that there are sufficient funds to develop programs, engage Aboriginal presenters without adversely affecting the work of the courts.

Where a judicial officer is required to regularly sit at a particular location, *local* cultural awareness should be encouraged.

The Commission encourages members of a community justice group to participate in cultural awareness training.

Aboriginal Liaison Officer to advise members of the court about cultural issues and this officer is a member of the Chief's Justice's Aboriginal Liaison Committee.

173. Letter to the LRCWA from the Chief Magistrate of Western Australia, 15 November 2005; Letter to the LRCWA from the Chief Judge of the District Court of Western Australia, 16 November 2005.

174. Letter to the Commission from the Chief Judge of the Family Court of Western Australia, 16 November 2005.

175. *Ibid.*