

# Chapter Nine

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## Aboriginal Customary Law in the Courtroom: Evidence and Procedure

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# Evidence

If Aboriginal customary law is to be recognised by courts in Western Australia Aboriginal people must be able to attend court as witnesses and explain their customary law in an effective way. In Part IX of its Discussion Paper the Commission recognised that Aboriginal people can have problems when giving evidence about their customary law in court.<sup>1</sup> It was also acknowledged that many Aboriginal people generally have difficulties dealing with the court process, whether as a witness or as a party to proceedings. The Commission identified some of the problems facing Aboriginal people in court and made proposals for changes to the rules governing evidence and court procedure to assist with those problems. The recommendations in this chapter are designed not only to assist Aboriginal people to give evidence about customary law, but also to help Aboriginal people to better understand and participate in the legal system.

In its Discussion Paper the Commission explained how the common law (or judge-made) rules of evidence and the *Evidence Act 1906* (WA) can make it difficult for Aboriginal people to give information to courts about matters of customary law.<sup>2</sup> The information that Aboriginal people have to tell the court is sometimes said to be inadmissible or such that the court cannot rely on it in making its decision. This is because information about customary law often does not comply with the rules the Australian legal system has developed to determine the types of information a court may rely on in coming to a decision. The reasons for this are complex, but flow from the fact that Australia's legal system is based on laws and rules posited in written form. By contrast, Aboriginal people have a tradition of oral history, with customary law handed down through the generations and recorded in stories, paintings and dance.

There are two main obstacles to the court receiving the information about customary law generally provided

by Aboriginal people: the rule against hearsay and the opinion rule.<sup>3</sup> In short, when Aboriginal people are asked in court about the source of their knowledge of customary law, their reply is often that the law is what has been told to them. This offends the rule against hearsay because that rule states that the court cannot rely on second-hand information to determine the truth of a factual matter in dispute. When an Aboriginal person is asked to draw an inference or express an opinion about customary law the set of rules known collectively as the opinion rule determines whether that person is qualified to give evidence and on what their opinion or inference can be based. The opinion rule can be problematic for Aboriginal people for a number of reasons, which are discussed in detail in the Discussion Paper.<sup>4</sup> The main problems are satisfying the legal test for who can give expert (or opinion) evidence and the fact that any opinion expressed must be based on admissible evidence. Thus the court will not allow an Aboriginal witness to state an opinion if the basis of the opinion is hearsay (or second-hand) evidence.

Some of the recommendations in this Report will lead to an increased need for courts to hear information about customary law; for example, to prove the existence of a traditional marriage<sup>5</sup> or specific customary law obligations for the purposes of applying for an extraordinary drivers licence.<sup>6</sup> There is therefore a need for the difficulties posed by the rules of evidence to be addressed.

## The Commission's Proposals

In order to address these problems the Commission in its Discussion Paper proposed amendments to the *Evidence Act*. The proposals sought to exclude the hearsay and opinion rules in relation to information that proves the existence (or non-existence) or content of Aboriginal customary law. They also provided that a

1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 385–95.

2. For fuller discussion, see *ibid* 385–87.

3. These expressions are shorthand expressions for a group of rules governing the reception of particular kinds of evidence. For a more detailed discussion of the application of these rules of evidence to information about Aboriginal customary law, see *ibid* 387–92.

4. *Ibid* 389–92.

5. See Recommendation 83, above p 274.

6. See Recommendation 13, above p 95.

person may be qualified to give expert evidence about Aboriginal customary law based on his or her experience of that law.<sup>7</sup>

Lawyers who had experienced difficulties in seeking to prove aspects of customary law welcomed the proposed changes.<sup>8</sup> They noted that the common law rules of evidence are often broad enough to permit information about customary law to be admitted; however, much complex legal argument can be required before this position is established.<sup>9</sup> For this reason, it was argued that it was desirable to make the position clear in the *Evidence Act*. The Office of the Director of Public Prosecutions (DPP) submitted that the proposed legislation would 'clarify the position and assist the courts to receive such evidence in a consistent manner'.<sup>10</sup>

## Customary Law and the Uniform Evidence Acts

In making its proposals the Commission was informed by the recommendations of the Australian Law Reform Commission (ALRC) in both its 1986 report *The Recognition of Aboriginal Customary Laws*<sup>11</sup> (referred to in this chapter as the '1986 ALRC Report') and its 2005 *Review of the Uniform Evidence Acts*<sup>12</sup> (referred to in this chapter as the '2005 ALRC Discussion Paper'). Since the publication of this Commission's Discussion Paper, a final report on the uniform Evidence Acts has been released by the ALRC (referred to in this chapter as the '2005 ALRC Final Report').<sup>13</sup> In respect of Aboriginal customary law<sup>14</sup> the 2005 ALRC Final Report is directed to two issues. First, whether it is necessary

for the uniform Evidence Acts to be amended to include a provision dealing specifically with the admission of evidence of Aboriginal or Torres Strait Islander traditional laws and customs. And second, whether there should be a new form of privilege with respect to evidence that may render an Aboriginal witness liable to traditional punishment.<sup>15</sup>

## Use of terminology

There is a slight divergence between the use of terms in the 2005 ALRC Final Report and this Report. In this Report the Commission uses the term 'Aboriginal customary law', whereas the 2005 ALRC Final Report uses the expression 'Aboriginal and Torres Strait Islander traditional laws and customs'.<sup>16</sup> In the 1986 ALRC Report the expression 'Aboriginal customary law' was used and it was acknowledged that customary law could not be precisely defined.<sup>17</sup> In contrast, in its 2005 ALRC Final Report the ALRC preferred the expression 'traditional laws and customs' and defined this expression as 'the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal and Torres Strait Islander persons'.<sup>18</sup> This expression is consistent with the language of the *Native Title Act 1993* (Cth), which refers to 'traditional laws acknowledged, and traditional customs observed'.<sup>19</sup> The ALRC received a varied response to this definition in submissions and consultations.<sup>20</sup> Some issues were raised such as whether the narrow interpretation of the word 'traditional' in the *Yorta Yorta* decision<sup>21</sup> would impact on the use of this expression. There was also concern

7. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 395, Proposal 77.

8. Support for this proposal was also expressed in a number of submissions received by the Commission: Australian Property Institute, Submission No. 11 (21 April 2006) 3; Law Society of Western Australia, Submission No. 36 (16 May 2006), 11; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006), 6; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5. The Law Society recognised that Aboriginal customary law 'is known, held and disseminated in ways which create evidentiary difficulties in legal proceedings.' It asserted that this 'mismatch' should not prohibit the formal recognition of Aboriginal customary law; particularly 'where the physical, economic, social and cultural well-being of Aboriginal people is affected.'

9. Greg McIntyre SC & George Irving, consultation (24 May 2006).

10. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 6.

11. Australian Law Reform Commission (ALRC), *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986).

12. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper No. 69 (2005). The uniform Evidence Acts means the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas), and *Evidence Act 2004* (Norfolk Island).

13. ALRC, *Uniform Evidence Law*, Report No. 102 (2005). This report was prepared and published in conjunction with the New South Wales Law Reform Commission (as their Report No. 112) and the Victorian Law Reform Commission.

14. The expression used in the report is 'Aboriginal and Torres Strait Islander traditional laws and customs'. For comparison with the terms used in this Report, see discussion under 'Use of terminology' below.

15. The conclusions expressed in the 2005 ALRC Final Report about whether it is necessary to extend the categories of privilege to witnesses who do not wish to give evidence for reasons of customary law are discussed in more detail later in this chapter: see below p 323.

16. In the 2005 ALRC Final Report the expression 'Aboriginal and Torres Strait Islander' is used to describe Australian Indigenous persons. For the reasons expressed in the introduction to this Report the Commission has used 'Aboriginal' to refer to both Aboriginal and Torres Strait Islander people: see 'Introduction', above p 1.

17. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [99]. This issue is discussed in more detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 49.

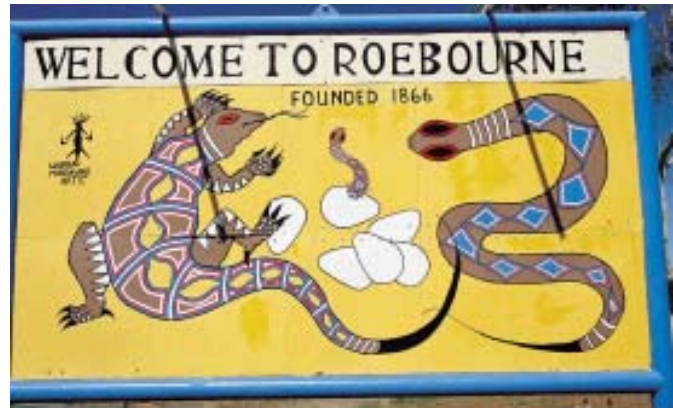
18. ALRC, *Uniform Evidence Law*, Report No. 102 (2005) Recommendation 19-3.

19. *Native Title Act 1993* (Cth) s 223.

20. ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.91].

21. *Ibid* [19.89]. In *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [46] 'traditional' was held to mean the normative rules of Aboriginal societies before the assertion of sovereignty by the British Crown.

about whether the similarity of the expression to the words used in the *Native Title Act* would mean that the judicial interpretation of those words would be adopted automatically into the uniform Evidence Acts.<sup>22</sup> The ALRC stated that these issues do not present insurmountable problems and noted that most submissions preferred a 'broad-based definition';<sup>23</sup> that is, a definition broad enough to cover the types of material relevant for the purpose.<sup>24</sup> In any event, it was noted that no alternative solution was proposed.<sup>25</sup>



Although the divergence of expressions may not have any practical impact, the Commission is concerned to ensure that no unintended consequences flow from the listing of specific items in the definition.<sup>26</sup> The Commission has therefore preferred the non-defined term 'Aboriginal customary law' for the purposes of this reference.<sup>27</sup> Nevertheless, it is clear from the discussions in both the 2005 ALRC Final Report and this Report that both are directed to the same notion and attempt to describe a broad concept that is not capable of precise definition.

## Proposed amendments to the uniform Evidence Acts

In order to provide a background to the Commission's proposed changes to the *Evidence Act* it is useful to examine the recommendations that the ALRC has made in respect of this issue over the past 20 years. The 1986 ALRC Report contained proposed changes to the rules of evidence for Aboriginal witnesses seeking to give evidence about customary law. It made a recommendation (referred to in this chapter as the '1986 ALRC recommendation') that legislation be enacted to provide:

that 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 that evidence:

- has special knowledge or experience of the customary laws of that community in relation to that matter; or
- would be likely to have such knowledge or experience if such laws existed.<sup>28</sup>

The 2005 ALRC Final Report noted<sup>29</sup> that this proposal aimed to make information about Aboriginal customary law admissible and also dealt with problems created by the rules of evidence discussed above.<sup>30</sup> This recommendation was never implemented.

The uniform Evidence Acts, enacted in 1995, relaxed the rules against hearsay and opinion evidence.<sup>31</sup> In 2004 the ALRC commenced a review to evaluate the operation of the uniform Evidence Acts which, among other things, considered the impact of the Acts on evidence of Aboriginal customary law. In the 2005 ALRC Discussion Paper it was suggested that both the measures introduced in the uniform Evidence Acts and the 1986 ALRC recommendation did not go far enough to enable information about Aboriginal customary law to be properly heard by courts. The ALRC found that the admissibility of information of this kind was still contested, that divergent judicial approaches were

22. Ibid [19.4]. The ALRC states that it does not intend for the judicial interpretation developed in the *Native Title Act* context to be automatically incorporated into the uniform Evidence Acts.

23. Ibid [19.93]. It is stated at [19.100] that what was intended was wording that would ensure the full range of matter within the scope of the concept was included, and at [19.103] that 'by defining broadly the uniform Evidence Acts will be better able to receive more diverse evidence which can be used to prove the existence and content of particular traditional laws and customs'.

24. Ibid. See comments between [19.91]–[19.95].

25. Ibid [19.98].

26. It can be argued that listing items in a definition (in the manner of the 2005 ALRC Final Report) risks excluding relevant matters.

27. See discussion under 'Definitional Matters – Customary law', Chapter Four, above p 64.

28. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No. 31 (1986) [642]. The ALRC also recommended the legislation provide that such evidence is admissible, notwithstanding the question of Aboriginal customary laws is a fact in issue in the case.

29. ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.65].

30. These issues are discussed in more detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 389–92.

31. The uniform Evidence Acts contain the rule against hearsay (s 59) but they also provide that hearsay can be admitted for a non-hearsay purpose (s 60); and that the hearsay rule does not apply to reputation evidence about relationships or age (s 73) and reputation evidence about public or general rights (s 74). The Acts also provide that a person can attain specialised knowledge (and therefore give opinion evidence) through study, training or experience (s 79) and abolish the ultimate issue and common knowledge rules (s 80).

taken, and that there was too much reliance on the attitudes of individual judges and lawyers.<sup>32</sup> Therefore, the 2005 ALRC Final Report proposed that an exception be provided to the hearsay and opinion rules for evidence of Aboriginal customary law.

In the 2005 ALRC Final Report it was noted that a number of submissions recognised that a primary concern is ‘the discord between the rationale underpinning the hearsay and opinion rules in the common law system and the [Aboriginal and Torres Strait Islander] oral tradition of knowledge’.<sup>33</sup> The intention of the recommendations in the 2005 ALRC Final Report is to shift the court’s focus from technical breaches of the rules of evidence to a determination about whether the information presented is reliable.<sup>34</sup> Thus the recommendation in the 2005 ALRC Final Report is that the uniform Evidence Acts be amended to provide:

- an exception to the hearsay rule for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs;<sup>35</sup>
- an exception to the opinion evidence rule for evidence of an opinion expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group;<sup>36</sup> and
- a definition of ‘traditional laws and customs’ to include ‘the customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group (including a kinship group) of Aboriginal and Torres Strait Islander persons.’<sup>37</sup>

These recommendations have not yet been enacted.

## The Western Australian position

The Commission’s recommendation essentially mirrors the most recent ALRC recommendation, but does not use the term ‘traditional laws and customs’ for the reasons referred to above. The recommendation also specifically provides for a person whose knowledge is based on experience to be regarded as an expert and therefore able to give opinion evidence. This addition is necessary because, unlike the uniform Evidence Acts, the Western Australian *Evidence Act* does not specifically allow a person to be qualified as an expert on the basis of experience alone (although that is the position at common law).<sup>38</sup>

### Recommendation 109

#### Exclusion of the hearsay and opinion rules for evidence about Aboriginal customary law

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

1. An exception to the hearsay rule for evidence relevant to Aboriginal customary law.
2. An exception to the opinion rule for evidence relevant to Aboriginal customary law.
3. 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.

32. The ALRC also expressed concern that the court may take a liberal approach to the admission of material, and then afford it little weight. For a detailed history of the ALRC’s proposals about evidence of customary law, see ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.2]–[19.105].

33. *Ibid* [19.13].

34. *Ibid* [19.74].

35. *Ibid* Recommendation 19-1.

36. *Ibid* Recommendation 19-2.

37. *Ibid* Recommendation 19-3.

38. See generally Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29060]. For example, an Aboriginal man who was trained from the age of seven by his grandparents in tracking human and animal footprints and had experience in footprint recognition over many years was considered to be an expert by the Northern Territory Supreme Court: *R v Harris* (1997) 7 NTLR 1.

# Procedure

For many Aboriginal people, appearing in court as a witness and telling the court about their customary law is an extremely difficult thing to do. There can be a number of reasons for this including: the difficulties experienced by some Aboriginal people in understanding the court process;<sup>1</sup> problems associated with the language used in court;<sup>2</sup> problems caused by the techniques used by lawyers in court;<sup>3</sup> and the fact that the demeanour of some Aboriginal witnesses might be misunderstood by the judge or jury.<sup>4</sup> In addition, an Aboriginal witness may be restricted, for reasons of customary law, about what he or she can say in court.<sup>5</sup> In its Discussion Paper the Commission gave careful consideration to the problems Aboriginal people face when appearing in court and made a number of proposals about practical ways of resolving these problems. The resulting recommendations fall into two broad groups: recommendations to assist with circumstances where the requirements of the court clash with an Aboriginal person's obligations under customary law; and recommendations to assist Aboriginal people to better understand and participate in the court process.

## Conflict with Obligations under Customary Law

In its Discussion Paper the Commission examined ways in which the customary law obligations of an Aboriginal witness can conflict with the requirements of the court. These include where:

- witnesses cannot speak about a subject in front of certain people, such as where a man is not permitted to speak in front of his mother-in-law;

- there is a speech ban or taboo in place, such as where it is not permissible to use the name of a deceased person;
- information which may be relevant to the proceedings is secret, or cannot be publicly disseminated, such as information that can be known only by Elders; and
- knowledge of information that may be relevant to the proceedings is restricted to one gender only.<sup>6</sup>

It was recognised that Aboriginal witnesses can face a difficult decision in these circumstances. They can choose not to give evidence, in which case the court would fail to hear material that is relevant to the matter;<sup>7</sup> or they may comply with Australian law, in which case they may breach customary law and possibly face punishment. Alternatively, they may censor their evidence, with the result that the court is unaware that all relevant evidence has not been provided.

## Should a further category of privilege be created for customary law?

One way of dealing with the problem of a conflict between an Aboriginal witness's obligations under customary law and the requirements of the court is to extend the categories of privilege.<sup>8</sup> This would enable a witness faced with such a situation to elect not to answer a question that might incriminate him or her under customary law. It was noted in the Commission's Discussion Paper that the ALRC was considering whether a further category of privilege should be created to encompass Aboriginal customary law;

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1. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396. See also discussion under 'Practice and Procedure', Chapter Five, above pp 188–91.

2. Ibid 396.

3. Ibid 398.

4. Ibid 400.

5. Ibid 407–408.

6. Ibid.

7. Ibid 408–409. In *Western Australia v Ward* (1997) 76 FCR 492, 499 Hill and Sundberg JJ noted that it was accepted by the parties to that case that it was 'notorious that there are circumstances where indigenous persons of one gender might rather refrain from giving evidence at all than reveal to a person of another gender matters secret to the gender to which the prospective witness belongs.'

8. A privilege is a right of a party to refuse to disclose certain confidential material to a court, not the right to refuse to attend before the court and give any evidence whatsoever: see ALRC, *Uniform Evidence Law*, Report No. 102 (2005) [19.107], quoting Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 7th ed., 2004) [25005].

however, the 2005 ARLC Final Report concluded that this was not desirable. The Commission was not told in its consultations conducted prior to, or after, the release of its Discussion Paper that such a measure was necessary or desirable. Nor was it raised in submissions.

The Commission is of the opinion that the measures recommended in this Report will encourage Aboriginal witnesses to give evidence where they might previously have been reluctant to do so. In particular, by making changes to court procedure to alleviate some of the problems related to customary law and other cultural considerations. The Commission considers this to be a better option because the court will hear all the evidence a witness has to provide to the court. This is preferable to the situation where a witness exercising a privilege withholds information, thus denying the court an opportunity to hear evidence that may be relevant and reliable.<sup>9</sup> The Commission therefore agrees with the conclusions expressed in the 2005 ARLC Final Report that a further category of privilege for Aboriginal customary law is not necessary.<sup>10</sup>

## The Commission's approach

In order to overcome conflicts between customary law obligations of an Aboriginal witness and the requirements of the court, possible options include restricting evidence to persons of one gender or making evidence secret. While these potentially undermine the principles of openness and accessibility upon which the Australian legal system is founded, it is important to note that these principles are not absolute. For example, the names of offenders in the Children's Court are not made public.<sup>11</sup> Further, courts can be closed when hearing evidence from a person in the witness

protection program<sup>12</sup> or when hearing an application for a freezing order over a person's assets.<sup>13</sup> Apart from these specific legislative powers, the court also has power at common law to close the court to the public. Further, a court can make orders restricting who may see certain evidence.<sup>14</sup> It is clear that the court will, where the interests of justice demand it, restrict the persons who can be present in certain kinds of hearings or restrict access to sensitive information.<sup>15</sup> The Commission considers that it is in the interests of justice that courts assist Aboriginal witnesses to avoid, where possible, conflicts with their customary law. The Commission took a pragmatic approach to this issue. Its recommendations are an attempt to provide a set of powers that would enable a judge in a case where customary law is relevant, or impacts on the ability of a witness to give evidence, to make orders to suit that case.

In submissions and consultations the Commission was told that, in addition to the measures proposed in the Discussion Paper, some of the court's existing powers should be used more often to deal with issues raised by customary law.<sup>16</sup> Since the publication of the Discussion Paper the fact that Aboriginal witnesses can feel restricted by customary law in giving evidence in court has been discussed in the media.<sup>17</sup> Notably, it has been suggested that the Australian Crime Commission could use its powers to compel witnesses to give evidence. If witnesses refused to answer questions they could be found in contempt of court, and perhaps jailed.<sup>18</sup> The Commission does not consider that a punitive approach should be taken to these issues. The Commission's recommendations are directed to reducing the existing barriers to Aboriginal people giving evidence in court through changes to the existing court procedure.

9. The ALRC also noted that the establishment of a privilege against self-incrimination for reasons of customary law may place greater pressure on witnesses not to give evidence (ie, to rely on the privilege) in particular matters: *ibid* [19.127]. In addition, if Aboriginal people could refuse to give evidence because of Aboriginal customary law this *may* perpetuate the silence about issues of violence and sexual abuse: see Chapter One, above p 26 and Chapter Seven, above pp 284–88.

10. The issue is dealt with in detail in ALRC, *Uniform Evidence Law Report*, Report No. 102 (2005) [19.106]–[19.128].

11. *Children's Court Act 1988* (WA) s 36.

12. *Witness Protection Act 1996* (WA) s 32. Section 31 of the *Children's Court Act 1988* (WA) also allows the Children's Court to order that any persons be excluded from the courtroom or place of hearing where the interests of a child may be prejudicially affected.

13. Sections 42(a) and (b) of the *Criminal Property Confiscation Act 2000* (WA) provide that the court hearing the application can close the court or limit the persons present. Section 171(2) of the *Criminal Procedure Act 2004* (WA) gives a court hearing a criminal trial the power to order a person, or class of persons out of the court or restrict publication of the proceedings or any part of them, where it is required in the interests of justice.

14. *Scott v Scott* [1913] AC 417. For a fuller discussion of the circumstances in which the court does not hold hearings in open court or restricts publication of evidence, see Seaman P, *Civil Procedure Western Australia* (Sydney: Butterworths, 1990) [34.0.2]–[34.0.3].

15. In *Western Australia v Ward* (1997) 76 FCR 492, 498–99 a comparison was made between an order that restricted access to certain evidence in native title matters to persons of one gender, and proceedings involving sensitive commercial information where the court orders that information be made available to a party's legal advisers, but not the party. It must be noted that the decision in *Ward* was made in the context of the particular provisions of the *Native Title Act*.

16. Legal practitioner, confidential consultation (30 May 2006). The Commission was told that measures such as trial by judge alone and closing the court to the public might also be appropriate in some trials involving Aboriginal witnesses.

17. O'Brien N, 'Aborigines to be Compelled to Give Evidence', *The Australian*, 11 July 2006.

18. *Ibid*.

## The measures recommended in this Report will encourage Aboriginal witnesses to give evidence where they might previously have been reluctant to do so.

The recommendations in this chapter can be broadly grouped into two categories. First, recommendations that enable the court to use its existing powers to respond to issues of customary law:

- restricting who can be in court to hear certain evidence;
- using facilities for vulnerable witnesses;
- allowing certain evidence not to be said in open court;
- restricting who can be shown certain evidence; and
- restricting the publication of certain evidence.

Second, recommendations that give the court new powers to enable it be more responsive to issues of customary law:

- making orders that allow for gender-restricted evidence to be heard in court;
- allowing the court to hear evidence from witnesses in groups;
- allowing the court to hear evidence on country.

Each of these recommendations is discussed below.

### Using court's existing powers to respond to customary law issues

#### Closed courts

Although the general rule is that courts should be open to the public,<sup>19</sup> courts may be closed in certain

circumstances. In criminal matters the *Criminal Procedure Act 2004* (WA) provides that all proceedings should be open to the public; however, s 171(4)(a) allows the court to make an order that a person or a class of persons may be excluded from the court where it is in the interests of justice to do so.<sup>20</sup> There are a number of other situations in which Western Australian legislation specifically provides for courts to be closed or persons to be excluded.<sup>21</sup> In addition, the court has an inherent jurisdiction to close the court where the administration of justice would be hampered by the presence of the public.<sup>22</sup> The Commission notes that there may be circumstances where, for reasons associated with customary law, it is desirable for the court to be closed, either while certain evidence is given or for the duration of a matter.<sup>23</sup> The Commission is of the view that Western Australian courts currently have sufficient power to close proceedings for reasons of customary law where appropriate.

#### Trial by judge alone

It was suggested to the Commission that in criminal trials, where sensitive issues of customary law are relevant, one way of assisting witnesses to feel able to give evidence is to have the trial before a judge, without a jury.<sup>24</sup> Section 118 of the *Criminal Procedure Act* provides that a person may elect to be tried by a judge sitting alone and a judge may make an order where it is in the interests of justice. This power could be of assistance where there are issues of customary law; for example, by reducing the number of persons who have to hear particular evidence, or by ensuring that

19. *Scott v Scott* (1913) AC 417, 437–46. At common law the rule is that courts should be public, except where the court is guarding a person under its parental jurisdiction (such as persons with a mental incapacity), or where the effect of publicity would destroy the subject matter of the litigation (such as matters involving trade secrets) or in other circumstances in which the administration of justice would be rendered impracticable by the presence of the public (such as matters involving national security): Seaman P, *Civil Procedure in Western Australia* (Sydney: Butterworths, 1990) [34.0.2].

20. Section 171(8) of the *Criminal Procedure Act 2004* (WA) provides that a person who is entitled under s 172(3) to act on behalf of a party to the proceedings must not be excluded from the courtroom under this section.

21. The *Criminal Property Confiscation Act 2000* (WA) states that in application for a freezing order the proceedings may be heard in a closed court (s 42(a)) or that the court may order that only persons or classes of persons specified by the court may be present during the whole or any part of the proceedings (s 42(b)). Section 107(1) of the *Corruption and Crime Commission Act 2003* (WA) provides that certain kinds of applications under the act can be made in closed court.

22. *Scott v Scott* [1916] AC 417, 437. See the discussion in Seaman P, *Civil Procedure in Western Australia* (Sydney: Butterworths, 1990) [34.0.2]. The Commission understands that criminal courts have closed the court to the public for security reasons: see, for example, *The State of Western Australia v Taylor, Barry, Yorkshire and Blurton* (Unreported, Supreme Court of Western Australia, No. 116/2005, 6 June 2006).

23. For example, where a witness is fearful of retribution under customary law if certain information is made public. It must be noted that while such considerations have gained some prominence in media reporting of this topic, the Commission was not told in its consultations with Aboriginal people about concerns of this nature.

24. Legal practitioner, confidential consultation (30 May 2006).

the persons in court are all of one gender.<sup>25</sup> The Commission encourages discussion of the potential use of this power in cultural awareness training for judges and lawyers working with Aboriginal people.<sup>26</sup>

### Vulnerable witness provisions

Section 106R(3)(b) of the *Evidence Act* provides that a witness can be declared a 'special witness' if he or she would, if required to give evidence in the normal way, either be likely:

- (i) to suffer severe emotional trauma; or
- (ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.

Once declared as a special witness the person may have access to the following protective measures in giving evidence:

- they may have a support person with them in court;<sup>27</sup>
- their evidence may be pre-recorded at a special hearing;<sup>28</sup>
- they can give evidence from a remote room by closed circuit television;<sup>29</sup> or
- a screen can be placed between the witness and defendant in criminal proceedings.<sup>30</sup>

In its Discussion Paper the Commission proposed that if a witness was not able to give evidence in the normal manner for reasons of customary law that witness should be able to be declared a special witness<sup>31</sup> and have access to the protective measures set out above.

The Commission received some positive responses to this proposal.<sup>32</sup> Lawyers consulted stated that the special witness provisions were working well for vulnerable witnesses.<sup>33</sup> They supported the idea of extending the concept to a witness who is restricted

in the way he or she can give evidence by reason of customary law. Two issues were raised in respect of this proposal. First, that arrangements in many regional courts did not permit the measures provided for special witnesses in the *Evidence Act* to be used; and second, that it is not necessary as the present provisions of the *Evidence Act* are wide enough to cover this situation.

### Availability of special witness facilities

There is a lack of special witness facilities in regional Western Australia. In his submission the Chief Magistrate expressed concern that unless proposals such as this one are properly funded they will be 'paper promises'.<sup>34</sup> He explained that in the vast majority of courts outside the metropolitan area there are no closed circuit television facilities. Further, he commented that the government has not made available the funds necessary for such facilities and as 'a result inadequate measures such as screening are adopted'.<sup>35</sup>

Recent proposed amendments to the *Family Court Act 1997 (WA)* make provision for evidence and submissions by video or audio link. The Explanatory Memorandum to the Family Legislation Amendment Bill 2006 (WA) states that the provisions of Division 2 of Part XI of the Act are designed to reduce the need for parties to travel long distances to attend directions hearings or final hearings of their cases.<sup>36</sup> It is clear that as courts move towards further acceptance of such technology it will be necessary for the facilities in regional areas to be improved.

The Commission considers that the same measure of protection currently provided to vulnerable witnesses in metropolitan courts should be given to vulnerable witnesses (both Aboriginal and non-Aboriginal) giving evidence in regional courts. If violent and sexual offences are to be properly prosecuted it is necessary to provide victims with appropriate protection. In order to ensure that witnesses are able to overcome the kinds of

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25. It must be noted, however, that the Commission has recommended that a power be inserted into the *Criminal Procedure Act* to allow for the empanelling of juries comprised only of persons of one gender: see Recommendation 41, above p 63.

26. See discussion under 'Cultural awareness training for judicial officers', below pp 347–48. See also 'Cultural awareness training for lawyers', Chapter Five, above p 91.

27. *Evidence Act 1906 (WA)* s 106R(4)(a)

28. *Evidence Act 1906 (WA)* s 106R(4)(b).

29. *Evidence Act 1906 (WA)* s 106N(2).

30. *Evidence Act 1906 (WA)* s 106N(4).

31. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) Proposal 83, 410.

32. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14; Legal practitioner, confidential consultation (30 May 2006).

33. Wickham Chambers, consultation (25 May 2006); Legal practitioners, confidential consultations (30 May 2006; 12 June 2006).

34. Chief Magistrate Steven Heath, Magistrates Court, Submission No. 10 (21 March 2006) 1. The Magistrates Court sits in 103 locations outside the metropolitan area: Magistrates Court of Western Australia, email (1 August 2006). Closed circuit television facilities are available in 13 courts outside the metropolitan area: Courts Technology Group, Department of the Attorney General, email (24 July 2006).

35. *Ibid* 1. This view was also expressed in Department of the Attorney General, Submission No. 34 (11 May 2006) 15.

36. *Family Legislation Amendment Bill 2006 (WA)*, Explanatory Memorandum, 3.

problems that at present contribute to the under-reporting of violent and sexual offences, the government must provide adequate facilities in courts operating in remote locations.<sup>37</sup>

### Recommendation 110

#### Funding to upgrade special witness facilities in regional areas

That the Department of the Attorney General ensure that adequate facilities are available in every Western Australian court to enable witnesses to use the special witness measures provided for in the *Evidence Act 1906* (WA).

#### Are the present provisions of the Evidence Act sufficient?

The DPP agreed that protective measures should be made available for reasons of customary law, but was of the view that there is adequate provision for this under the present terms of s 106R(3)(b) of the *Evidence Act*.<sup>38</sup> In addition, some lawyers consulted<sup>39</sup> stated that any considerations of customary law should fit the existing legislative criteria before allowing a witness to be declared a special witness. That is, the witness must be said to be likely to suffer emotional trauma or be intimidated and distressed if they were to give evidence in the normal way. The Commission acknowledges that the reasons set out in the Act include 'any other factor that the court considers relevant'. Thus, if customary law is the source of emotional trauma, intimidation or distress, the present provisions are wide enough. However, the Commission is of the view that there may be situations (such as avoidance relationships or where a witness is not able to talk about a particular subject in front of person of the opposite gender) in which a witness may not exhibit distress, but simply refuse to speak, and therefore may not fit the criteria of the section. Further, the Commission recognises that while Aboriginal people are likely to be distressed by having to give evidence contrary to customary law, judges and lawyers may

not always appreciate this. For these reasons the Commission is of the view that it is appropriate to include a power in the *Evidence Act* that a witness may be declared a special witness for reasons of customary law. The Commission is of the view that the existence of likely emotional trauma should not be a requirement before a witness is afforded the protection provided by the special witness provisions where the witness's difficulty arises as a result of customary law.

### Recommendation 111

#### Special witness for reasons of customary law

That s 106R of the *Evidence Act 1906* (WA) be amended to provide that a witness may be declared a special witness if for reasons of customary law he or she is not able to give evidence in the normal manner. This order can be made on the application of the witness, or on the initiative of the court.

#### Dealing with sensitive information

In its Discussion Paper the Commission noted that customary law may prevent a witness from saying certain words; for example, the name of a deceased person, or a person going through the law.<sup>40</sup> The Commission proposed that out of respect for Aboriginal customary law 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.<sup>41</sup>

The DPP was supportive of this proposal, and noted that this has in fact occurred for many years.<sup>42</sup> However, lawyers consulted believed that this is not done consistently and further direction is needed to ensure that information offensive to Aboriginal people is not mentioned in court without warning.<sup>43</sup> Further, it was suggested that such a power should not be limited to criminal trials and should be available to judges generally. The Commission accepts that this is a sensible approach. Thus, rather than being provided for in the *Criminal Procedure Act*, the Commission recommends

37. See discussion under 'Under-reporting of family violence and sexual abuse', Chapter 7, above pp 284–88.

38. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 7–8.

39. Legal practitioners, confidential consultations (30 May 2006 & 12 June 2006).

40. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 413.

41. *Ibid*, Proposal 87.

42. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 8. The DPP also expressed the opinion that this proposed provision should not be available only to Aboriginal people, but to all cultural groups in Western Australia. While the Commission has confined its proposal to Aboriginal people it may be necessary for further research to determine whether other cultural groups need similar provisions.

43. Wickham Chambers, consultation (25 May 2006). The proposal was supported by the Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

that the *Evidence Act* provide that all courts may make an order that certain information (including words or phrases) should not be referred to for reasons of customary law.

### Recommendation 112

#### Sensitive information not referred to in court

That the *Evidence Act 1906* (WA) be amended to provide that a court may order that certain information should 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

In its Discussion Paper the Commission discussed whether judges should be able to prevent the publication of sensitive information about customary law. It was noted that s 171(5) of the *Criminal Procedure Act* permits the court to prohibit the publication of anything that may identify a victim of crime. Section 57 of the *Evidence Act 1939* (NT) gives a court the power to prohibit the publication of a name of a party or witness if such publication would offend against public decency.<sup>44</sup> The Commission proposed that the *Criminal Procedure Act* be amended to include a provision that allowed a court to prohibit the publication of any evidence if the court is satisfied that the publication of that material would be offensive to an Aboriginal person or community by reason of matters concerned with Aboriginal customary law.<sup>45</sup> The proviso was added that 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.<sup>46</sup> The Commission received only one submission supporting this proposal<sup>47</sup> and in the absence of any opposition, the Commission makes the following recommendation.

### Recommendation 113

#### Suppression of information

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

1. On the application of a party or on its own initiative a court may make an order that prohibits the publication of any information if the court is satisfied that publication of, or reference to, the information would be offensive to an Aboriginal person by reason of matters concerned with customary law.
2. A court must not make such an order if it is satisfied that publication of, or reference to, the information is required in the interests of justice.

## Extending courts' powers to respond to customary law issues

### Gender-restricted material

As noted by the Commission in its Discussion Paper, the problems presented by gender-restricted information are complex.<sup>48</sup> It is widely recognised that for some aspects of Aboriginal customary law knowledge is restricted to women or men only. The Commission proposed in its Discussion Paper that an application could be made to the relevant chief judicial officer in each jurisdiction 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.<sup>49</sup> The purpose of such a power is to enable the judicial officer to assess the relevance and importance of the gender-restricted information and make appropriate orders for the way in which the court should hear it. The Commission is not proposing that courts comprising persons of one gender be routinely convened. The Commission acknowledges that to do so would be logistically difficult, as well as contrary to the fundamental principle

44. In *R v B* (1992) 111 FLR 463 this section was relied upon to prohibit the publication of the name of a deceased Aboriginal male. Mildren J decided that, due to the high number of Aboriginal people living in the Northern Territory, publication of the victim's name in a murder trial would offend a large section of the public.

45. The court also has powers that can be exercised in other circumstances to prohibit the publication of proceedings or parts of proceedings: see, for example, *Criminal Property Confiscation Act 2000* (WA) s 42(c).

46. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposal 88, 414.

47. Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

48. For a fuller discussion of this issue, see LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 411–13.

49. Ibid 413, Proposal 86. This proposal was supported by lawyers consulted: Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).

## *It is appropriate for courts to be equipped with wide powers to make orders that may enable gender-restricted material to be heard.*

that the court must administer justice in public.<sup>50</sup> Nevertheless, the Commission believes that it is appropriate for courts to be equipped with wide powers to make orders that may enable gender-restricted material to be heard.

The Commission considers that a combination of the courts' existing powers (for example, that the trial be heard by a judge sitting alone, without a jury)<sup>51</sup> and the extended powers recommended in this Report (to suppress certain information, or to use the special witness provisions to keep a party from view)<sup>52</sup> will generally be sufficient to enable the court to make orders to protect gender-restricted (or other secret) information about Aboriginal customary law. Nevertheless, the Commission concluded that provision for a single-gender jury may be necessary; therefore, the Commission recommended that in a criminal trial, where gender-restricted evidence might be heard by a jury, a judge can order that the jury be comprised of persons of one gender only.<sup>53</sup>

Aboriginal people consulted expressed concerns about gender-restricted information and stressed that these issues are not just relevant to native title matters. It was also said that measures designed to protect this information are particularly important to ensure that the perspective of Aboriginal women is heard in court.<sup>54</sup> Lawyers practising in the area of native title gave encouraging accounts of the flexibility shown by the Federal Court<sup>55</sup> in land claims where it is necessary for

witnesses to give evidence about gender-restricted material.<sup>56</sup> A number of measures have been successfully adopted in the Federal Court to ensure that Aboriginal witnesses feel able to speak about matters that are gender-restricted for reasons of customary law. For example, where gender-restricted evidence is to be heard and counsel is of the opposite gender, a 'stand in' counsel has been used for particular sections of a hearing. Where a 'stand in' has been used, a summary of the evidence is prepared with the gender-restricted details removed. Importantly, it was said that the best way of dealing with such information was to properly prepare witnesses before a hearing. The witnesses can be assisted to describe the information in an abstract way, so that gender-restricted details do not have to be specifically referred to in evidence. There is then no need for restrictions to be put in place about the way the evidence is given.<sup>57</sup>

In such matters a measure of flexibility will be required from both the courts and the Aboriginal witnesses involved. One of the concerns the Commission had about recommending a power allowing single-gender courts to be convened is that a court could not give an undertaking to a witness that persons of the opposite gender would never see the evidence. It was described to the Commission that in native title matters witnesses had to accept that the evidence might be seen by others if the matter was appealed.<sup>58</sup> The

50. *Scott v Scott* [1913] AC 417. For a discussion of the circumstances in which the court does not hold hearings in open court or restricts publication of evidence, see Seaman P, *Civil Procedure Western Australia* (Sydney: Butterworths 1990) [34.0.2]–[34.0.3]. The Commission acknowledges that the recognition of customary law must be subjugated to the dominant interests of the state: see above p 11.

51. Section 651A of the *Criminal Code 1913 (WA)* provides that a person may elect to be tried by a judge sitting alone (without a jury). Section 118 of the *Criminal Procedure Act 2004 (WA)* sets out the procedure for a trial of this nature. There is not a proscribed set of circumstances in which a judge may make an order for a trial by judge alone; the order can be made where it is in the interests of justice.

52. See Recommendations 111–113, above pp 327–28.

53. See Recommendation 41, below p 189.

54. Indigenous Women's Congress, consultation (28 March 2006).

55. It must be noted that the Federal Court has statutory power to sit in camera and to forbid or restrict publication of various matters, arguably wider powers than the Supreme Court: see *Western Australia v Ward* (1997) 76 FCR 492, 498–99. This case turned on the particular provisions of the *Native Title Act 1993* (Cth).

56. Greg McIntyre SC & George Irving, consultation (24 May 2006). See also discussion of this issue in McIntyre G, 'Aboriginal Customary Law: can it be recognised?' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 341, 377–79.

57. Greg McIntyre SC & George Irving, consultation (24 May 2006): it was said that restricted details are usually names, names of ceremonies and descriptions of what occurs at ceremonies, and that often knowledge of these details is not required by counsel. However, it must be pointed out that George Irving has been involved in at least one matter where the very piece of evidence that was sought to be restricted was crucial to the case; the gender-restricted evidence concerned descriptions of how law and language in the country under claim came to be and how it is passed on. The evidence thus went to the heart of the requirement, in native title cases, to establish a 'normative system'.

58. *Ibid.* It must be noted, however, that it is a remote possibility that it would be necessary to reveal what had been restricted in the course of an appeal given that an appeal only concerns questions of law or conclusions drawn from facts.

Commission is of the view that the best way of dealing with gender-restricted information is to allow the court to work out practical orders on a case-by-case basis. Where possible, efforts should be made to prepare witnesses to give evidence so that restricted material does not have to be disclosed, such as by the use of summaries or initials or descriptions in place of names. Where the disclosure of evidence cannot be avoided then powers to suppress information,<sup>59</sup> or for certain words not to be mentioned in court,<sup>60</sup> could be used. If necessary, the court may be closed<sup>61</sup> or convened with court staff and a jury<sup>62</sup> of only one gender. The Commission does not believe that it is appropriate to provide that the court may order the parties to be represented by counsel of a specific gender. Rather, the Commission is of the view that the kinds of practical measures at present adopted in the Federal Court for gender-restricted material should be employed where appropriate. Where such orders have been made the court would have to determine the best way of dealing with the transcript of evidence. Some witnesses may not be concerned about dissemination of information in transcript form; but, for those witnesses who are concerned, the extent to which the information can feasibly be protected should be determined before the witness gives evidence. This would enable the witness to make an informed decision about how to provide information to the court.<sup>63</sup>

All lawyers consulted endorsed the proposal that a judge of a particular gender be assigned to a case that may involve gender-restricted information. It was said that this would be of assistance in making orders to enable information to be protected.<sup>64</sup> The Department of the Attorney General commented that the existing rules or processes provide mechanisms for parties seeking such an order.<sup>65</sup> The Commission considers that although it may be possible for courts to arrive at such an outcome by means of their present powers (because

it is in the public interest to allow such evidence to be heard),<sup>66</sup> it is nonetheless desirable to make it clear through a specific provision.

### Recommendation 114

#### Application for a judge or magistrate of a particular gender to be assigned to a matter

1. That the *Criminal Procedure Act 2004 (WA)* provide that an application can be made to the Chief Judicial Officer of the relevant jurisdiction 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.
2. That the *Supreme Court (General) Rules 2005 (WA)*, the *State Administrative Tribunal Rules 2004 (WA)* and the *Magistrates Court (Civil Proceedings) Rules 2005 (WA)* should provide that an application can be made to the Chief Judicial Officer of the relevant jurisdiction 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.

### Group evidence

In its Discussion Paper the Commission acknowledged that there may be situations where it is not appropriate, for reasons of customary law, for evidence to be given by one person alone. With this in mind, the Commission proposed that the *Evidence Act* be amended to allow for witnesses to give evidence about customary law in groups. Some lawyers consulted had experience with witnesses giving evidence in groups in native title matters. It was described as a beneficial method that helped to ensure all knowledge was being put before

59. See Recommendation 113, above p 328.

60. See Recommendation 112, above p 328.

61. See discussion under 'Closed courts', above p 325.

62. See discussion under 'Single-gender juries', Chapter Five, above p 189.

63. The importance of measures protecting gender-restricted information being adhered to was emphasised by the Indigenous Women's Congress. An example was given of a situation in which women had provided information to a hearing which was placed in a sealed envelope, but later shown to a non-Aboriginal man. The Commission is of the view that such instances can be avoided by explaining fully to the witnesses (before the evidence is given) what possible use will be made of information provided to the court. See Indigenous Women's Congress, consultation (28 March 2006).

64. There was also support for wording the recommendation so that it applies to evidence that is 'likely to be heard' to address the concern that if a witness is required to give all details of what gender-restricted material may be relevant in order to get an order for a judge of a particular gender to be assigned, then the witness may have revealed what he or she wanted to conceal in the first place: Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006). See also LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 412.

65. Department of the Attorney General, Submission No. 34 (11 May 2006) 15–16.

66. It is noteworthy that in *State of Western Australia v Ward (on behalf of the Miriwung Gajerrong Peoples)* (1997) 145 ALR 512 the High Court did not overturn Lee J's decision to make orders that for certain pieces of evidence only persons of one gender could be present (including expert witnesses and lawyers).

## Some Aboriginal people experience difficulty giving evidence and answering questions in the unfamiliar surroundings of the courtroom.

the court and by enabling some witnesses to speak where otherwise they may not.<sup>67</sup> In the absence of any submissions in opposition to this proposal<sup>68</sup> the Commission considers that it is desirable to allow that witnesses may give evidence in groups; however, it is acknowledged that this power may not be frequently required.

### Recommendation 115

#### Witnesses can give evidence in groups

That the *Evidence Act 1906* (WA) provide that a court in the exercise of its discretion may allow witnesses to give evidence about Aboriginal customary law in groups, where it is required in the interests of justice.

### Evidence taken on country

In its consultations for this reference the Commission was told of the difficulty some Aboriginal people experience giving evidence and answering questions in the unfamiliar surroundings of the courtroom. In addition, the Commission was told of the problems many Aboriginal people from remote areas face in travelling large distances to attend court hearings. Accordingly (and in recognition of the fact that it is done successfully in native title matters), the Commission proposed that the *Evidence Act* be amended to allow the court to convene 'on country' to hear evidence of customary law.<sup>69</sup> It was suggested that the court could decide to do so where a particular witness, or witnesses, may more likely be able to give evidence that would

assist the court if they remained on their country. It would also allow the court to travel to a remote location in circumstances where a number of witnesses (or a vulnerable witness) would have difficulty in travelling to a major centre to attend court.

Support was expressed for this proposal in the Commission's discussions with Aboriginal communities, in meetings with lawyers<sup>70</sup> and in submissions.<sup>71</sup> The comment was made that pre-recording (where vulnerable witnesses in criminal trials have their evidence recorded without the presence of a jury) should be held where possible 'in own community and in language'.<sup>72</sup> It was said that this would prevent the problem of witnesses 'clamming up' in court because of the unfamiliar surroundings, the presence of a (usually predominantly non-Aboriginal)<sup>73</sup> jury, and language problems. Lawyers consulted stated that when they had been involved in matters where evidence had been taken on country, Aboriginal witnesses were able to express themselves much more freely.<sup>74</sup> It was noted that the court was required to be flexible and



67. Wickham Chambers, consultation (25 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006). It was noted by George Irving and Greg McIntyre that in native title matters the technique has only been used where the credibility of the witnesses is not in issue. An example was provided in a recent native title matter argued in the Federal Court: *Strickland & Nudding v Western Australia*, Lindgren J (judgment reserved).
68. The proposal was supported by Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 8; Anonymous, Submission No. 50 (30 June 2006).
69. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposal 85, 411.
70. Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).
71. Office of the Commissioner of Police, Submission No. 46 (7 June 2006) 14; Anonymous, Submission No. 50 (30 June 2006); Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.
72. LRCWA, Discussion paper community consultation – Geraldton, 3 March 2006 (in confidence). The Western Australia Police were supportive of this concept. They stated that 'police prosecutors have in the past taken depositions remotely or by video from Aboriginal women who are declared special witnesses: Western Australia Police, Submission No. 46 (7 June 2006) 13.
73. See discussion under 'Juries', Chapter Five, above p 188.
74. Wickham Chambers, consultation (25 May 2006); legal practitioner, confidential consultation (22 August 2006).

improvise; however, the quality of the evidence justified the effort.<sup>75</sup>

Despite the overwhelmingly positive response to the proposal that courts hear evidence on country, reservations were expressed about the practicalities of this proposal and the extra time and money it would require. In particular, the Chief Magistrate expressed concern about the cost of taking evidence 'on country'.<sup>76</sup> The Western Australia Police stated that increased amounts of time spent 'on country' would result in significant resource implications for the police, given that police prosecutors and witnesses would all be required to travel to remote communities. It was also mentioned that courts and those working with Aboriginal witnesses would have to be mindful that there are often not sufficient support facilities available for witnesses in remote areas and that special arrangements may have to be made.<sup>77</sup>

The Commission recognises that, because of the logistical difficulties inherent in the concept of taking evidence on country, this is not a power that is likely to be frequently exercised. Nonetheless, it is an important way of acknowledging the status within the community of some witnesses who may be called upon to give evidence about customary law. The Commission considers that it is appropriate to equip the courts with this power, even if it is only used in exceptional situations.<sup>78</sup>

### Recommendation 116

#### Evidence taken on country

That the *Evidence Act 1906* (WA) provide that a court can allow evidence about Aboriginal customary law to be taken on country where it is required in the interests of justice.

## Assisting Aboriginal People to Better Understand and Participate in the Court Process

The Commission recognised that there are significant barriers to Aboriginal people understanding and participating in the legal system. It proposed a number of changes to the rules governing court procedure to assist Aboriginal people. In summary they are:

- increasing the use of Aboriginal language interpreters;
- changing court procedure to take account of some of the problems Aboriginal people experience in giving evidence;
- providing further assistance to Aboriginal people in the court system; and
- continuing to educate all those working in the legal system about Aboriginal culture.

### Increasing the use of Aboriginal language interpreters

Many Aboriginal people find it difficult to understand the language used in court – this was repeatedly stressed in the consultations and noted by legal practitioners consulted by the Commission. In Western Australia many Aboriginal people are bilingual or multilingual (with English as their second or third language)<sup>79</sup> and those Aboriginal people who speak English often speak a form of Aboriginal English that may differ significantly from Standard English.<sup>80</sup> Despite this, there are very few Aboriginal language interpreters working in Western Australian courts and there is only one Aboriginal language interpreter service in Western Australia: the Kimberley Interpreting Service.<sup>81</sup>

75. Greg McIntyre SC & George Irving, consultation (24 May 2006); legal practitioner, confidential consultation (22 August 2006).

76. Chief Magistrate Steven Heath, Magistrate's Court, Submission No. 10 (21 March 2006) 3. The Department of the Attorney General also stated that 'the remoteness of Western Australia would make this provision expensive and have the effect of delaying justice': Department of the Attorney General, Submission No. 34 (11 May 2006) 15.

77. Anonymous, Submission No. 50 (30 June 2006). It was pointed out that often whole communities may be distressed by the circumstances of particular hearings, and in that case it is not appropriate to expect the communities to be able to provide support for witnesses without assistance from witness/victim support services. This also obviously has resource implications.

78. Stewart O'Connell gave an account of the power such a measure might have: 'Chief Justice Martin afforded the community enormous respect. Not many Supreme Court Judges would leave the comfort of their courtrooms to sit under a tree in 30 degree heat and listen patiently to community elders. The community in turn listened, through a female Indigenous interpreter, patiently to him. It was reciprocal respect and education in action': Stewart O'Connell, Submission No. 54 (10 July 2006) 5.

79. The Australian Bureau of Statistics reports that 'in 2002, over one quarter (27%) of Indigenous people in WA spoke an Indigenous language. This was a higher proportion than at the national level (21%) due in part to a greater share of this state's Indigenous population living in remote areas (47% compared with 27% nationally) where an ability to speak an Indigenous language is more common. ... Around one in eight Indigenous people in WA (12%) reported that the main language spoken at home was an Indigenous language, with this figure rising to one in four (24%) in remote areas.' However, the Kimberley Interpreter Service says that it is difficult to accurately state the number of Indigenous language speakers in Australia and how many of those people speak some English because of the shortcomings in the language questions included in the Commonwealth Census and the lack of other accurate language surveys: Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 4–5. See also McConnell P & Thieberger T, *State of Indigenous Languages in Australia* (Department of the Environment and Heritage, 2001).

80. The Kimberley Interpreter Service advised the Commission that in the Kimberley region most Aboriginal people will say that they speak English when they are speaking Aboriginal English or Kriol: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

81. The Kimberley Interpreter Service began operating in 2000, and is an initiative of the Mirima Dawang Woorlab-gerring Language and Culture Centre

## Until 2000 there were no interpreting services for Aboriginal languages in Australia.

Until 2000 there were no interpreting services for Aboriginal languages in Australia.<sup>82</sup> In recent years, however, there has been a push to establish interpreting services for Aboriginal languages that has resulted in the creation of the Aboriginal Interpreting Service in the Northern Territory, the Kimberley Interpreting Service and other community-based services supported by local language centres.<sup>83</sup> There has therefore been some improvement in the availability of Aboriginal language interpreters,<sup>84</sup> but the present situation is far from adequate.<sup>85</sup> There is no coordinating body for these language centres and services, and no available list of qualified Aboriginal language interpreters (and their contact details).<sup>86</sup> Further, the current level of funding for these services is limited, and does not allow for professional development or expansion.<sup>87</sup>

In its submission the Aboriginal Legal Service noted that 'arrangements are ad hoc and people communicate as best they can'.<sup>88</sup> The need for interpreters of Aboriginal languages has often gone unnoticed because, even where English is not the first or second language of many (particularly remote) Aboriginal people, they have enough English to 'get by'.<sup>89</sup> In addition, the need for interpreters is masked by the adoption of makeshift (but apparently very common)

practices, such as using a family member, friend, another prisoner or a member of court staff as an interpreter. There are strict rules under customary law about how and with whom Aboriginal people may communicate. Certain topics may be prohibited between men and women or people in a particular relationship. The Kimberley Interpreting Service notes that 'it is therefore very important that the correct interpreter is selected for each job'.<sup>90</sup>

In seeking submissions about the use of interpreters the Commission was told about problems communicating some concepts from English into Aboriginal language



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in Kununurra and the Kimberley Language Resource Centre based in Halls Creek. In the Kimberley region there are over 40 Aboriginal languages spoken. The funding for the Kimberley Interpreting Service is shared between eight government departments and their annual operating budget in 2004 was \$120,000: Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 10; see also the Kimberley Interpreting Service website, <<http://www.kimberleyinterpreting.org.au>>. As at August 2006 the Kimberley Interpreting Service had 92 registered interpreters in 24 Aboriginal languages: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

82. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 5.

83. Ibid. There are Aboriginal language centres throughout Western Australia including: Mirima Dawang Woolab-gerring Language and Culture Centre (Kununurra); Kimberley Language Resource Centre; Pundulmurra College (Port Hedland); Wangka Maya, The Pilbara Aboriginal Language Centre; Yamatji Language Centre (Gascoyne region). Aboriginal Legal Services of Western Australia, *Submission: Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia* (April 2006).

84. The Kimberley Interpreting Service have advised the Commission, however, that their records indicate the use of interpreters by government is declining: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

85. The Kimberley Interpreting Service has described the attempts of many government agencies to communicate with Aboriginal people in the Kimberley as 'totally incomprehensible'. They provide as a contrasting example the Kimberley Land Council and Karrayili Adult Education Centre (Fitzroy Crossing): 'both Indigenous owned and run organisations that understand that their members don't understand English. They use accredited interpreters as a matter of course for official business meetings and gatherings': Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

86. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006). The Western Australian Government's Languages Services Policy provides a free-call telephone number for advice about interpreting services for Indigenous languages. This telephone number connects callers to their local Department of Indigenous Affairs (DIA) office; however, the DIA does not hold a list of qualified interpreters. The Kimberley Interpreting Service has a database of accredited and non-accredited interpreters for the Kimberley region, along with small number in and around Perth.

87. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 3, 10.

88. Aboriginal Legal Service, Submission No. 35 (12 May 2006) 10. See also *ibid* 4.

89. The Kimberley Interpreting Service notes that 'many Aboriginal people from the communities in the Kimberley region only have 'survival skills' in English. They understand and communicate best in Aboriginal languages. 'Simple English' is not a good way to communicate essential information. Important information is often left out because it is too hard': see <<http://www.kimberleyinterpreting.org.au>>.

90. KIS: Frequently Asked Questions, <<http://www.kimberleyinterpreting.org.au>>.

and vice versa.<sup>91</sup> An example described to the Commission occurred in the trial of a Goldfields Aboriginal man for wilful murder. He was asked, through an interpreter, whether he had intended to kill the deceased. He answered that he had. This answer took those in court somewhat by surprise, because the man had pleaded 'not guilty' to the charge. The judge asked the interpreter to tell the court what question he had asked the accused. The interpreter replied that he had asked the accused if he had killed the deceased – the concept of 'intention' not being one that it was possible to translate into language.<sup>92</sup>

### The Commission's proposals

In its Discussion Paper the Commission recognised the need for, and the difficulties associated with, the increased use of Aboriginal language interpreters. It made a series of proposals designed to increase the use of Aboriginal language interpreters and assist with the problems associated with their use. The Commission proposed:

- increasing the funding for the training of interpreters (including giving consideration to the accreditation system to enable more Aboriginal people to become interpreters);
- including the right to an interpreter in the *Evidence Act*;
- formulating a test to provide assistance to the court in determining when a witness requires the services of an interpreter;
- providing education about the use of interpreters to Aboriginal communities; and
- developing guidelines for the Department of the Attorney General to follow when using the services of interpreters.<sup>93</sup>

At the return consultations conducted by the Commission, Aboriginal people expressed strong support for the proposals about interpreters. Aboriginal people in Broome advised that interpreters were needed at all stages of the criminal trial process. They further commented that lawyers representing Aboriginal people need to be aware of when their clients required interpreters.<sup>94</sup> Submissions showed strong support for the increased availability and use of interpreters for Aboriginal languages and for the right to an interpreter in court.<sup>95</sup>

### The significance of interpreters and the potential for their wide usage

Aboriginal people also pointed out that using Aboriginal language in court has a wider significance. In Fitzroy Crossing (where they have a pool of qualified interpreters) it was noted that there is an important link between language and preserving culture.<sup>96</sup> The Indigenous Women's Congress asserted that an Aboriginal person should not have to go to court and argue for an interpreter; instead an interpreter service should be in place at the court. They said that this is an important symbolic part of Aboriginal customary law and culture.<sup>97</sup> Women Elders attending a community meeting in Broome stressed that government 'must support language to support culture'.<sup>98</sup> It was noted that the more Aboriginal language is taught in schools, the bigger the pool of interpreters there will be in the future.<sup>99</sup>

Submissions also acknowledged that training more Aboriginal language interpreters would have broader application than court proceedings. In Chapter Five above, the need for interpreters in police interviews is discussed.<sup>100</sup> In its submission the Aboriginal Legal Service (ALS) stated that some of the problems Aboriginal people experience with orders under the

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91. It must be recognised that this is the case for other languages as well. For a discussion of the authorities looking at the manner in which interpreter services can be provided in legal proceedings, see *De la Esprilla Velasco v The Queen* [2006] WASCA 31 (Roberts-Smith J). For a discussion of the problems associated with interpreting 'word for word' and literal interpretation, see [17], [52] & [75].

92. Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006). Greg McIntyre advised that a similar problem occurred in *R v Felton* (1977) where the issue for the court was whether the accused was able to properly understand proceedings. The interpreter advised the court that he could not adequately interpret into the applicable Aboriginal language either 'wilful' or 'murder'.

93. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposals 78–82.

94. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 7 March 2006.

95. Marian Lester, Submission No. 18 (27 April 2006) 2; Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Law Society of Western Australia, Submission No. 36 (16 May 2006) 12. The Department of Corrective Services stated that this proposal: 'is supported by the Kimberley Custodial Plan which states that translators should be made available in all court hearings where English is not the first language, and should be available to all Aboriginal people charged as a matter of course': Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 19.

96. Submissions received at a women's meeting: LRCWA, Discussion Paper community consultation – Fitzroy Crossing, 9 March 2006.

97. Indigenous Women's Congress, consultation (28 March 2006).

98. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 7 March 2006.

99. Submissions received at LRCWA, Discussion Paper community consultation – Broome, 10 March 2006. It is notable that in the Office of Multicultural Interests, *Analysis of the Need for Interpreter and Translator Services within the Western Australia Government Sector* (May 2004) it is reported that there has recently been an increase in the use of Aboriginal language in Western Australia.

100. See discussion under 'Police Interrogations – Interpreters, Chapter Five, above p 207.

## Submissions recognised that an increased availability of interpreters would be of great assistance in the areas of health, education and training.

*Restraining Orders Act 1997* (WA) relate to language and communication problems.<sup>101</sup> In addition, the ALS considered that interpreters will be of great assistance in involving Elders in legal proceedings:

ALSWA's executive committee is ... concerned about the high risk of miscommunication between the Elders and employees of the Western Australian legal system. Elders often speak English as a second or third language and may not be able to read or write. For this reason, information should be exchanged in both written and oral form and a qualified interpreter must be present when required.<sup>102</sup>

Further, submissions recognised that an increased availability of interpreters would be of great assistance in the areas of health,<sup>103</sup> education and training.<sup>104</sup> The Department of Corrective Services commented that the use of interpreters should be an 'integral part of the way agencies work with Aboriginal people'.<sup>105</sup>

The Commission acknowledges that there are significant barriers<sup>106</sup> to the increased use of interpreters for Aboriginal people in court. These barriers include: the fact that there are very few people qualified as interpreters of Aboriginal languages; the absence of an easily accessible interpreter service in all areas of Western Australia; the culture of 'getting by' that has become the norm with both Aboriginal people appearing in court and lawyers working with Aboriginal people; and the reluctance to incur further delay in the court process which might be the result of using an interpreter, or having to look for one.

### A statewide interpreter service for Aboriginal languages

In order to overcome these problems it is necessary not only to provide more (properly trained) interpreters but to educate both the Aboriginal community, and people working with the Aboriginal community, about the use of interpreters. It is the Commission's view that these issues must be addressed in a coordinated approach to the provision of Aboriginal interpreter services. And of course, this approach must be properly funded. The Commission considers that for far too long the needs of Aboriginal people to properly understand what is happening in court have been inadequately addressed. Despite the best intentions of lawyers and the courts, it is not sufficient to rely on makeshift measures to ensure that Aboriginal people understand the court process. It is imperative that the Western Australian government give priority to the establishment of a statewide interpreter service for Aboriginal languages.

The Commission's proposals for interpreters are not new. The need for better interpreter services for Aboriginal people has been well-known and well-documented for some considerable time. The better provision of interpreter services for Aboriginal people has been recommended in numerous reports.<sup>107</sup> It is consistent with the government's stated aims, as set out in the Western Australian Government Language Services Policy<sup>108</sup> and the Western Australian Aboriginal Justice Agreement,<sup>109</sup> and with Australia's obligations under international law.<sup>110</sup> The urgent need for a

101. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 8.

102. *Ibid.*

103. The Kimberley Interpreting Service has written strongly about the need for Aboriginal language interpreters in the health services area: 'low levels of communication between health professionals and their clients leads to inadequate diagnosis and poor treatment': Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 5.

104. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 19; Department of the Attorney General, Submission No. 34 (11 May 2006) 14.

105. Department of Corrective Services (WA), Submission No. 31 (4 May 2006) 19.

106. These issues are discussed in more detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 403–405.

107. For a full list of previous reports and recommendations, see Aboriginal Legal Service of Western Australia, *Submission: Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia* (April 2006).

108. *Western Australian Government Language Services Policy* (July 2000), <[www.omi.wa.gov.au/OMI\\_language.asp](http://www.omi.wa.gov.au/OMI_language.asp)>.

109. *Western Australian Aboriginal Justice Agreement* (March 2004).

110. Including Article 14(3) of the *International Covenant on Civil and Political Rights* (1966); Article 12 of the *Indigenous and Tribal Peoples Convention* (1989), the *Universal Declaration on Linguistic Rights* (1996) and the *Convention on the Protection of Human Rights and Fundamental Freedoms* (2001).

statewide Aboriginal languages interpreter service in Western Australia was recently recognised by the Commonwealth Department of Education Science and Training<sup>111</sup> and the Western Australian Office of Multicultural Interests.<sup>112</sup>

The Department of Indigenous Affairs (jointly with the Office of Multicultural Interests) has commissioned a discussion paper on Indigenous interpreting issues, but that report is not yet publicly available.<sup>113</sup> Comments made in meetings held with lawyers included: 'there have been calls for the establishment of such a service for at least 30 years' and 'it is an issue of basic fairness – it is not good enough that there is an easily accessible interpreter service for other languages, but not for Aboriginal people.'<sup>114</sup> It is clear that there is widespread support for the policy of establishing a statewide interpreter service. What is needed is for action to be taken to implement that policy and for it to be properly funded.

One of the main obstacles to the creation of a statewide interpreter service is lack of funding. The Office of Multicultural Interests commented in its report that:

There is general consensus among the service providers and community members consulted through this study that Indigenous interpreting services are often marginalised and do not enjoy the same level of funding allocation and allocation of resources, that is afforded to interpreting services for 'migrant' languages.<sup>115</sup>

The Department of Indigenous Affairs has stated that the set up costs are prohibitive: it took funding from eight Western Australian government departments to set up the Kimberley Interpreting Service.<sup>116</sup> While the Kimberley Interpreting Service business plan shows that the service has the potential to be self-sustaining, at present extra funding is required to conduct professional development and provide training for new interpreters.<sup>117</sup> The Commission notes that the Aboriginal Interpreting Service in the Northern Territory has been jointly funded by the Commonwealth and Northern Territory governments since 2000. In May 2006 the Commonwealth government announced that it would provide a further \$5.1 million to the service. The Attorney General, Philip Ruddock, stated that 'lack of access to interpreter services can adversely affect Indigenous Australians' access to a whole range of government and non-government services'.<sup>118</sup> Despite the cost of setting up such a service, the Commission considers that the use of interpreters has the potential to result in reduced costs to government; for example, in the areas of justice and health by reducing the number of delayed court hearings and re-admission of patients to hospital.<sup>119</sup>

### Aboriginal Legal Service proposal

In April 2006 the ALS sent a submission to both the Commonwealth and state governments seeking funding for the establishment of a statewide Aboriginal languages interpreter service (the ALS proposal).<sup>120</sup> In the ALS proposal the fact that there is no statewide

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111. Department of Education Science and Training, *Career Paths and Training for Interpreters and Translators* (December 2005).
  112. Office of Multicultural Interests, *Analysis of the Need for Interpreting and Translating Services within the Western Australian Government Sector* (May 2004). The Office of Multicultural Interests commissioned a review of the Languages Services Policy. The report on the review makes several recommendations for the development of a new Language Policy that would address issues raised in this report. This report is presently being considered by the Minister so was not available for the Commission to view prior to the publication of this report: Anne Aly, Office of Multicultural Interests, telephone consultation (9 June 2006).
  113. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006).
  114. Wickham Chambers, consultation (25 May 2006). A comparison can be made with the situation for interpreters of non-Aboriginal languages. The Translating and Interpreting Service (TIS) is operated by the Department of Immigration and Multicultural Affairs (for more information, see <[www.immi.gov.au](http://www.immi.gov.au)>). TIS provides interpreters for court proceedings, as well as a telephone service 24 hours a day, seven days a week. It services over 100 languages and has more than 1500 contractors. TIS does not provide interpreting for Aboriginal languages and they direct any enquiries to the Kimberley Interpreting Service.
  115. Office of Multicultural Interests, *Analysis of the Need for Interpreting and Translating Services within the Western Australian Government Sector* (May 2004) 66.
  116. The Kimberley Interpreting Service counters that funding its operations for three years for \$360,000 is cheap: 'what price does the government put on good communications?': Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).
  117. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006); KIS, telephone consultation (1 August 2006). It must be noted that the Kimberley Interpreting Service stated that its business plan shows that it can be self-sustaining only if it develops some other income-generating business like cultural awareness training, not by providing interpreting services alone: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).
  118. Attorney General, The Honourable Philip Ruddock MP, media release (9 May 2006).
  119. This is confirmed by the Kimberley Interpreting Service who state 'the use of interpreters can have significant impact on public spending, with savings becoming immediately obvious. Court proceedings are delayed on a regular basis due to lack of communication with the defendant or the victim. Witness statements cannot be obtained and witnesses cannot be examined. This often results in court proceedings being re-listed, delayed or even abandoned. The use of Aboriginal interpreters also reduces dramatically the re-admission rate of patients. Aboriginal patients often do not take their medication or follow procedures because they did not understand the instructions and they have to be re-admitted ... By providing interpreters the government is enhancing service delivery to a significant group of clients whilst actually reducing costs': Kimberley Interpreting Service: Frequently Asked Questions, <[www.kimberleyinterpreting.org.au](http://www.kimberleyinterpreting.org.au)>.
  120. Aboriginal Legal Services of Western Australia, *Submission: Aboriginal and Torres Strait Islander Languages Interpreter Service in Western Australia* (April 2006).

*For far too long the needs of Aboriginal people to properly understand what is happening in court have been inadequately addressed.*

interpreter service for Aboriginal languages is described as 'indefensible'. It is asserted that the situation 'should be urgently remedied by government, at least in the area of law/justice and health'.<sup>121</sup> The ALS proposal is a significant step toward the establishment of an Aboriginal languages interpreter service. It contains a discussion of the issues to be addressed by a statewide interpreter service, sets out the current models for the provision of such a service, and makes a proposal for the establishment of a service in Western Australia. It concludes that:

1. A statewide interpreter service for Aboriginal and Torres Strait Islander languages urgently needs to be implemented in Western Australia, especially in relation to legal and health matters.
2. Government has provided a statewide interpreter service for speakers of other languages. Similarly it is government's responsibility to provide an interpreter service for speakers of Aboriginal and Torres Strait Islander languages.
3. Comprehensive information about the needs of both interpreters and those who need interpreters, best practice to address these, and interpreting service models, is available and accessible by government.
4. There is already in place in Western Australia an infrastructure that includes Aboriginal and Torres Strait Islander language centres, NAATI, TAFEs and TIS, all of which can be utilised in the provision of a statewide Aboriginal and Torres Strait Islander interpreter service. What is needed is a means to link them all together. ALSWA proposes that creating a short-lived organisation with the specific task of achieving this is a cost-effective way of developing and establishing an appropriate service.<sup>122</sup>

In its submission the Law Society notes and supports the ALS proposal.<sup>123</sup> While the DPP does not refer to the ALS proposal, it suggests that a 'multi agency committee, with representation from the Law Society, ALS and Legal Aid should be established to develop proposals for the gamut of issues surrounding the development and use of interpreters. The DPP would wish to be involved with such a committee'.<sup>124</sup>

The Commission recommends that the ALS proposal be supported. It is important that the service should be established in conjunction with the existing community language centres that are in place around Western Australia.<sup>125</sup> At the end of five years, assessment can be made of the best ways of expanding the service to ensure that it meets the needs of Aboriginal people in all areas of communication, including such areas as education, training and welfare.<sup>126</sup>

### **Recommendation 117**

#### **Establishment of a statewide Aboriginal languages interpreter service**

1. That a statewide interpreter service for Aboriginal languages be established in accordance with the Aboriginal Legal Service of Western Australia proposal.
2. That the service be reviewed and evaluated by the Commissioner for Indigenous Affairs after it has been in operation for five years, with a view to expanding it to include all areas of communication, including, but not limited to education, training and welfare.

121. *Ibid* 1.

122. *Ibid*.

123. Law Society of Western Australia, Submission No. 36 (16 May 2006) 12.

124. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 6.

125. See 'Principle Five: Community-based and community-owned initiatives', Chapter 2, above pp 36–37. The Kimberley Interpreting Service asserts: 'it is worth noting that Indigenous language interpreting services are supported and controlled by Indigenous people, developing their skills and building the capacity of Indigenous people to manage their own communities': Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 8.

126. In respect of welfare, it is noted by the Kimberley Interpreting Service that in 2004 'the Department of Community development has booked an interpreter on one occasion over the past three years – a situation that raises many questions about the effectiveness of welfare in remote Indigenous communities': Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 17.

In addition, the Commission considers that a committee of the kind suggested by the DPP should be set up by the Department of the Attorney General. This committee should monitor the issues relating to the use of interpreters in the courts. All of the more specific recommendations that follow are matters that could be carried out under the umbrella of a statewide interpreter service, or by the committee.

### Recommendation 118

#### Establishment of a committee to oversee the use of interpreters in court

That the Department of the Attorney General establish a committee to review and evaluate the use of Aboriginal interpreters in court. The Committee should be comprised of representatives from (at least) the judiciary, interpreter bodies, the Office of the Director of Public Prosecutions, Legal Aid and the Aboriginal Legal Service.

### Training of interpreters

In its Discussion Paper the Commission acknowledged that there is presently a shortage of trained Aboriginal language interpreters in Western Australia.<sup>127</sup> It also recognised that it can be difficult for Aboriginal people to train and become qualified as interpreters for a number of reasons, including the fact that many Aboriginal people live in remote areas and the lack of qualified trainers.<sup>128</sup> Careful consideration must be given to issues of accreditation in conjunction with the National Accreditation Authority for Translators and Interpreters (NAATI) to ensure that more Aboriginal

people are able to attain qualifications, without compromising the high standard needed for interpreting in courts. The Commission therefore proposed that there be increased funding for the training of Aboriginal language interpreters.<sup>129</sup>

Those who provided submissions on this proposal expressed strong support for the training of Aboriginal interpreters, but some expressed concern about the suggestion that consideration be given to an accreditation system which enabled more Aboriginal people to attain accreditation as an interpreter.<sup>130</sup> It was noted that interpreters for court work need to be of a very high standard. The Chief Magistrate stated that 'there is a need to ensure that [this proposal] does not result in a second-class service for Aboriginal people. The standard of interpreter should be of a uniformly high standard. Aboriginal persons should not have to accept a lower standard than other non-English speakers'.<sup>131</sup>

The Commission has been advised by the Department of Indigenous Affairs,<sup>132</sup> Central TAFE<sup>133</sup> and the Kimberley Interpreting Service that a number of attempts have been made to increase the numbers of people training as interpreters of Aboriginal languages. These efforts have included TAFE developing an Aboriginal-specific intake for the Diploma of Interpreting<sup>134</sup> and running a number of interpreting courses in regional Western Australia.<sup>135</sup> The extent to which those recently trained have found employment is not known.<sup>136</sup> A further issue is the requirement for ongoing training: to remain current, qualified interpreters should undertake at least two professional development sessions each year and continue to practise as an interpreter.<sup>137</sup>

127. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 402.

128. Dagmar Dixon, Central TAFE, telephone consultation (4 August 2006). See also Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 18.

129. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 402, Proposal 78.

130. Chief Magistrate Steven Heath, Submission No. 10 (21 March 2006) 3; Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 6.

131. Heath, *ibid*.

132. Trevor Tann, Department of Indigenous Affairs, telephone consultation (15 June 2006).

133. Dagmar Dixon, Central TAFE, telephone consultation (4 August 2006).

134. Department of Indigenous Affairs, *Annual Report 2004–2005*, 22.

135. Pundulmurra College (Pilbara TAFE) has committed to run the Diploma of Interpreting for 38 students from the Kimberley and 10 from the Pilbara for fourth term 2006. The course will be run at Pilbara TAFE initially with some later modules at the students' local TAFE or Adult Education Centre. Professional development will also be offered at Pilbara TAFE. Some accommodation has been arranged and all students will be funded by Abstudy: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

136. The Kimberley Interpreting Service has advised that all graduates have had some assignments; however, in the last 12 months neither the local Magistrate nor the prison has booked an interpreter; ALS has booked three, and the five major hospitals in the area have also booked three: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

137. Dagmar Dixon, Central TAFE, email (29 August 2006). Ms Dixon states that it is very important for interpreters to keep their qualifications current, although there is no formal requirement from NAATI to maintain accreditation. Ms Dixon notes that the Kimberley Interpreting Service is very good at maintaining the professional development of its interpreters, but much depends on the kind of on-going training offered and the ability of those providing the training: Dagmar Dixon, Central TAFE, telephone consultation (4 August 2006). The Kimberley Interpreting Service provides as an example that in August 2006 in Fitzroy Crossing the Royal College of Obstetricians and Gynaecologists provided female interpreters with a workshop on sexual assault and domestic violence terms and concepts. This professional development was paid for by the Kimberley Interpreting Service out of self-generated funds: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

## Recommendation 119

### More training for Aboriginal language interpreters

That the Department of the Attorney General, in conjunction with Aboriginal communities, TAFE and the National Accreditation Authority for Translators and Interpreters:

1. Provide funding for the training of Aboriginal language interpreters.
2. Give consideration to a system that enables more Aboriginal people to attain accreditation as an interpreter.
3. Provide funding for the ongoing professional development of accredited Aboriginal language interpreters.
4. Give particular attention to training and professional development for Aboriginal language interpreters in regional Western Australia.

### Right to an interpreter in court proceedings

There is no right to an interpreter in the Western Australian *Evidence Act*. The common law rule is that if a person on trial cannot speak English then that trial will be unfair if an interpreter is not provided.<sup>138</sup> The Commission proposed in its Discussion Paper that the *Evidence Act* be amended to provide a right to an interpreter in court proceedings.<sup>139</sup>

Submissions received by the Commission supported this proposal.<sup>140</sup> Concern has been expressed that including this right in the *Evidence Act* could lead to the undesirable result of accused people being held in custody on remand for longer than necessary while an interpreter is located. In the consultations in Broome it was mentioned that there could also be a problem accommodating an accused while an interpreter is

located.<sup>141</sup> Lawyers stated concerns that adjournments would be required if police, prosecutors or defence counsel did not realise that their witnesses needed interpreters, and interpreters were difficult to locate. Because the courts travel infrequently to remote areas this could lead to undesirable delays in the administration of justice.<sup>142</sup>

Submissions and consultations also addressed the way the right to an interpreter would work in practice. The importance of an accused person not being required to pay for the services of the interpreter was stressed.<sup>143</sup> The DPP asserted that the leave of the court should be required, that procedures should be implemented for a linguist to reach a decision as to the need for an interpreter, and that the legislation should include that expert evidence can be provided to the court about the way Aboriginal people communicate and respond to questioning.<sup>144</sup> The DPP further cautioned that, while the principle in the recommendation is supported, 'it could not be implemented to its full extent until the situation regarding the lack of accredited interpreters has been rectified and sufficient interpreters become available'.<sup>145</sup>

The Commission notes these concerns. Nonetheless, it considers that providing for a right to an interpreter in the *Evidence Act* would serve an important



138. See further the discussion by Roberts-Smith J in *De la Espriella Velasco v The Queen* [2006] WASCA 31, [18]–[50]. The fact that the right to be inserted in the *Evidence Act* reflects the position at common law was recognised by the DPP: Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 7.

139. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 402, Proposal 79.

140. The Law Council asserted that 'as an initial point of principle ... there should be a presumption in court proceedings and interviews with lawyers and police involving an Indigenous accused or witness that an interpreter will be needed': Law Council of Australia, Submission No. 41 (29 May 2006) 11. See also Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5. The Kimberley Interpreting Service noted that Indigenous people do not know that they can ask for an interpreter and additionally there may be some 'shame' on their part (ie, embarrassment about not being able to speak sufficient English): Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

141. The further unwelcome alternative might be that if they are given bail and have come into Broome from the outlying communities, they will add to the number of homeless people from the communities in Broome, and there will be potential for more offences to be committed: submissions received at LRCWA Discussion Paper community consultation – Broome, 7 March 2006.

142. Wolff Chambers, consultation (16 May 2006); Wickham Chambers, consultation (25 May 2006).

143. Wickham Chambers, consultation (25 May 2006).

144. Office of the Director of Public Prosecutions, Submission No. 40 (19 May 2006) 7.

145. *Ibid.*

declaratory function.<sup>146</sup> The establishment of a statewide interpreter service may alleviate some of the concerns about delay expressed in submissions and consultations. The service would locate interpreters and allow arrangements to be made prior to hearings so that adjournments could be minimised.<sup>147</sup> It is important to note that the proposed section would operate in conjunction with Recommendation 42 above which states that s 129 of the *Criminal Procedure Act 2004 (WA)* should be amended to provide that for all accused persons a court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences.<sup>148</sup> The Commission considers that there is a need for legislative recognition of the basic principle that any witness who is not properly able to understand the language of the court should have access to an interpreter. This recommendation is not confined to Aboriginal witnesses.

### Recommendation 120

#### Right to an interpreter in court proceedings

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

1. A party or witness to proceedings has the right to assistance from an interpreter, unless it can be established that he or she is sufficiently able to understand and speak English.
2. An accused in criminal proceedings who cannot sufficiently understand English be entitled to the services of an interpreter throughout the proceedings, whether or not he or she elects to give evidence.
3. Where a court is not satisfied that a witness or party to proceedings is sufficiently able to speak or understand English then the proceedings should not continue until an interpreter is provided, or until the court is satisfied that it is appropriate to continue.

### Recommendation 121

#### State to provide interpreters in certain circumstances

1. That the Western Australian government make funding available for:
  - (a) interpreters to be provided where required in criminal proceedings in all Western Australian courts for:
    - (i) all witnesses and accused persons; and
    - (ii) not-for-profit legal services to take instructions from their clients.
  - (b) interpreters to be provided in civil proceedings in all Western Australian courts and tribunals where:
    - (i) a judge or magistrate has decided that, in the interests of justice, a witness or party requires the services of an interpreter; and
    - (ii) the party is unable to pay the costs of the interpreter service.
2. That the Department of the Attorney General actively promote the amendment of the *Family Law Act 1975 (Cth)* to include similar provisions to (b) (i) and (ii) and that corresponding amendments be made to the *Family Court Act 1997 (WA)* (to ensure that the same provisions apply to proceedings involving children of a marriage and ex nuptial children).

#### When is an interpreter required?

The Commission considers that to accompany the above amendment to the *Evidence Act* it would be useful to provide assistance to judges, magistrates, lawyers and others dealing with Aboriginal people in the courts to help them to determine when the services of an interpreter are required.<sup>149</sup> It has been noted by linguistic experts that an Aboriginal person's ability to communicate in Standard English can be misunderstood

146. The Commission notes that the uniform Evidence Acts contain a right to an interpreter. Section 30 of the *Evidence Act 1995 (Cth)* provides: 'A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to be able to understand, and to make an adequate reply to, questions that may be put about that fact'.

147. The Kimberley Interpreting Service expressed concern about the ability of a statewide interpreter service to perform this function. They have commented that contacting interpreters in the Kimberley region is not straightforward as many do not have phones and are highly mobile. They have also noted the lack of local cultural awareness or even 'geographic awareness' that is often evident in bureaucracies located in southern Western Australia: Jane Lodge, Manager, Kimberley Interpreting Service, email (1 September 2006).

148. See Recommendation 42, Chapter Five, above p 191.

149. Dr Michael Cooke has noted the difficulties that lawyers and judges can have in determining whether an interpreter is required by a witness: Cooke M, 'Aboriginal Evidence in the Cross-Cultural Courtroom' in D Eades (ed.), *Language in Evidence: Issues confronting Aboriginal and multicultural Australia* (Sydney: UNSW Press, 1995) 93.

*The key change needed is for both the courts and interpreters to be aware of, and be able to deal with, issues related to customary law.*

because of the combination of the fact that Aboriginal people usually speak some English and the fact that Aboriginal English closely resembles Standard English because it uses some of the same words.<sup>150</sup> This can be compounded by an Aboriginal person's inclination to agree with authority figures (such as a judge, lawyer or police officer) asking them if they understand.<sup>151</sup> This is apparent in the conflict between what Aboriginal people told the Commission they understood about court proceedings<sup>152</sup> and the fact that interpreters are seldom used.

The Commission therefore proposed that a qualified linguist formulate a test to assist courts to determine when a witness or an accused requires the services of an interpreter.<sup>153</sup> In its submission the Department of the Attorney General expressed concern that the provision of a test may have the effect of preventing access to an interpreter by those in need and that more may need to be considered.<sup>154</sup> It was not the Commission's intention to create a test of a restrictive nature; rather, it was intended as an aid to persons working with Aboriginal witnesses to assist them with what is acknowledged to be a difficult task. In light of these concerns the Commission has elected to use the expression 'assessment guidelines' rather than 'test' in the recommendation below. Since the proposal has been supported by other submissions<sup>155</sup> and no opposing comments were received, the Commission confirms its recommendation.

### Recommendation 122

#### **The development of assessment guidelines to assist courts to determine if an interpreter is needed**

That the Department of the Attorney General employ a suitably qualified linguist to develop assessment guidelines (both oral and video) to be used to assist the court, lawyers and others to determine when a person appearing in court either as a witness or as an accused may require the services of an interpreter.

## Interpreters and customary law

In his background paper to this reference Michael Cooke described the way considerations of customary law can impact upon the role of the interpreter and made a number of suggestions to address this problem.<sup>156</sup> The key change needed is for both the courts and interpreters to be aware of, and be able to deal with, issues related to customary law. To this end, the Commission suggested that guidelines be developed for use by the Department of the Attorney General in dealing with Aboriginal language interpreters. It also proposed that Aboriginal communities be educated about the role of interpreters.<sup>157</sup> The purpose of this education is to raise awareness of the role that

150. Although, they can have significantly different meanings and sometimes a Standard English word may have one or more different meanings in Aboriginal languages and vice versa. It is noted that the word 'kill' may mean 'hit' and 'hurt' as well as 'kill': Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002).

151. The guidelines for using Aboriginal language interpreters in the Northern Territory include a series of questions to assist in the determination of whether an interpreter is required. The questions range from very simple ones such as 'do you know how to read and write English?' to more complex questions designed to see if the witness is simply agreeing with statements that may be put to them, such as 'Gough Whitlam comes from your community too! That's right isn't it?': see Northern Territory Department of Local Government, Housing and Sport website, <[http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/pages/AIS\\_Guidelines](http://www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/pages/AIS_Guidelines)>.

152. See discussion under 'Fitness to plead because of cultural and language barriers', Chapter Five, above p 191.

153. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 403, Proposal 80.

154. Department of the Attorney General, Submission No. 34 (11 May 2006) 15.

155. Aboriginal Legal Service (WA), Submission No. 35 (12 May 2006) 10; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

156. For a more in-depth discussion, see Cooke M, 'Caught in the Middle: Indigenous interpreters and customary law' in LRCWA, *Aboriginal Customary Laws: Background Papers*, Project No. 94 (January 2006) 77.

157. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) Proposal 82, 405. It is noted in the Discussion Paper (Part IX, n 83) that the Kimberley Interpreting Service had applied for funding to make videos to impart information to Aboriginal communities about the role of interpreters. It has not received any funding for such a project and does not have plans to do so at this time: Kimberley Interpreting Service, telephone consultation (1 August 2006).

interpreters play in court and should include (in addition to the matters outlined in Cooke's Background Paper) overcoming any sense of shame attached to not understanding English and improving the status attached to Aboriginal languages.<sup>158</sup> The guidelines for the Department of the Attorney General would require that only trained interpreters be used and that sufficient information is provided to interpreters to enable them to determine whether they might have a conflict under customary law in a particular matter.<sup>159</sup> It is also suggested that the protocols to be developed by the Law Society for lawyers working with Aboriginal clients should include guidelines for the use of Aboriginal language interpreters.<sup>160</sup>

### Recommendation 123

#### Department of the Attorney General provide education about the role of interpreters

That the Department of the Attorney General, in conjunction with Aboriginal communities, provide education about the role of interpreters through community education, including the development of information videos to be distributed in communities and accessible at police stations, courts and prisons.

### Recommendation 124

#### Department of the Attorney General establish guidelines for using Aboriginal language interpreters in court

That the Department of the Attorney General establish guidelines for the use of Aboriginal language interpreters in court, including:

1. only using trained interpreters; and
2. providing information to prospective interpreters prior to engagement so that they can ensure there are no conflicting customary law considerations.

The Commission's recommendations for the increased use of Aboriginal language interpreters are a fundamental means of enabling the voice of Aboriginal people to be heard in all areas affecting their lives and communities. Interpreters can also make sure that the messages of the non-Aboriginal community are conveyed in a way that Aboriginal people can understand.<sup>161</sup> The Kimberley Interpreting Service stated that: '[t]his is empowering Indigenous people and contributing to their full and equal participation in society.'<sup>162</sup>

## Changes to court procedure

In its Discussion Paper the Commission examined the difficulties experienced by many Aboriginal witnesses because of the techniques used by lawyers in questioning witnesses, particularly leading questions; questions demanding quantitative speculation; and repetitious questions.<sup>163</sup> Overcoming these problems is not simple. It is important that the court hears all relevant evidence, but it is undesirable to place undue restrictions on the manner in which questions are asked in court. The Commission recommends three ways in which these problems may be addressed:

- by witnesses giving evidence in narrative form;
- by the court restricting the questioning of witnesses for cultural reasons; and
- by the further use of special witness facilities.

### Evidence in narrative form

One way that has been suggested to deal with the problems experienced by many Aboriginal people when giving evidence is to depart from the question-and-answer format and for the witness to tell their story uninterrupted by questioning. This is known as evidence in 'narrative form'. In its Discussion Paper the Commission expressed the view that no reform to the law in Western Australia is needed to enable Aboriginal witnesses to give evidence in this way.<sup>164</sup> Nonetheless, the Commission sought submissions as to whether it was desirable for amendments to be made to the *Evidence Act* to set out guidelines for narrative evidence.

158. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 9.

159. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) Proposal 78, 402.

160. See discussion under 'Protocols for lawyers working with Aboriginal people', Chapter Five, above p 96.

161. Kimberley Interpreting Service, *Indigenous Language Interpreting Services*, Discussion Paper (June 2004) 9.

162. *Ibid.*

163. LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 398–400.

164. *Ibid.* 405–406.

## Recommendations for the increased use of Aboriginal language interpreters are a fundamental means of enabling the voice of Aboriginal people to be heard.

In general, submissions received supported the use of narrative evidence.<sup>165</sup> The difficulties inherent in evidence being taken in this way were widely acknowledged.<sup>166</sup> That is, irrelevant or inadmissible material might be put before the court; witnesses may take longer than necessary to give their evidence; and there is a risk that a witness may take control of the proceedings.<sup>167</sup> Moreover, as was pointed out in consultations with lawyers, the use of narrative form evidence could never replace the question-and-answer format as even after a witness has provided the narrative there may be matters that the witness has not addressed, and specific questions may have to be put to ensure all relevant evidence is before the court. The Law Society noted that the ALRC had identified a considerable body of evidence supporting the view that the giving of evidence in narrative form is more culturally appropriate for some Aboriginal witnesses<sup>168</sup> and that such evidence is likely to be more accurate than evidence adduced by the standard question-and-answer format.<sup>169</sup>

Section 29(2) of the uniform Evidence Acts allows a witness to give evidence in narrative form. The New South Wales Law Reform Commission has recommended that, wherever possible, courts should exercise their statutory power to permit Aboriginal witnesses to give evidence in chief wholly or partly in narrative form.<sup>170</sup> In 1996 the Queensland Criminal Justice Commission recommended that courts in

Queensland adopt the use of narrative form evidence, but this recommendation has not been enacted.<sup>171</sup>

It is clear from the submissions and consultations that courts in Western Australia have from time-to-time exercised their power to allow evidence to be given in narrative form. Some lawyers consulted said that in criminal trials they might object to its use (although none consulted actually had) because of the risk that inadmissible information might be heard by a jury. Those lawyers who had led witnesses through evidence in narrative form agreed that to successfully use evidence in this manner it was essential to be both confident about the personality of the witnesses (that is, that they would not be likely to stray into inadmissible material) and very well prepared.<sup>172</sup> The same concerns were expressed in many of the consultations to the recent review of the uniform Evidence Acts.<sup>173</sup> The 2005 ALRC Final Report states that despite the reservations expressed by some advocates 'narrative evidence is an important tool in ensuring that the best evidence is before the court'.<sup>174</sup> The Commission agrees.

Although it is clear that the law in Western Australia does allow for evidence to be given in narrative form,<sup>175</sup> the consensus view of submissions received is that it is desirable to provide for narrative evidence in the *Evidence Act*. This will serve a number of useful purposes: to dismiss any issue about whether the technique is permissible; to provide an awareness-raising exercise so that lawyers and judges are aware of the

165. Stephanie Fryer-Smith (an academic working at Curtin University and the author of the *Aboriginal Benchbook for Western Australian Courts*) asserted that permitting Aboriginal witnesses to give evidence in this form is consistent with principles of substantive equality: Stephanie Fryer-Smith, Submission No. 23 (1 May 2006). The Australian Property Institute supported the use of narrative form evidence and commented that: 'it appears only reasonable that the form in which the oral evidence [of Aboriginal witnesses] is given should be in a culturally sensitive manner to permit the witness to provide the Court and other parties to the litigation the fullest understanding of the rights and interests asserted': Australian Property Institute, Submission No. 11 (21 April 2006) 3.

166. Stephanie Fryer-Smith, Submission No. 23 (1 May 2006); Law Society of Western Australia, Submission No. 36 (16 May 2006) 12; Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).

167. ALRC, *Evidence*, Report 26 (Interim) (Vol. 1, 1985) [608]. Further, it must be acknowledged that this form of evidence will not advantage all Aboriginal witnesses. Stephanie Fryer-Smith and the Law Society of Western Australia repeated the comments made by the ALRC that 'inarticulate, nervous or unprepossessing' witnesses might be disadvantaged by this mode of giving evidence.

168. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.34].

169. ALRC, *Evidence*, Report 26 (Interim) (Vol. 1, 1985) [280] [607]–[609].

170. NSWLRC, *Sentencing: Aboriginal Offenders*, Report 96 (2000) [7.41].

171. Queensland Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), Ch 4, Recommendation 4.1.

172. Wolff Chambers, consultation (16 May 2006); Greg McIntyre SC & George Irving, consultation (24 May 2006); Wickham Chambers, consultation (25 May 2006).

173. See discussion of submissions and consultations in ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.26]–[5.31].

174. *Ibid* 5.32.

175. Section 29(2) of the Uniform Evidence Acts is a statement of the common law position; namely, that upon an application by a party a judge may order that a witness give evidence in narrative form.

availability of the technique; and to allow formal recognition of the different mode of communication adopted by many Aboriginal people.

Narrative form evidence is not only for use by Aboriginal witnesses. It could also be used by other witnesses, including children<sup>176</sup> and experts.<sup>177</sup> Factors relevant to the exercise of the power to give evidence in narrative form may include a witness's age, cultural background and ability to observe warnings about what evidence is admissible. The Commission agrees with the assertion in the 2005 ALRC Final Report that narrative form may not be used often, but will be useful:

- where a witness is lapsing into narrative evidence and the judge believes this is appropriate;
- where the court anticipates that a witness will best be able to give evidence in this form; or
- where the party makes an application that the witness be allowed to give evidence in this way.<sup>178</sup>

The 2005 ALRC Final Report recommends that s 29(2) of the uniform Evidence Acts be amended so that an order may be made for evidence to be given in narrative form either on the application of a party, or at a judge's request. The Commission essentially adopts the wording of Recommendation 5-1 from the 2005 ALRC Final Report.

### Recommendation 125

#### Evidence in narrative form

That the *Evidence Act 1906* (WA) be amended to include a provision that a court may, on its own motion or an application, direct that a witness give evidence in narrative form and make orders for the way in which narrative evidence may be given.

### Protecting Aboriginal witnesses from unfair questions

In its Discussion Paper the Commission noted that the courts in Western Australia already use their inherent powers to restrict questioning of Aboriginal witnesses

that is regarded as unfair, as they do for any witness. No proposal was made in relation to inserting a specific power in the *Evidence Act* to protect witnesses in this situation as it was considered that it was unnecessary. The Commission has revised its position after consultation with Aboriginal people and lawyers working with Aboriginal clients and witnesses. Although the specific vulnerabilities of Aboriginal people to particular kinds of questioning are well-known, there was a general consensus that counsel could do more to protect witnesses in this situation.<sup>179</sup>

Section 26 of the *Evidence Act* provides that:

- (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is—
  - (a) Misleading; or
  - (b) Unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
- (2) Subsection (1) extends to a question that is otherwise proper if the putting of the question is unduly annoying, harassing, intimidating, offensive or oppressive.
- (3) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account—
  - (a) any relevant condition or characteristic of the witness, including age, language, personality and education; and
  - (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

It was suggested to the Commission in consultations with lawyers<sup>180</sup> that it would be desirable to include 'cultural background' as one of the factors listed in s 26(3)(a).

### Vulnerable witnesses and the uniform Evidence Acts

Section 41 of the uniform Evidence Acts uses the same words as s 26 of the Western Australia's *Evidence Act*. The protection of vulnerable witnesses from improper questioning is considered in some detail in the 2005 ALRC Final Report.<sup>181</sup> Opinion about the best way to

176. A discussion of the applicability of evidence in narrative form to the evidence of children can be found in ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.18]–[5.21].

177. Evidence in narrative form could be used in conjunction with the present provisions of the *Evidence Act 1906* (WA) relating to expert witnesses: ss 27A and 27B make provision for a different manner of giving voluminous or complex evidence, including the use of explanatory charts.

178. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.32].

179. Wolff Chambers, consultation (16 May 2006); Wickham Chambers, consultation (25 May 2006); Legal practitioner, confidential consultation (30 May 2006; 12 June 2006).

180. Wolff Chambers, consultation (16 May 2006).

181. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.70]–[5.132].

legislate to protect vulnerable witnesses from improper questioning is divided among the Commissions that contributed to the report. The ALRC and New South Wales Law Reform Commission (NSWLRC) recommended that the uniform Evidence Acts be amended to adopt the new approach to vulnerable witnesses found in s 275A(7) of the *Criminal Procedure Act 1986* (NSW). This differs from s 41 in that it imposes a duty on the court to disallow an improper question, rather than a discretion.<sup>182</sup> It states that the court *must* disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the questions meets the same criteria set out in ss 26(1)(a) and 26(1)(b) of the Western Australian *Evidence Act*. It includes the extra provision that it must do so if the court is of the opinion that the question ‘is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate’,<sup>183</sup> or has no basis other than as a sexist, racial, cultural or ethnic stereotype.<sup>184</sup> The factors that may be taken into account in determining whether a question should be disallowed are extended to include the ethnic and cultural background of the witness; the language background and skills of the witness; and the level of maturity and understanding of the witness.<sup>185</sup>

The Victorian Law Reform Commission (VLRC) took a different view. It preferred to retain the discretion of the trial judge to disallow inappropriate questions. It also recommended the introduction of a mandatory requirement to protect witness that are particularly vulnerable, and defined vulnerable witness to make it clear to whom it applies.<sup>186</sup> It defined an improper question in the same way as the ALRC and NSWLRC and stated that a court must disallow any question put to a vulnerable witness of the type referred to above unless satisfied it is necessary in the circumstances.<sup>187</sup>

Given that s 275A of the *Criminal Procedure Act 1986* (NSW) only commenced on 12 August 2005, and the proposal put forward by the VLRC has not yet been enacted, it is not possible to determine which of the above approaches works better in practice. Further assessment of this issue will be necessary as Western Australia considers the adoption of the uniform Evidence Acts.<sup>188</sup> In the meantime, the Commission recommends that the *Evidence Act* include a specific reference to cultural background to reflect the concerns expressed in the consultations and submissions to this reference.

### Recommendation 126

#### Disallowing questions put to witnesses that are vulnerable by reason of their cultural background

That s 26(3)(a) of the *Evidence Act 1906* (WA) include ‘cultural background’ as one of the matters which may inform a court in exercising its discretion to disallow a question or require that it not be answered pursuant to s 26(1).

### More assistance for Aboriginal people in the court system

The Commission was told during its consultations that Aboriginal people often do not understand the court process and want more help to do so. These comments often took the form of criticism of the ALS. The fact that ALS lawyers often do not have the time to explain things to their clients appears to be the source of much dissatisfaction, such as ‘ALS keep telling our people to plead guilty’.<sup>189</sup> This does not suggest to the Commission that ALS lawyers are advising Aboriginal people to plead guilty when they are not; rather, it appears to demonstrate that often ALS lawyers do

182. Ibid [5.90].

183. *Criminal Procedure Act 1986* (NSW) s 275A(7)(c).

184. *Criminal Procedure Act 1986* (NSW) s 275A(7)(d).

185. Section 275A(3) provides that a question is not disallowable under the section merely because the question (a) challenges the truthfulness of the witness or the consistency or accuracy of any statements made by the witness, or (b) requires the witness to discuss a topic that could be considered to be distasteful or private.

186. A ‘vulnerable witness’ is to be defined as a person under the age of 18, or a person with a cognitive impairment/intellectual disability, and also includes any other person rendered vulnerable by reason of: (a) the age or cultural background of the witness; (b) the mental, physical or intellectual capacity of the witness; and (c) the relationship between the witness and any party to the proceedings, and the nature of the offence.

187. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) [5.128].

188. Ibid [5.130]. The ALRC states that ‘it is desirable for the uniform Evidence Acts to contain effective and uniform provisions to deal with this issue. But it is also important for the best solution to be developed and adopted in any uniform proposal.’ It is therefore suggested that an assessment be made of the two approaches before a choice is made as to what should comprise the uniform approach.

189. Submissions received at LRCWA, Discussion Paper community consultations – Kalgoorlie (28 February 2006); Broome (7 March 2006); Broome Regional Prison (7 March 2006); Fitzroy Crossing (men’s meeting) (9 March 2006).

not have the time to explain the intricacies of the criminal law to their clients. It is acknowledged<sup>190</sup> that the resources of the ALS do not permit the lawyers and field officers employed by them to devote much time to explaining the court procedure generally to defendants in court proceedings. This has the predictable result that many Aboriginal people are left confused by the process.

It must also be recognised that it is not just Aboriginal accused who are confused by the process – this is also a concern for victims appearing in court, and witnesses generally.<sup>191</sup> Funding restrictions also impact on the ability of police prosecutors, the DPP and Victim Support Service to spend time explaining court procedure. It has also been noted that for a variety of reasons Aboriginal people are less likely to access assistance from such agencies where it is available.<sup>192</sup> For this reason, the Commission proposed the employment of court facilitators to assist all Aboriginal people appearing in court, whether they are accused persons, complainants, parties or witnesses.<sup>193</sup> The position has been variously described as facilitator, liaison officer, or court worker. Although the Commission used the term ‘facilitator’ in its Discussion Paper, the expression ‘Aboriginal liaison officer’ is used in this Report to adopt the description of the existing position in the Supreme Court.

The proposal was widely supported.<sup>194</sup> The Department of the Attorney General suggested that the support of Aboriginal people should not be restricted to criminal courts and that such liaison officers ought to be available to all witnesses appearing in any jurisdiction. They provided the examples of family law matters, housing, adoptions and child protection.<sup>195</sup>

Another submission stated that this kind of role is often carried out by Aboriginal volunteers, and stressed the

importance of employing Aboriginal people to fill these positions:

I support the proposal to employ ABORIGINAL court facilitators. However, the support needs to be provided a long time prior to the actual trial/hearing date/s. There is a dire need for more Aboriginal staff, including Aboriginal victim support and child witness preparation officers to be employed within the court system. I specifically mentioned these two occupations because these are the positions that provide the kind of court support that is referred to above. I don't believe we should become reliant on the recruitment of Aboriginal volunteers to provide this form of court support. Rather, we ought to be valuing and suitably rewarding the cultural knowledge and expertise that Aboriginal people bring to their roles. I would also note that there aren't too many Aboriginal people who are in a financial position to provide voluntary services.<sup>196</sup>

The Commission further notes that liaison officers would be a very useful reference point for the court when seeking to make their hearings—on circuit, in particular—as culturally appropriate as possible. Liaison officers could assist with setting up local cultural awareness training or the ‘welcome to country’<sup>197</sup> at the beginning of a circuit. If it was proposed that evidence be taken on country, the services of Aboriginal liaison officers would likely prove invaluable.<sup>198</sup> The Commission considers that the role of the liaison officers could extend not just to explaining proceedings, but also to attempting to ensure that all customary law considerations are brought to the attention of the court so that special witness and other provisions can be used if necessary.

While the Commission acknowledges that courts in Western Australia are attempting to increase the numbers of Aboriginal liaison officers,<sup>199</sup> there are presently not enough positions to carry out the role

190. Submissions received at LRCWA, Discussion Paper community consultation – Kalgoorlie (28 February 2006). See also ‘Funding of the Aboriginal Legal Service, Chapter Five, above p 88.

191. Confidential, Submission No. 50 (30 June 2006).

192. *Western Australian Aboriginal Justice Agreement*, 11.

193. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 415, Proposal 89.

194. Marian Lester, Submission No. 18 (27 April 2006); Department of the Attorney General, Submission No. 34 (11 May 2006) 16–17; Aboriginal Legal Service (WA), Submission No. 5 (12 May 2006) 5; Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5; Family Court of Western Australia, Submission No. 57 (26 July 2006). During the return consultations in Broome it was stated that many people did not understand the court process; this included some prisoners at Broome Regional Prison who reported that they did not understand the offence of which they had been convicted.

195. The Department of the Attorney General, Submission No. 34 (11 May 2006) 16–17. It is noted that the Family Court of Western Australia has already proposed that such facilitator positions be established: Family Court of Western Australia, Submission No. 57 (26 July 2006).

196. Confidential, Submission No. 50 (30 June 2006) (original emphasis). In Chapter Two the Commission noted that the reliance on Aboriginal people to provide voluntary services is an attitude that is not demonstrated to the same degree with non-Aboriginal people. The Commission is of the view that Aboriginal people should be remunerated for the provision of essential services.

197. Dr Brian Steels, consultation (28 April 2006). It was noted that the court is opened by police, there is no traditional welcome or acknowledgment of country, and that there is a lack of Aboriginal culture in the courts.

198. See Recommendation 116, above p 332.

199. Chief Magistrate Steven Heath & Magistrate Libby Woods, consultation (17 May 2006).

that the Commission proposes.<sup>200</sup> It is the Commission's view that an Aboriginal liaison officer should be employed wherever courts sit in Western Australia. It is acknowledged that this will require significant funding;<sup>201</sup> however, the Commission believes that the benefits of the recommendation would far outweigh the cost. As the Department of the Attorney General has asserted: 'overall the employment of [liaison officers] to provide assistance to Aboriginal people giving evidence in court would save valuable court time by helping to ensure a clear understanding of the court process'.<sup>202</sup>

### Recommendation 127

#### Aboriginal liaison officers to be employed to work in courts

That the Department of the Attorney General employ Aboriginal liaison officers in all Western Australia 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.

## Educating those who work in the legal system about Aboriginal culture

In its Discussion Paper the Commission made two proposals directed to educating lawyers and judges about Aboriginal culture.<sup>203</sup> The Commission also acknowledged that the Law Society was considering the development of protocols for lawyers dealing with Aboriginal clients.<sup>204</sup>

### Protocols for lawyers

In Chapter Five of this Report the Commission has recommended that protocols be developed to assist

lawyers working with Aboriginal people. The Commission suggests that the proposed protocols should address the problems that Aboriginal people can face in the court system<sup>205</sup> and provide practical ways in which these problems can be ameliorated, including:

- suggesting culturally appropriate methods of leading evidence from witnesses (such as narrative form);<sup>206</sup>
- encouraging lawyers to object when questions are being asked of Aboriginal witnesses that are linguistically or culturally inappropriate; and
- involving experts to suggest techniques to ensure that evidence from Aboriginal witnesses is adduced in a manner that comes within the rules of evidence, is fair to the witness and does not prejudice the interests of the parties to the litigation.<sup>207</sup>

### Cultural awareness training for judicial officers

The Commission proposed in its Discussion Paper that cultural awareness training be provided for all government employees working with Aboriginal people.<sup>208</sup> Within the legal system it was proposed that such training be undertaken by lawyers;<sup>209</sup> employees of the Departments of the Attorney General and Corrective Services;<sup>210</sup> and police officers.<sup>211</sup> For judicial officers, it was proposed that Aboriginal cultural awareness training be continued. It was also proposed that sufficient funds be allocated by the government to the implementation of this proposal to enable:

- effective and appropriate programs to be developed;
- Aboriginal presenters to be engaged;
- the training to be local, particularly where a particular judicial officer is required to sit regularly at a particular location; and
- sufficient time to be allocated to such training so

200. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 415. The Department of the Attorney General stated in its submission that the existing Aboriginal liaison officer structure is effective if applied statewide and adequately resourced: Department of the Attorney General, Submission No. 34 (11 May 2006) 17.

201. Department of the Attorney General, *ibid* 16. However, it is acknowledged that in areas where courts sit infrequently, liaison officers need not be employed on a full-time basis. This was recognised by the Department of the Attorney General, who stated that consideration should be given to employing competent contractors.

202. Department of the Attorney General, Submission No. 34 (11 May 2006) 17. The Commission notes the Department of the Attorney General has expressed the intention to introduce Aboriginal Court Liaison Officers around Western Australia.

203. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposals 7 & 90. Proposal 8 suggested cultural awareness training for the employees of the Department of Justice.

204. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 414. See discussion of the protocols and Recommendation 10, Chapter Five, above p 90.

205. Some of the difficulties are discussed by the Commission in its Discussion Paper: LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396–401.

206. See Recommendation 125, above p 344.

207. This has been described as a 'reconciliatory approach' to litigation: see Flynn M & Stanton S, 'Trial by Ordeal: The stolen generation in court' (2000) 25 *Alternative Law Journal* 75, 77 quoted in LRCWA, *Aboriginal Customary Laws: Discussion Paper* Project No. 94 (December 2005) 414.

208. See Recommendation 2, above p 51.

209. LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) Proposal 7; see also Recommendation 11, above p 92.

210. See Recommendation 12, above p 93.

211. See Recommendation 56, above p 212.

that it does not adversely affect the work of the courts.

Support for cultural awareness training for judicial officers was expressed in the submission from the Law Society and the Criminal Lawyers Association.<sup>212</sup> Return consultations at Geraldton<sup>213</sup> and Fitzroy Crossing<sup>214</sup> noted that cultural awareness training should be local in character.<sup>215</sup> The return consultations in Bunbury were also supportive: cultural awareness training was described as a 'must'.<sup>216</sup> It was noted by the Indigenous Women's Congress that cultural awareness training must operate in addition to information about relevant customary law being provided on a case-by-case basis. It would thereby ensure that judges are educated generally about Aboriginal issues so they are informed about these matters before a specific case comes before them.<sup>217</sup> In the consultations with lawyers it was noted that judges (as well as lawyers) need education about the kinds of problems Aboriginal witnesses can face because of their customary law and practical ways of dealing with these problems.

The Chief Magistrate commented that, when cultural awareness training was implemented both by the Australian Institute of Judicial Administration and National Judicial College of Australia, 'the greatest difficulty has not been the preparedness of judicial officers to attend but the ability to find appropriate presenters'.<sup>218</sup> The Commission suggests that where community justice groups are set up they may be of assistance in locating suitable presenters and ensuring that training is local in character.

The need for training of this nature was discussed in the 2005 ALRC Final Report in the context of narrative form evidence. It was said that it is not the enacting of legislation to provide for such measures that will solve the problems facing many Aboriginal people in court:

Without an understanding of the reasons why giving evidence in narrative form may be more appropriate for some witnesses, it is likely that judges will fall back

on their own experience as advocates and view the practice with suspicion.<sup>219</sup>

The report therefore recommends that judicial training include an examination of the ways that different kinds of witnesses may respond to traditional methods of examination-in-chief and cross-examination. The Commission endorses that approach. It also considers it vital that such training encompass the issues of disadvantage set out in the Discussion Paper and this Report, as well as the problems facing Aboriginal people in court<sup>220</sup> so that the measures recommended in this chapter to overcome those problems can be properly implemented. The submission from the Catholic Social Justice Council recognised the general need for a 'broad cooperative educational and training approach involving the Aboriginal community, governmental, church and other non-governmental agencies'. They stated that this should 'precede, accompany and follow the suggested actions of the Commission's report'.<sup>221</sup> The Commission agrees with the Council that if the recommendations in this chapter are to succeed then it is crucial that all people working in the legal system attain a better understanding of the cultural differences that are at present a barrier to Aboriginal people properly understanding and participating in the legal system.

### Recommendation 128

#### Cultural awareness training for judicial officers

1. That all Western Australian courts and the State Administrative Tribunal continue Aboriginal cultural awareness training.
2. That the Western Australian government provide adequate resources to ensure that:
  - (a) effective programs can be developed;
  - (b) Aboriginal presenters can be engaged;
  - (c) training is local in character; and
  - (d) time is allocated to the training so that the work of the courts is not affected.

212. Law Society of Western Australia, Submission No. 36 (16 May 2006) 1. Support was also expressed in Criminal Lawyers Association, Submission No. 58 (4 September 2006) 5.

213. Submissions received at LRCWA Discussion Paper community consultation – Geraldton, 3 March 2006.

214. Submissions received at LRCWA Discussion Paper community consultation – Fitzroy Crossing (women's meeting), 9 March 2006.

215. See discussion under 'Cultural Awareness', Chapter Three, above pp 49–51 and 'Principle Four: Local focus and recognition of diversity', Chapter Two, above p 36.

216. Submissions received at LRCWA Discussion Paper community consultation – Bunbury, 17 March 2006.

217. Indigenous Women's Congress, consultation (28 March 2006).

218. Chief Magistrate Steven Heath, Submission No. 10 (21 March 2006) 3–4.

219. ALRC, *Uniform Evidence Law Report*, ALRC 102 (December 2005) 5.36.

220. As described in detail in LRCWA, *Aboriginal Customary Laws: Discussion Paper*, Project No. 94 (December 2005) 396–401.

221. Catholic Social Justice Council, Archdiocese of Perth, Submission No. 25 (2 May 2006).