THE CULTURAL SPECIFICITY OF EVIDENCE: THE CURRENT SCOPE AND RELEVANCE OF THE *ANUNGA* GUIDELINES*

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I. INTRODUCTION

> [T]he criminal courts have perpetuated the myth that everyone is equal under the law, and have failed to develop strategies for overcoming the differences in language, culture and wealth which in reality place Indigenous defendants at such extreme disadvantage.[1]

It is well recognised that the law of evidence and procedure is culturally and socially contingent. The rules of evidence and procedure tend to target certain cultural and social groups. In recent years the law has attempted to redress this imbalance through the introduction of culturally sympathetic rules and procedures. The *Anunga* guidelines, which attempt to regulate the conduct of police during their interrogation of Aboriginal suspects, are one such example. It is the aim of this paper to critically examine the *Anunga* guidelines.[2] To this end, the first part of the paper will introduce readers to the guidelines and examine their historical context. The second part of this paper critically

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* *R v Anunga and others* and *R v Wheeler and another* (1976) 11 ALR 412. (Hereafter referred to as *Anunga*).

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1 H McRae, G Nettheim, L Beacroft, *Indigenous Legal Issues*, Law Book Company (1997), p 362.

2 This paper will focus on the jurisdictions of the Northern Territory and Queensland. For an examination of the cases which discuss the application of the *Anunga* Guidelines between 1976 and 1984 see F Bates, "Interrogation of Aboriginal People" (1984) 8 *A Crim LJ* 373.

examines the implementation of four of the guidelines and comments on some of the difficulties which have arisen in relation to existing requirements. Part three discusses some proposals for reform.

A. Why Special Rules for Aboriginal Suspects are Necessary

At the time of the colonisation of Australia in 1788, one of the primary roles of the police was the protection of the white settlers from Aboriginal people. Keeping Aboriginal resistance at bay[3] (often through bloody massacres) was perhaps the earliest relationship to exist between Aboriginal people and police. Later, the police role changed to that of 'protector' of Aboriginal people.[4] In the later 'protection' period, Aboriginal people were gathered into missions and reserves and overseen and controlled, frequently by police. It was often the task of police to remove half caste children from their families and to inspect domestic circumstances. Later policies of assimilation and integration had similar effects, the basis of assimilation being that Aboriginal people should be culturally absorbed into the mainstream.

More recently, police involvement with Aboriginal people has been less blatantly discriminatory. However, often the laws which police enforce fail to take into account cultural and social difference, so that their absolute application by police promotes inequality. Examples include public drunkenness laws[5] and vagrancy.[6] Although police may claim objectivity in their policing,[7] such culturally different attitudes of Aboriginal people lead to their increased visibility to police; when this is coupled with police stereotyping of Aboriginal people, the arrest rate increases,[8] as does the feeling of victimisation and anger felt by Aboriginal people.[9]

Historically, the notion of white racial superiority was heavily emphasised to the public through paternalistic government policy. Lack of equal treatment has been entrenched in government policy in relation to Aboriginal people since colonisation. Police were (and remain) the enforcers of such policies, and this has brought police into constant conflict with Aboriginal people. From this

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3 H Wootten, "Aborigines and Police" (1993) 16 *UNSWLJ* 265 at 266.

4 Meanwhile, the rest of the population waited for the Aboriginal race to die out; see H McRae *et al*, note 1 *supra*, p 355. See generally R Kidd, *The Way We Civilise: Aboriginal Affairs, the Untold Story*, University of Queensland Press (1997).

5 See for example s 45D of the *Summary Offences Act* (NT) which provides that persons should not drink liquor within 2 kilometres of a licensed premises. Its effect is to make drinking in a public place an offence.

6 Wootten points out that; "many Aboriginals ... have different attitudes to drinking in public, sleeping in parks and otherwise using public space". Note 3 *supra* at 270.

7 H Goodall, "Policing: In Whose Interests? Local Government, the TRG and Aborigines in Brewarrina 1987-1988" (1990) 3 *Journal of Social Justice Studies* 19.

8 Aboriginal people account for 26.2 per cent of people in police custody. McRae *et al*, note 1 *supra*, p 348. Johnston argues that an important issue in reducing the number of Aboriginal people in prison is to reduce Aboriginal/police tension: E Johnston, "Aborigines and the Law" in E Johnston QC, M Hinton, D Rigney (eds), *Indigenous People and the Law*, Cavendish (1997) at 105.

9 See Wootten, note 3 *supra* at 268.

history "many things flow".[10] The involvement of Aboriginal people with police continues to be one of extreme imbalance of power.[11] This legacy has resulted in Aboriginal peoples' continuing distrust[12] of police while at the same time seeing police as the embodiment of authority which is to be obeyed.[13] Aboriginal people require protection from entrenched negative police attitudes and the systematic bias which has been developed against them.

Linguistic and cultural differences are now well recognised by the courts.[14] Lester has pointed out that Aboriginal languages are very different from English - the negative is used differently and connecting words and concepts of time, place and distance are translated differently.[15] Deference to authority may cause some Aboriginal people to constantly agree to statements put to them by police rather than answer honestly.[16]

Speakers of Aboriginal English may also use words in an unusual way. Police may not understand the particular use of silence and gesture employed by Aboriginal people in conversation.[17] Some Aboriginal suspects may feel shame and believe therefore that they *must* speak with police. Carberry, in a submission to the Queensland Criminal Justice Commission, noted other cultural complications. These include the fact that some Aboriginal suspects will "play up their involvement in an incident for theatrical effect which derives from a tradition of story telling; and there is a strong sense of family obligation, to the extent that it is culturally appropriate to 'take the rap' for a relative's actions".[18]

Another relevant concern is that chronic middle ear infection is common and has caused significant hearing loss in 47 per cent of Aboriginal children.[19] This latter problem clearly affects a suspect's ability to understand police interview proceedings adequately without assistance.

These issues constantly recur in the decisions which discuss the implementation of the *Anunga* rules. Safeguards for Aboriginal people are necessary to take account of these kinds of social and cultural differences.

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10 Commissioner E Johnston QC, *Royal Commission into Aboriginal Deaths in Custody*, AGPS (1991) at [1.4.5].

11 See *McKellar v Smith* (1982) 2 NSWLR 950 at 962 per Miles J; "the history of Aboriginals and law enforcement authorities ... should put a tribunal on notice that an Aboriginal person may be at a substantial disadvantage in the interrogation process".

12 Criminal Justice Commission, *Queensland, Aboriginal Witnesses in Queensland's Courts*, 1996 at 6.

13 *R v Williams* (1976) 14 SASR 1 at 7; *Anunga,* note * *supra* at 414.

14 See *Cutter v R* (1997) 143 ALR 498 at 506-7 per Justice Kirby.

15 T Lester is quoted in Australian Law Reform Commission, *Aboriginal Customary Law Report,* 1986 at [403]. (Hereafter referred to as the *Customary Law Report*). See also, Australian Law Reform Commission *Criminal Investigation*, 1975 at 117.

16 This has been described as "gratuitous concurrence". See D Eades, *Aboriginal English and the Law*, Queensland Law Society, Continuing Legal Education Department (1992), p 79.

17 *Customary Law Report,* note 15 *supra* at [404].

18 Submission of Mr. Carberry, representative of the Queensland Aboriginal and Torres Strait Islander Legal Service; Criminal Justice Committee Report, *Review of Police Powers in Queensland, Vol IV, Suspects Rights, Police Questioning and Pre-Charge Detention*, 1995 at 184. (Hereafter referred to as *Police Powers Qld*).

19 C Baker, "North Queensland Aborigines and Criminal Justice in the Courts" (1992) *Uni Qd LJ* 57 at 67.

B. The Spirit and Intent of the *Anunga* Rules[20]

The disadvantages which Aboriginal people face during police interrogation and the cultural specificity of evidence and procedure have long been a cause of concern. In recognition of these issues, in the 1976 case of *R v Anunga*,[21] Forster J of the Supreme Court of the Northern Territory set down nine guidelines for regulating the conduct of police officers when interrogating Aboriginal people.

The guidelines came to be known as the *Anunga* guidelines or *Anunga* rules. The aim of the guidelines was to "remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police".[22] While they offered some hope in this aim, their application relies on police and judicial discretion and they have been applied inconsistently and often unsatisfactorily.

It is the aim of this part of the paper to introduce the reader to the *Anunga* guidelines and to clarify the requirements of police when interviewing Aboriginal suspects.[23]

The *Anunga* guidelines require that when an Aboriginal person is being interrogated:[24]

1. where necessary, an interpreter should be present,
2. where practical a 'prisoner's friend' should be present,
3. care should be taken in administering the caution to ensure there is a proper understanding,
4. leading questions should be avoided,
5. even after an apparently frank and free confession is obtained, police should continue to investigate the matter to find proof of the commission of offences from other sources,
6. police should offer the interviewee a meal, coffee, tea, water and toilet breaks,
7. suspects are not interviewed when ill, drunk[25] or tired[26] and that interviews should not last for an unreasonable[27] amount of time,
8. if the suspect seeks legal advice,[28] reasonable steps[29] should be taken to obtain it and if the suspect states that they do not wish to answer any more questions, the interview should be terminated, and

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20 *R v Weetra* (1993) 93 NTR 8 at 9.

21 *Anunga*, note * *supra*. Justice Forster was joined by two other judges of the Northern Territory Supreme Court, Ward and Muirhead JJ, in setting down the guidelines.

22 *Anunga*, *ibid* at 413.

23 Note 2 *supra*.

24 *Anunga*, note * *supra* at 414-15.

25 *Customary Law Report*, note 15 *supra* at [405]; severe health problems, alcoholism and alcohol related disease are often factors which need to be considered in relation to Aboriginal suspects. See also *R v Clevens* (1981) 55 FLR 453.

26 In relation to lack of sleep see *R v Mungatopi* (unreported, SC NT, Asche CJ, 24 August 1990).

27 This reflects statutory provisions in Queensland and the Northern Territory: *Justices Act* 1886 (Qld) s 69, *Criminal Code* (Qld) s 552, *Police Administration Act* (1978) NT ss 137-8. See also the *Police Powers and Responsibilities Act* (Qld) 1997 (*PP&R Act*), s 50(3)(a).

28 Note that in Queensland, the failure to advise the accused of their right to a solicitor may provide a ground for discretionary exclusion; *R v Borsellino* [1978] Qd R 507.

29 See *MD (a child) v McKinlay* (1984) 31 NTR 1 at 8; also *R v Jimberry* (unreported SC NT, Mildren J, 16 December 1993) at 4.

9. substitute clothing should be provided where clothing is taken for forensic examination.[30]

Rules five to nine are applicable to most members of the community in the police interview situation and will not be discussed in this paper. The first four guidelines will be the primary focus of this paper. These four rules attempt to deal with the reality that many Aboriginal people do not understand some of the concepts of Anglo-Western law, such as the right to remain silent. The rules also attempt to address the fact that Aboriginal people tend to be overly agreeable, especially to those in authority such as police.[31]

C. The Place of the *Anunga* Rules in Evidence

Before critically examining the rules it is important to locate them within the law of evidence. Pursuant to the *Lee* discretion,[32] trial judges have a discretion to exclude evidence of a confession where it would be unfair to admit it, having regard to the conduct of the police and the circumstances surrounding the way in which the confession was obtained. Once the defence has properly raised the issue of discretionary exclusion, the trial judge must rule on the matter.[33] This generally occurs in a *voir dire*.[34] The accused person must then prove, on the balance of probabilities, that exclusion of the confession is justified.[35] In some jurisdictions, a breach of the *Anunga* guidelines may be considered by the trial judge in deciding whether to exercise the *Lee* discretion[36] and exclude a confession. In *Anunga*, Forster J noted that any material departure from the guidelines would "probably lead to the exclusion of evidence".[37] The rationale for this exercise of judicial discretion is that the accused has a right to a fair trial, including a right against self-incrimination and procedural fairness,[38] and that such a right may be jeopardised if "a statement is obtained in circumstances which affect the reliability of the statement".[39] Although the *Anunga* rules are generally applied in relation to fairness, the line between unfairness and

29 See *MD (a child) v McKinlay* (1984) 31 NTR 1 at 8; also *R v Jimberry* (unreported SC NT, Mildren J, 16 December 1993) at 4.

30 *R v Clevens*, note 25 *supra* at 453, where the defendant was in wet clothes for the interview.

31 *Anunga*, note * *supra* at 414.

32 *R v Lee* (1950) 82 CLR 133 at 154. See also *Foster v R* (1993) 113 ALR 1 at 6.

33 See *R v Borsellino*, note 28 *supra*; the judge retains the right to exclude evidence which has been obtained by conduct of which the Crown ought not take advantage.

34 JD Heydon, *Cross on Evidence*, Butterworths (5th Ed, 1996), pp 272-6; and see *Fry v Jennings* (1983) 25 NTR 19 at 25.

35 *Cleland v R* (1982) 151 CLR 1; see also *R v Butler [No 1]* (1991) 102 FLR 341 at 347.

36 *Collins v R* (1980) 31 ALR 257; see also *Gudabi v The Queen* (1984) 52 ALR 133.

37 *Anunga*, note * *supra* at 413.

38 *Customary Law Report*, note 15 *supra* at [420].

39 *R v Van de Meer* (1988) 35 A Crim R 232 at 248-9. See *R v Anderson* (1991) 57 A Crim R 143 at 148-9, this case involved an Aboriginal defendant and a failure by police to appropriately follow the *Anunga* rules.

involuntariness may be hard to draw and on some occasions a breach of the *Anunga* rules has been used to show involuntariness.[40]

The *Anunga* guidelines recognise that the right to silence is a fundamental right.[41] The right to silence itself is a "statement about how [the anglo-legal system] values the individual and limits the power of the state".[42] The guidelines aim to ensure explanation of and to give practical effect to that right to silence.[43] One of the aims of the guidelines is to make sure that Aboriginal people understand that remaining silent in a police interview is a real choice. This right to silence has been considered central by some judges. In some situations where the guidelines have not been followed, the trial judge has been satisfied that the right to silence was understood and the confession has not necessarily been excluded.[44]

D. The Application of the *Anunga* Rules

Since *Anunga* was decided, administrative directions have been developed in both the Northern Territory and Queensland in relation to police interrogation of Aboriginal suspects.[45] These administrative directions have been treated in the same way as the Judges Rules.[46]

The *Queensland Police Manual* sets out the *Anunga* rules and notes that they are "guidelines designed to ensure that Aboriginal suspects are treated fairly".[47] Breach of the guidelines has lead to the trial judge using the discretion to reject a confession although it has been noted that "contravention of [the *Anunga* guidelines] is not conclusive" that the confession will be rejected.[48] In his dissenting judgement in the Queensland case of *R v Aubrey*,[49] Fitzgerald P recommended that police should follow the *Anunga* guidelines when interviewing Aboriginal suspects or risk exclusion of the confession.[50] Subsequently, in the unreported Queensland decision of *R v Izumi*, Cullinane J excluded a record of interview on the basis that a prisoner's friend (who was

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40 See *R v Riley* (unreported, SC NT, Mildren J, 4 March 1994) at 2. In relation to voluntariness, see also *Cleland v R*, note 35 *supra* at 19 and see *McDermott v The King* (1947-8) 76 CLR 501 in relation to overborne will.

41 See *Rice v Connolly* [1966] 2 QB 414 at 419. For some discussion of this 'right', see M Bagaric, "The Diminishing 'Right' of Silence" (1997) 19 *Sydney Law Review* 366.

42 *R v Butler [No1]*, note 35 *supra* at 346.

43 *Ibid* at 349.

44 See *R v Weetra*, note 20 *supra* at 9.

45 Queensland Police Service, *Operational Procedures Manual*, 21 May 1996 at [6.3.6] and [6.3.7] (referred to as *Qld Police Manual*). Commissioner of Police of the Northern Territory, *General Standing Orders*, 1990 (referred to as *NT Police Orders*).

46 *R v Collins*, note 36 *supra* at 310-11. For a discussion of the Judges Rules see *Police Powers Qld*, note 18 *supra*, ch 21 at 21-4.

47 *Ibid* at [2.14.11].

48 *R v W and others* [1988] 2 Qd R 308 at 315.

49 *R v Aubrey* (1995) 79 A Crim R 100.

50 *Ibid* at 111. In the same case, Davies JA found it "unnecessary to express any concluded view on the extent of the Application of [the *Anunga*] rules" (at 114) and MacPherson JA failed to address the question of the application of the *Anunga* rules.

provided by police) was inappropriate and that the Aboriginal suspect, who spoke non-standard English, had not understood the caution.[51]

The Northern Territory police force has formulated similar guidelines to those developed in Queensland.[52] The Northern Territory guidelines mirror those set out in *Anunga*, and they are expressed to function merely as a guide. Unlike the situation in Queensland, the judiciary in the Northern Territory are *obliged*, because of the doctrine of precedent, to apply *R v Anunga*[53] and a significant body of case law has developed in the Northern Territory around the primary case.

Although it is beyond the scope of this paper, it is interesting to note that the *Anunga* guidelines have been held to be applicable in other jurisdictions.[54] For example, they have been applied in the Australian Capital Territory[55] South Australia,[56] Tasmania[57] and in Western Australia.[58]

E. To Whom do the *Anunga* Rules Apply?: The Tribal/Urban Construction

Ultimately, the judge in a particular case has a discretion to decide *to whom* the *Anunga* rules should be applied.[59] Justice Forster in *Anunga* did not draw distinctions between Aboriginal people, but rather made observations of Aboriginal people generally, based on his personal experience and judicial observations. He noted that often Aboriginal people do not understand English very well and even if they understand the words, the concepts may be

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51 *R v Izumi* (unreported, SC Qld, Cullinane J, 22 May 1995). See also Trezise (1996) *79 Aboriginal Law Bulletin* 17 at 18 for a case note.

52 *NT Police Orders*, note 45 *supra*.

53 Hon Justice D Mildren, "Redressing the Imbalance Against Aboriginals in the Criminal Justice System" (1997) *A Crim LJ* 7 at 8.

54 Also note that particular protections are applied to juveniles in the police interview process. The *Juvenile Justice Act* (Qld) demands that for children under 17 years a statement will be inadmissible unless it is given to police in the presence of a "suitable person". A suitable person is a parent, the child's lawyer, a representative of the Department of Family Services (where a child is a ward), a Justice of the Peace or an adult nominated by the accused (see s 36). It would seem that particular care should be taken in respect of Aboriginal children; see *R v W and others*, note 48 *supra* at 323.

55 *R v Clevens*, note 30 supra at 461. Justice Kelly commented that; "it is clear that the use of those [*Anunga*] rules need not be confined to Aboriginals resident in the Northern Territory", the judge found the rules helpful in his consideration of whether to reject the confessional evidence of an Aboriginal youth.

56 *R v S and J* (1983) 32 SASR 174.

57 *Walsh v R* (unreported, CCA Tas, Cox CJ, Crawford and Slicer JJ, 7 March 1996). Justice Slicer cited *Anunga* as authority for the proposition that in deciding whether a police interview has been properly conducted, cultural background is a factor which should be considered.

58 *R v Webb* (1994) 74 A Crim R 436; per Malcolm CJ at 438, per Ipp J at 445 (Seaman J agreed with the reasons of Ipp J at 440); the Full Court found that the *Anunga* rules should be taken into account when exercising a discretion to exclude an Aboriginal person's confession. Note also *Gibson v Brooking* [1983] WAR 70 at 75

59 Note that Forster J in *Anunga* suggested that the *Anunga* guidelines may be applicable to people of non-English speaking background; note * *supra* at 414. The rules have subsequently been applied to non-Aboriginal people; see *Re Jee Wah Leng* (unreported, Immigration Review Tribunal, Phillips and Metledge, members, 2 December 1993).

misunderstood.[60] Further his Honour commented on the tendency of Aboriginal people to answer questions in a way they the think the questioner wants.[61]

There has been a great deal of discussion in the case law in relation to the question of to whom the *Anunga* rules apply. Should the rules apply to: all Aboriginal people being interviewed;[62] those Aboriginal people who are disadvantaged in comparison to the rest of the community;[63] semi-tribal and tribal Aborigines, [64] or tribal Aborigines only?[65]

For the purpose of applying special rules, there has been a tendency in the criminal law generally to take a narrow view of who is Aboriginal. The definition of 'Aboriginal' for the purpose of the application of the *Anunga* guidelines has, to a large extent, been confined to those Aboriginal people who live in remote area communities and who are 'traditionally' orientated.[66] This narrow definition is problematic; it excludes so called 'urban' Aboriginal people and non-remote Aboriginal people[67] who are likely to suffer many of the disadvantages associated with more 'traditional' Aboriginal people. Relying on these essentially imaginary divisions between groups within Aboriginal culture risks generalising and has implicit dangers.[68]

There appears to be a lack of consistency in relation to whom the rules will be applied. Many of the decisions which discuss the application of *Anunga* examine the types of social indicators that can be taken into account in making a decision about whether to apply *Anunga* in a particular case. Place of residence, level of education and fluency in English have been considered. The courts have recognised that even so called 'traditional' Aboriginal accused may have a high level of contact with 'western civilisation'. Many Aboriginal accused will be familiar with videos, television, taped music, reside in conventional houses and be able to drive a car. However such familiarity will not necessarily exclude application of the *Anunga* rules.[69] Similarly, it has been pointed out that the *Anunga* rules do not simply apply to "tribal men, unsophisticated in modern ways".[70] Fluency in English has been assessed by the courts in deciding whether to apply the rules: Where the accused has only a basic understanding of English,[71] or where he or she only understands "everyday English"[72] the rules are more likely to be applied. The *Anunga* rules have regularly been applied to

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60 *Anunga*, note * *supra* at 413.

61 *Ibid* at 414.

62 *R v Aubury*, note 49 *supra* at 114.

63 *Ibid* at 111.

64 See *Wanganeen v Smith* (1977) 73 LSJS 139.

65 *R v W and others*, note 48 *supra* at 319.

66 *Ibid*; Dowsett J comments that "more primitive Aborigines are contemplated by the Anunga rules".

67 S Yeo, "The Recognition of Aboriginality by Australian Criminal Law" in G Bird *et al* (eds), *Majah: Indigenous Peoples' and the Law*, Federation Press (1996) at 234. See also *NT Police Orders*, note 45 *supra* at Q2 [3].

68 See B Debelle, "Aboriginal Customary Law and the Common Law" in E Johnson QC, M Hinton and D Rigney (eds), *Indigenous Australians and the Law*, Cavendish publishing (1997) at 87.

69 *R v Nundhirribala* (1994) 120 FLR 125 at 130.

70 *R v Butler [No 1]*, note 35 *supra* at 345.

71 *R v Jimberry*, note 29 *supra* at 9.

72 *R v Echo* (unreported, SC NT, Martin CJ, 19 December 1996) at 4.

accused persons who have completed year 9 or 10 at High School.[73] Beyond this level of education, however, there is no relevant judicial comment. Generally, in spite of the judges' preparedness to take into account a broad range of factors, they tend to remain conservative in relation to this issue.

In many urban environments, Aboriginal people will speak a form of non-standard English, or "Aboriginal English".[74] The obvious danger of using a narrow definition (in that the *Anunga* rules will apply only to tribal Aboriginal people) is that a speaker of Aboriginal English will not have the protection they may need in the police interview scenario. Thus, the 'spirit and intent' of the *Anunga* rules will not be satisfied.

In spite of changes in the Aboriginal culture since 1976, for example higher levels of education and more urban lifestyles, the *Anunga* rules maintain their relevance. Social indicators in respect of Aboriginal people continue to reflect extreme disadvantages,[75] and the *Anunga* rules continue to have an important function in attempting to eliminate some of the disadvantages[76] that Aboriginal people often encounter during police interrogation. If the rules are able to fulfil their purpose, judges need to be flexible in determining to whom the rules should be applied. The assumption should be that Aboriginal people will be disadvantaged in a police interrogation. In some situations, the social indicators discussed above will rebut that presumption.

II. EXAMINATION OF THE APPLICATION OF THE FIRST FOUR OF THE ANUNGA GUIDELINES

A. Interpreters in Police Interviews or "Vox Nullius"[77]

The first of the *Anunga* rules requires that:

> When an Aboriginal person is being interrogated as a suspect, unless he is as fluent as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present and his assistance should be utilised whenever necessary to ensure complete and mutual understanding.[78]

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73 *R v Em* (unreported, SC NT, Thomas J, 12 December 1995) at 4.

74 D Eades, note 16 *supra*, p 13. Not all linguists recognise this dialect.

75 Aboriginal people are three times more likely to be unemployed and three times more likely to live in rented accommodation (rather than owned accommodation), as compared to the rest of the population. Aboriginal people make up 12.5 per cent of the prison population and 1.5 per cent of the general population. See McRae *et al*, note 1 *supra*, p 12, based on 1993 census data.

76 In *R v Aubrey*, note 49 *supra* at 111, Fitzgerald P (dissenting) emphasised that where an Aboriginal person is disadvantaged in respect of the police investigation when compared to the rest of the Australian population, the *Anunga* rules should be applied. Note that the majority judges, McPherson and Davies JJ, took a narrow view and found that the *Anunga* rules should not be applied. Aubrey, the accused, was 16 years old, had left school at grade nine, was of Aboriginal descent and had spent most of his life at the community of Cherbourg.

77 R Goldflam, "Silence in Court! Problems and Prospects in Aboriginal Legal Interpreting" in D Eades (ed) *Language in Evidence*, UNSW Press (1995) at 29.

78 *Anunga*, note * *supra* at 414; this rule is reproduced in the *Qld Police Manual*, note 45 supra at [2.14.11] and in *NT Police Orders*, note 45 *supra* at [5.1].

A number of particular issues of practical and legal significance have arisen in relation to the interpretation and application of this rule.

(i) Particular Linguistic Issues

One of the problems Aboriginal people encounter in a police interrogation is that they have particular linguistic difficulties which lead to misunderstandings in the interview process. In spite of the fact that it is clear that many Aboriginal defendants do not speak English as fluently as the "average white man of English descent",[79] interpreters are rarely called by police.[80] In fact, contrary to the spirit of the rules, it has been judicially suggested that even where an accused person's English "is less fluent than the average white person of English descent, an interpreter will not always be necessary".[81] This attitude stems partially from the immense practical problems associated with locating appropriate interpreters. Caustic comments have come from the bench on a number of occasions in relation to this problem. For example we hear in *R v Martin*: "[t]o say that the accused speaks English is itself a misuse of the English language".[82] Significant difficulties exist for both accused and police in terms of obtaining the services of an appropriate interpreter, some of these difficulties are discussed below.

In his judgment in *Anunga*, Forster J noted that Aboriginal people have a tendency to answer questions put to them by white authority figures in a way they think they *should* be answered, rather than the way they may want to answer.[83] Linguists have named this tendency "gratuitous concurrence".[84] It is clear from recent cases that this problem persists. Note the following exchange between a police officer and an Aboriginal suspect which took place in 1995;

> - Okay. Now what I'm going to do is I'm going to ask you some questions about that ... Okay, that trouble. And um, and those questions I ask ... but you don't have to answer those questions if you don't want to, okay?
>
> - Yeah.
>
> - ... You don't have to say anything about that trouble if you don't want to. It's your choice. Do you understand that? Can you tell me in your own words what I just said to you then?
>
> *[No answer].*
>
> - ... Do you have to answer my questions?
>
> - Yes.
>
> - Okay. You don't have to answer the questions okay? That's your choice. If you want to you can. If you don't want to, then you don't have to answer my questions okay? You don't have to talk to me now if you don't want to. Do you understand that?

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79 See for example; *R v Gumbinyarra* (unreported, SC NT, Thomas J, 28 September 1995), *R v Ninnal* (1992) 109 FLR 203.

80 Goldflam notes that the criminal justice system 'routinely fails' to provide interpreters to Aboriginal people who speak English as a second language: Goldflam, note 77 *supra*, p 41.

81 *R v Ninnal*, note 79 *supra* at 216.

82 *R v Martin* (1991) 105 FLR 22 at 23.

83 *Anunga*, note * *supra* at 414

84 Note 12 *supra* at 22.

- Yes.
- ... Do you have to answer my questions or not?
- Yes.

[The police officer then attempted to procure a translation of the caution for the accused from the prisoner's friend].

- Do you have to speak to me?
- Yes.[85]

Another linguistic difficulty that may confront Aboriginal people, which was identified by Forster J in the principal case, is that they may lack appropriate terminology or conceptual understanding to express common English concepts, such as numbers, amounts, distances[86] and places.[87] In addition, the use of various connecting words in English such as "because", "in", "at", "on" and "by"[88] may have no equivalent in Aboriginal languages. Further confusion may be caused when positive and negative questions are asked,[89] this relates to the problem of gratuitous concurrence discussed above.[90] Other problems which may be harder to recognise, both for the accused and the police interviewer are that suspects may speak a variety of Aboriginal English and/or that the accused is using words differently to the way in which they would generally be understood by the non-Aboriginal community, for example using "kill" to mean "hurt".[91]

(ii) Deciding When an Interpreter is Necessary

Justice Kearney has commented that: "[t]he importance of using competent interpreters ... appears to be somewhat overlooked these days when it comes to un-sophisticated outback people. That is a trend that must be smartly reversed".[92]

The object of this rule is to "ensure complete and mutual understanding".[93] An ability on the part of an accused to converse in simple English will not necessarily guarantee this level of understanding. In *R v Maratabanga*, where the accused demonstrated that he could understand simple concepts in uncomplicated English, the court found that it was not necessary to provide an interpreter.[94] While this may have been relevant in the case at hand, this is a problematic conclusion for police or judiciary to reach too readily. Even though police, who are often very familiar with the type of English spoken by Aboriginal people may believe that they understand what the accused is saying,

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85 *R v Mangaraka* (unreported, SC NT, Martin CJ, 9 June 1995) at 8 and 9; also see for another example *R v Gumbinyarra,* note 79 *supra* at 4.

86 For example, one often hears terms such as "little bit long way" (personal experience).

87 Lester in McRae *et al,* note 1 *supra* at 46 -9; *Anunga,* note * *supra* at 414.

88 Lester in McRae *et al, ibid; Anunga ibid.*

89 *Ibid.*

90 Justice Forster suggests that the reason for this is that Aboriginal people are more likely to provide the suggested answer given their general tendency to be courteous and polite; *Anunga,*note * at 414.

91 *R v Izumi,* note 51 *supra* at 18.

92 *R v Martin,* note 82 *supra* at 24-5.

93 *Anunga,* note * *supra* at 414.

94 *R v Maratabanga* (1993) 114 FLR 117 at 135.

their own understanding may not necessarily be accurate.[95] According to Kearney J, police interrogators should be satisfied that the suspect can speak English as fluently "as the average white man of English descent" before they dispense with the requirement of an interpreter.[96]

Most of the cases have taken a narrow focus (or easier option) of simply assessing whether there was complete understanding by the suspect of the right to remain silent. For example, in *R v Wurrkgidj* it was found that although the accused did not speak English as well as the average white man of English descent, he did understand his right to remain silent and thus was not disadvantaged in the investigation compared to other members of the Australian community.[97]

(iii) Problems with Obtaining the Services of an Appropriate Interpreter

Even when police decide to use an interpreter, numerous problems exist in trying to obtain the services of an appropriate interpreter for speakers of Aboriginal languages and of Aboriginal English. There are few people trained as interpreters of Aboriginal languages and virtually no interpreters are trained in interpreting Aboriginal English, thus there is the simple and practical problem of a lack of interpreters. Even where interpreters with some training are available they are not likely to have a sufficient knowledge of police interviewing procedures and, as Mildren J suggests, this is a necessary requirement of an interpreter in a police interrogation setting.[98] Even trained interpreters will have to attempt to:

> ... surmount problems such as the lack of lexicographical equivalents between languages; different grammatical constructions; 'culture-bound' references which require further explanation before they can be interpreted; [and] non-verbal forms of expression.[99]

A greater emphasis on training has been suggested from several quarters.[100] The *Customary Law Report* recommends that "existing programs for training and accreditation of Aboriginal interpreters should be supported and extended. The aim should be to ensure that interpreters are available at all stages of the criminal justice process".[101]

Aboriginal people will generally require that interpreters be of appropriate kin,[102] (thus certain members of the family group are likely to be excluded from

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95 *R v Inkamala* (unreported, SC NT, Thomas J, 18 December 1996) at 15.

96 *R v Martin*, note 82 *supra* at 23.

97 *R v Wurrkgidj* (unreported, SC NT, Mildren J, 10 December 1992) at 12-13. Alternatively, in *R v Ninnal*, at some stage into the interview, the accused began to have obvious difficulty repeating back the caution. Justice Mildren found that it was at this point that the interview should have been stopped and an interpreter arranged; *R v Ninnal*, note 79 *supra* at 216. In *R v Mangaraka*, the prisoner's friend attempted to fulfil the role of interpreter but it was found that the friend did not improve the accused's understanding of the relevant concepts, and the confession was found inadmissible; *R v Mangaraka*, note 85 *supra* at 25.

98 Mildren, note 53 *supra* at 9; also see note 12 *supra* at 28.

99 K Laster, V Taylor, "Technocratic Multiculturalism: Lawyers 'Use' Interpreters" (1994) 12 *Law in Context* 79 at 81.

100 Mildren, note 53 *supra* at 9, Goldflam, note 77 *supra*, p 52; see also note 10 *supra*, recommendation 100.

101 *Customary Law Report*, note 15 *supra* at [677].

102 *Ibid* at [546].

the task) and also of appropriate gender (for example it is unlikely to be appropriate for a woman to interpret for a man).[103] The question of whether a particular interpreter is appropriate may be established by asking the accused; alternatively, the interpreter will often simply refuse to interpret.[104] These individual requirements do, however, further narrow the field in terms of the availability of interpreters.

These factors emphasise the cultural divide that continues to exist between many Aboriginal people and the legal system and the importance of proper training. Goldflam argues that the language of law is oppressive and works to effectively silence non-English speaking Aboriginal people.[105] The legal system constructs Aboriginal people as "vox nullius".[106] The legal system continues to limit Aboriginal self-determination by suppressing Aboriginal people's right to a voice. Interpreters may become components of the legal system which seeks to silence Aboriginal people; they may become part of the "conspiracy to silence their people".[107] For example, interpreters may find themselves leaving out 'inappropriate' words when interpreting.

Even if the problems of obtaining the services of an interpreter are overcome, this may not be all that is needed to ensure understanding. As mentioned earlier, it is now recognised that a disproportionate number of Aboriginal people are deaf or have a reduced capacity to hear.[108]

B. The Prisoner's Friend or "A Piece of Appropriate Furniture"[109]

Justice Foster's second rule from *R v Anunga* states that:

> When the Aboriginal is being interrogated it is desirable where practicable that a 'prisoner's friend' (who may also be an interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal has apparent confidence ... The combinations of persons and situations are variable.[110]

Generally, the prisoner's friend must be someone that the suspect knows and trusts.[111] In some cases, where police have co-opted someone unknown to the accused, the confession has been excluded.[112] The suspect should feel confident with and be supported by the prisoner's friend.[113] The purpose of the friend's presence is to make the police interview situation less alienating and foreign. In

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103 See K Laster, V Taylor, *Interpreters and the Legal System*, Federation Press (1994), p 141, also Goldflam, note 77 *supra*, p 43.

104 Goldflam, *ibid*, p 46.

105 *Ibid*, p 38.

106 *Ibid*.

107 *Ibid*, p 41. Laster and Taylor enlarge on this suggesting that there is a danger that interpreters can become handmaidens to the law, Laster and Taylor, note 99 *supra* at 86.

108 See *R v Mangaraka*, note 85 *supra; R v Ninnal*, note 79 *supra*.

109 Quoted in *R v Butler [No 1]*, note 35 *supra* at 346, fn 11.

110 *Anunga*, note * *supra* at 414; see also *Qld Police Manual*, note 45 *supra* at [6.3.5] and *NT Police Orders*, note 45 *supra* at [5.2].

111 *NT Police Orders, ibid* at [14.1].

112 For example, *R v Izumi*, note 51 *supra*.

113 *NT Police Orders*, note 45 *supra* at [14.2].

this improved environment the suspect's ability to choose whether to speak or remain silent should be enhanced.[114]

(i) Who is an Appropriate Prisoner's Friend?

In *Anunga*, Forster J set out several suggestions of people who would make appropriate prisoner's friends. These suggestions included station owners and settlement superintendents.[115] More recent cases have moved away from accepting that those who hold positions of authority over the suspect are likely to be satisfactory.[116] This reflects the fact that while the underlying principles of the *Anunga* rules retain validity, their application has altered in order to keep up with changing social conditions and values.[117]

Some of the decisions illustrate this general shift. For example, in *R v Izumi*, an Aboriginal community police woman in uniform was conscripted by police as a prisoner's friend; she did not know the accused and Cullinane J found that she was not a person "whom the accused could look to for support or by whom she would feel supported".[118] This can be compared to a situation where a field officer who did not know the accused was sent to the police interview by a legal aid organisation and the field officer was found to be an appropriate person to act as a prisoner's friend.[119] On the other end of the scale, a prisoner's friend who was between 12 and 14 years old and was allegedly involved in the same offence for which the 18 year old suspect was being interviewed was described as nothing more than "a piece of appropriate furniture".[120] The *Customary Law Report* has suggested that the friend should not be a "police officer, an accomplice in the alleged offence or a person who the accused should be prevented from seeing (because of threat of destroying evidence or intimidating witnesses)".[121]

A number of cases enlarge on the kind of characteristics appropriate to the role of prisoner's friend. Generally, prisoner's friends are likely to be of Aboriginal descent.[122] It has been stressed that the ideal prisoner's friend should be able to speak the same language as the accused and should also be reasonably fluent in English.[123] Nevertheless, on many occasions the friend chosen by the accused person may not speak English yet may well be considered appropriate when they are considered to be able to offer support and instil confidence in the accused.[124] Although the prisoner's friend may perform a dual function, of

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114 *R v Gumbinyarra*, note 79 *supra* at 6.
115 *Anunga*, note * *supra* at 414.
116 *R v W and ors*, note 48 *supra* at 308.
117 *Gudabi v The Queen*, note 36 *supra* at 143.
118 *R v Izumi*, note 51 *supra*.
119 See *R v Aboriginal Youth* (unreported, SC Qld, Fitzgerald, Davies, McPherson JJA, 28 April 1995).
120 *Rockman v Stevens*, note 109 *supra*.
121 *Customary Law Report* note 15 *supra* at [568].
122 Mildren, note 53 *supra* at 9.
123 *R v Butler[No 1]*, note 35 *supra* at 344; *R v Weetra*, note 20 *supra* at 11; *R v Gumbinyarra*, note 79 *supra* at 5.
124 See for example, *Gudabi v The Queen*, note 36 *supra* at 140.

interpreter as well as more general support,[125] this dual role is not required.[126] Where a prisoner's friend may play no effective role and/or where he or she is a mere witness to proceedings, this person may still be considered to be an appropriate friend. In determining whether an inactive prisoner's friend is appropriate, the question will be whether any disadvantage to the accused arises from the inactivity of the friend. If there is no disadvantage, the confession is not likely to be excluded on the basis of a breach of the second rule.[127] It is not necessarily the role of the friend to achieve for the accused a practical equality with the average white man.[128]

Where police employ the friend for their own ends, he or she may ultimately be found to be an agent of the police rather than a prisoner's friend. For example, in *R v Riley*,[129] Mr Hammer, (the accused's grandfather) was chosen by the accused to be the prisoner's friend. Throughout the interview Hammer spoke in a "loud and intimidating" voice to the accused telling him to "talk" and to "speak up" and "you gotta talk".[130] Although the court found that Hammer was not a person in authority, it did find that Hammer's statements were made in the presence of persons in authority (the police officers) who did not "seek to distance themselves" from the statements, and thus the accused's confession was found to be involuntary.[131] Note however that in *R v Em*, where the accused had chosen his father as a friend, the police interviewer said to the accused: "I don't care what you tell me but I think you should tell your father the truth", this was not seen to cause the confession to be inadmissible.[132]

In determining whether a particular prisoners' friend is appropriate, judges have also discussed drunkenness and deafness. Drunkenness is likely to preclude a person from being an effective prisoner's friend, primarily because the friend would be unable to fully understand their role.[133] This can be seen in *R v Inkamala* where two prisoner's friends were chosen by the accused, both of whom later described themselves in evidence as 'half drunk' at the time of the interview. They believed their role was to interpret, however a transcript of their interpreting emphasised that they in fact had a very limited command of English.[134] In *R v Butler [No1]*, hearing difficulties of the chosen prisoner's friend did not prevent him from "sufficiently and effectively" fulfilling the role of the friend.[135]

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125 *Anunga*, note * *supra* at 416.

126 See *R v Jimberry*, note 29 *supra*, where the prisoner's friend was not able to assist police with the giving of the caution.

127 *R v Weetra*, note 20 *supra* at 17.

128 *Gudabi v The Queen*, note 36 *supra* at 142.

129 *R v Riley*, note 40 *supra*.

130 *Ibid* at 14.

131 *Ibid*.

132 *R v Em*, note 73 *supra* at 3.

133 *R v Inkamala*, note 95 *supra* at 8.

134 *Ibid*.

135 *R v Butler [No 1]*, note 35 *supra* at 346.

(ii) The Role of the Police Officer in Choosing and Advising the Suspect and the Friend

It is the right of the suspect to choose the prisoner's friend rather than the role of the interviewing police officer. The police, however may assist in locating the prisoner's friend if asked to by the accused.[136] Police should explain the role of the prisoner's friend to the suspect so that he or she can make an appropriate choice.[137]

Justice Mildren has commented that police have a duty to tell the suspect, as a minimum, two things about the role of the prisoner's friend. Firstly, that the friend should act in an advisory role to the accused; and secondly, that the friend should be able to assist in helping the accused to understand matters raised by the police.[138] Ideally, the suspect should also be told he/she can speak privately with the friend and that the friend should be someone who is aware of the suspect's rights, independent and not afraid of police.[139] Clearly, it may often be very difficult to employ a prisoner's friend who has all the desirable characteristics.[140] If a suspect has been properly advised by the police of the role of the friend and then makes an 'inappropriate' choice, this second rule is unlikely to be considered breached.[141]

Although the right of the suspect to choose their friend has been emphasised, it can pose problems if an unsuitable friend is chosen. The proper function of the prisoner's friend cannot be satisfied if they are effectively a "piece of furniture". Indeed, it has been suggested that Aboriginal Legal Aid Organisations should assist in the provision of the prisoner's friend and allow the free choice of the prisoner only as a last resort.[142]

A breach of the second rule may occur when the police interviewer fails to explain and ensure that the friend understands their role as a prisoner's friend in the proceedings.[143] In *R v Mangaraka,* the confession was excluded partly on this basis. Mangaraka chose her mother as a friend. Her mother told her throughout the interview to tell the police the truth and believed that the police were there to help the accused.[144] In *R v Marrmowa* it was not clear that the role had been properly described to either the suspect or the friend, this resulted in the prisoner's friend being "virtually ineffective".[145]

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136 *Ibid* at 344; *Gudabi v The Queen*, note 36 *supra* at 199-200.

137 *NT Police Orders*, note 45 *supra* at [7.4.1]. See *R v Weetra*, note 20 *supra* at 11, where the judge commented that, "unless the suspect is made aware, there is a danger that his choice may be an entirely inappropriate one". See also *R v Jimberry*, note 29 *supra* at 10.

138 *R v Weetra, ibid* at 11.

139 *R v Weetra, ibid*; *R v Butler [No 1]*, note 35 *supra* at 344.

140 *R v Butler [No 1], ibid* at 344.

141 *R v Weetra*, note 20 *supra* at 12.

142 *Customary Law Report*, note 15 *supra* at [568].

143 *NT Police Orders*, note 45 *supra* at [7.4] and [7.4.1] and [8]. See also *R v Em*, note 73 *supra* at 3.

144 *R v Mangaraka*, note 84 *supra* at 25.

145 *R v Marrmowa* (unreported, SC NT, Thomas J, 20 November 1996) at 3.

C. Administering the Caution to Aboriginal Suspects

The third and fourth of the *Anunga* rules are both directed to the Aboriginal suspect's understanding of the caution and the questions asked during the police interrogation. The third of the *Anunga* rules states:

> Great care should be taken in administering the caution when it is appropriate to do so. It is simply not appropriate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer questions?'. Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear that the Aboriginal has apparent understanding of his right to remain silent.[146]

With similar intent to the third rule, the fourth *Anunga* rule states:

> Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way ... cross-examination should be scrupulously avoided ... It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.[147]

Similar issues arise in relation to both rules. Often police interrogators will state the caution and ask a leading question such as, " you don't have to answer my questions, okay?". The third rule has been described as the most important of the *Anunga* rules. However, the rules relating to the prisoner's friend and the interpreter are designed to assist in promoting the accused's understanding of the right to silence and the questions asked. The rules are linked. Generally, it will be a combination of factors which will lead to the exclusion of confessional material. It will not always be necessary that the suspect is properly cautioned; it may be enough to satisfy the court that the suspect understood that he was not obliged to answer any questions.[148] It is necessary for the police interrogator to re-administer the caution at each interview; reliance on cautions from previous interviews will not be sufficient.[149]

(i) Analysing the Text of the Record of Interview

Generally, judges have analysed the narrative in the record of interview to decide whether the caution has been understood by the accused. One of the key factors taken into account appears to be the general fluency in English of the accused. From this judges have extrapolated the likelihood or not of the accused's understanding of the caution. Thus where a video recording demonstrated the accused being inaudible or giving monosyllabic answers such as "Yeah" and "mmm", it was found that it was unclear that the accused understood his right to remain silent[150] and the confession was excluded.[151] In a

146 *Anunga*, note * *supra* at 414-15; see *Qld Police Manual*, note 45 supra at [2.14.11] and *NT Police Orders*, note 45 *supra* at [5.3].

147 *Anunga, ibid* at 415, see also *Qld Police Manual, ibid* at [2.14.1] and *NT Police Orders, ibid* at [5.4].

148 *Gudabi v The Queen*, note 36 *supra* at 133.

149 See *R v Anderson* (1991) 57 A Crim R 143 at 147, where the police interviewer attempted to rely on a caution given a month previously in relation to another matter. See also *R v Ninnal*, note 79 *supra* where the caution was given the previous day.

150 *R v Yaltjanki* (unreported, SC NT, Martin CJ, 9 June 1994) at 8.

situation where the accused was shown to have "a good working knowledge of English ... when questions are framed in short sentences and expressed in fairly simple language, he is fully able to comprehend them and respond meaningfully in the English language", there was found to be "complete and mutual understanding" between the suspect and interviewer.[152] This included understanding of the caution.

Problems identified after analysis of the text of the record of interview include gratuitous concurrence, and failure of the accused to repeat back the caution in their own words.[153] Cross examination style questioning should be avoided in the police interview, and as suggested by the fourth rule, this will help avoid the possibility of gratuitous concurrence.[154]

It is not always a faulty administration of the caution that will cause lack of understanding. In *R v Marrmowa* the judge was satisfied that the "right words" were used by the police in giving the caution but the accused still failed to understand it.[155] Gratuitous concurrence causes particular difficulties in relation to the caution.[156] Throughout the giving of the caution, Marrmowa was asked on a number of occassions, "Do you understand?", to which he consistently replied "yes". The courts frequently consider this type of exchange to be fatal, in the sense that it has often lead to a positive answer and thus failed to show an understanding of the caution. In these circumstances the confession has been rejected.[157] In response to this problem, Mildren J recommends that instead of asking this question, police should ask suspects to repeat back the caution in their own words.[158]

In situations where it is clear that the accused has a very limited understanding of English, and there is no evidence that the accused was able to repeat back the caution in their own words, it will be very difficult for the prosecution to establish understanding of the caution unless it is interpreted to him or her. In *Riley*, the accused had a limited command of spoken English and could not write in English.[159] In this case, the prisoner's friend did not advise the accused that he had a right to silence. Rather he advised the accused that he should speak to the police. It was found that the confession should be excluded as the right to silence was not clearly understood by the accused.[160]

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151 *Ibid* at 14; note that real evidence found during the interview (a buried gun) was also excluded.

152 *R v Butler [No 1]*, note 35 *supra* at 345.

153 For example, *R v Gumbinyarra*, note 79 *supra; Gudabi v The Queen*, note 36 *supra; R v Marrmowa*, note 145 *supra* at 147.

154 *R v Nundhirribala*, note 69 *supra* at 143; in this case although the accused was effectively cross examined by police, the confession was admitted.

155 *R v Marrmowa*, note 145 *supra* at 3.

156 *Ibid* and see *R v Mangaraka*, note 85 *supra* at 8-9.

157 *Ibid.*

158 Mildren, note 53 *supra* at 11.

159 *R v Riley*, note 40 *supra* at 14. Similarly, when a 15 year old child with a limited ability to communicate in English was unable to repeat back the caution in his own words and where the prisoners friend did not assist in explaining the caution, the confession was found to be inadmissible; see *R v Em*, note 73 *supra* at 5.

160 *Ibid.*

In *R v Sharpe and Braedon*, emphasis was placed on whether the accused understood both parts of the caution; the first part being the right to silence and the second part being the fact that if the accused chooses to speak it is "potentially contrary to their interest".[161] The judge analysed the transcript of the record of interview and found that the accused understood the first part of the caution and not the second part. As a result, the confession was excluded.

The cases also suggest that proving that the accused 'wanted to speak to police' will not necessarily ensure admissibility of the confession. The key factor will be in showing that the accused had an understanding of the caution: Voluntary is not the same as volunteered.[162]

(ii) What Other Evidence Will the Judge Use to Decide Whether the Caution has been Understood?

Transcripts of past recorded police interviews have been tendered to prove understanding of the caution. *In R v Nundhirribala,*[163] the prosecution tendered a previous record of interview to show that the accused had some experience of the police interrogation process. Justice Mildren accepted that evidence and that the accused had understood his right to silence on the previous occasion.[164] In the 1992 case of *R v Maratabanga*, Mildren J heard evidence of a number of previous interviews and was satisfied that the accused understood the right to remain silent as early as 1984.[165] Records of prior convictions have also been tendered to prove that the suspect has come into contact with police in the past and that they are familiar with the police interview environment.[166] It is difficult to see how evidence of prior conditions alone could demonstrate an understanding of the caution.

Members of the community and the accused can be called to give evidence in relation to whether the accused has a satisfactory command of English. Eric Gumbinyarra, an accused person with limited English, was a petrol sniffer and alcohol abuser who had suffered head injuries and had a depressive illness. In his case, evidence was called from a Probation and Parole officer with the Northern Territory Department of Correctional Services. The officer stated in a pre-sentence report that the accused usually communicated with monosyllabic answers or yes/no gestures.[167] This evidence assisted the judge to find that the caution was not understood.

The non-Aboriginal community underestimates the level of English necessary to understand difficult concepts like the caution. The evidence of linguists has been called in relation to this matter,[168] although rarely by the prosecution. This

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161 *R v Sharpe and Braedon* (unreported, SC NT, Angel J, 15 July 1996) at 263. Also see note 159 *supra*.

162 For example, *R v Jimberry*, note 29 *supra*; *R v Yaltjanki*, note 150 *supra* (note the interview was disrupted temporarily by the intrusion of a large snake!). See also *Collins v R*, note 36 *supra* at 307; "voluntary means ... made in the exercise of a free choice to speak or be silent".

163 *R v Nundirribala*, note 69 *supra* at 131.

164 *Ibid.*

165 *R v Matarbanga*, note 94 *supra* at 130, 135.

166 For example, *R v Weetra*, note 20 *supra* at 21; R *v Ninnal*, note 79 *supra*.

167 *R v Gumbinyarra* note 79 *supra* at 9; see also *R v Weetra*, note 20 *supra* at 12.

168 See for example, *R v Izumi*, note 51 supra.

is not surprising given that this is likely to be evidence which is favourable to the accused.

III. DEALING WITH DIFFICULTIES IN THE IMPLEMENTATION OF THE *ANUNGA* RULES AND POSSIBILITIES FOR REFORM

> To get the whole lot of the Anunga's case applied in one case, to get them all done perfectly, is about as easy as it is to work out one of those cube blocks that they are selling around town at the moment.[169]

The decisions discussed above illustrate inconsistencies in the application of the first four of the *Anunga* rules. Such inconsistencies often lead to unfairness for the accused and a further entrenchment of disadvantage. Australian Aboriginal people continue to be especially disadvantaged in their interactions with the criminal justice system. The fact that the *Anunga* rules have been applied narrowly, that is that judges generally only require an understanding of the caution, ignores the fact that there are many other possible obstacles. These may include the particular relationship between Aboriginal people and police and the question of whether the entire process is understood by the suspect. Although there are difficulties in implementing the *Anunga* rules, adequate safeguards on police interrogation must be provided. Some possibilities for improving the police interrogation situation for Aboriginal people are examined below.

A. The Provision of Interpreters

To some extent it is unfortunate that, especially since the decision in *Dietrich v R*,[170] the judges' emphasis is placed heavily on the conduct of the trial in relation to discussions about fairness to the accused in his or her dealings with the criminal justice system. The processes leading up to trial can have a large bearing on the outcome of the trial. Article 14(3)(6) of the *International Covenant on Civil and Political Rights* (ICCPR),[171] to which Australia is a signatory, reflects this focus on the trial and enshrines the right to an interpreter if the accused cannot understand or speak the language used in court. However, article 14(3)(1) of the ICCPR states that the accused should be informed "promptly and in detail in a language which he understands, of the nature and cause of the charge against him". Surely, to ensure a fair trial, there should also be an equal emphasis on fairness in the interrogatory process, and article 14(3)(1) implies that an interpreter should be provided at this stage. The Australian legal system is slowly starting to recognise the right to an interpreter

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169 *Coulthard v Steer* (unreported, Magistrate's Court, Alice Springs, NT, Barritt SM, 18 August 1981).

170 *Dietrich v R* (1992) 177 CLR 292 per McHugh J and Mason CJ at 300, per Gaudron J at 363, per Deane J at 411; found that the absence of an interpreter may be one factor which would result in an unfair trial.

171 Available on-line <http://www.hrweb.org/legal/cpr.html>.

and this is evidenced by the development of legislated rights.[172] The common law, however, does not yet recognise a right to an interpreter at the interrogation or trial stage.[173] Greater emphasis should be placed on the pretrial processes. The cultural shift could be encouraged by recognising rights to an interpreter at the pretrial stage at least in documents like the ICCPR.

Even when interpreters are sought for the interrogation, lack of trained interpreters in Aboriginal languages continues to be a major problem. In spite of the fact that over 20 per cent of the population in the Northern Territory is Aboriginal, relatively recently (in 1981) the court in Alice Springs advertised that it could provide interpreters in nine languages; not one of which was an Aboriginal language.[174] The situation has possibly changed for the worse. Perhaps the most obvious way to improve police interrogation practices in the short term would be to provide and train more interpreters in Aboriginal languages, including Aboriginal English (as discussed earlier in this paper in the section relating to interpreters).

It is estimated that at least 93 per cent of Queensland's Aboriginal population speaks some form of English, but in most of those cases the English will be non-standard, or Aboriginal English.[175] Eades points out that although general understanding may be possible between standard English and Aboriginal English speakers, some dialectical differences may be significant and may lead to misunderstanding. This factor coupled with the over representation of Aboriginal people in the criminal justice system emphasises the need for interpreters in Aboriginal English.[176] Clearly, Aboriginal English should be more formally recognised and interpreters trained and provided who have understanding of this dialect.

Other issues of concern include difficulties in attracting interpreters to training and more specifically, to working as an interpreter within the criminal justice process. Who pays for their services is another question. These issues may well be linked as payment has often been a rather "cumbersome and bureaucratic" process where whoever uses the interpreter pays and is later billed.[177] Almost always, the user in the context of police interrogation will be the police or the accused on legal aid. Either way, the interpreter is ultimately paid for by the government. Free services could be government funded to avoid these kinds of financial entanglements. Facilitating payment may help to attract trained interpreters.

Generally, police should avoid the use of prisoner's friends as interpreters even though this will often seem practical. Frequently the friend's own understanding of English will be extremely limited, often hardly better than that

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172 The right to an interpreter at the trial stage is enshrined in some legislation (although no such legislation exists in the Northern Territory or Queensland) see Laster and Taylor, note 103 *supra*, p 72, a list of relevant legislation is reproduced at appendix "A" of their text.

173 McRae *et al*, note 1 *supra*, p 372.

174 *Ibid.* Since 1996 the court no longer provides interpreters.

175 Eades, note 74 *supra*, p 13. See also J Arthur, *Aboriginal English*, Oxford University Press (1996).

176 Eades, *ibid*, p 82.

177 Goldflam, note 77 *supra*, p 53.

of the accused.[178] The interpreter should also be impartial. This is unlikely to be the case if the prisoner's friend is used.[179] It is clear that in exercising the discretion to exclude confessional evidence, the judiciary has often taken the pragmatic approach in finding that an accused will not need an interpreter where simple English is understood by the accused.[180] The concepts raised in the interrogation environment are complex and an understanding of simple English is unlikely to be enough. The courts should not "too readily reach the conclusion that because the interview was conducted in simple English the required level of understanding had been achieved".[181]

B. The Development of a More Appropriate Caution

Police tend to experience a variety of difficulties when attempting to administer the caution. As has been illustrated, the question, 'Do you understand?' is likely to be answered in the affirmative regardless of whether there is actually any understanding.[182] Justice Mildren has suggested an example of a reformulation of the caution which reverses the two central concepts of the traditional caution: First explaining that the interview will be recorded and potentially used against the accused and then explaining the right to remain silent.[183] It is encouraging to note that in developing the alternative caution, Mildren J sought the advice and assistance of a linguist, Michael Cook.[184] Chief Justice Martin of the Supreme Court of the Northern Territory has also suggested that "a case could be made out for a revision of the wording of the caution, and the way it is delivered" so that it is more easily communicated by investigating police and, more easily understood by the suspect.[185]

A representative of the Queensland Aboriginal Legal Services has suggested that there is no 'magic formula' of words, rather the suspect should be required to repeat back the caution in their own words. If they are unwilling or unable to do this, the interrogation should cease.[186]

C. Education for Police and the Judiciary

The need to train the judiciary and police is well recognised[187] and reflects the fact that both are generally non-Aboriginal institutions. The need may also reflect that police and the judiciary are not as sensitive or as aware as they could be of the various cultural and practical difficulties that have been discussed. One positive initiative in Queensland and the Northern Territory is the employment of Aboriginal police aides and community police. There are currently no

178 Mildren, note 53 *supra* at 8.
179 Golflam, note 77 *supra*, p 53, note also the use of police aides as interpreters is unlikely to be appropriate.
180 See *R v Butler [No 1]*, note 35 *supra*.
181 Mildren, note 53 *supra* at 9.
182 See *R v Mangaraka*, note 85 *supra*.
183 Mildren, note 53 *supra* at 11-12.
184 Mildren, *ibid* at fn 11.
185 *R v Mangaraka* note 86 *supra* at 27.
186 Note 12 *supra* at 186.
187 G Bird, *The Process of Law in Australia: Intercultural Perspectives*, Butterworths (1988).

Aboriginal magistrates or judges in either jurisdiction. A longer term goal could be to tackle this by setting up affirmative action programs to encourage Aboriginal people to enter the legal profession. The arguments for and against such affirmative action programs have been widely debated.[188]

The Royal Commission into Aboriginal Deaths in Custody (Deaths in Custody Report),[189] and the Australian Law Reform Commission's report on Multiculturalism and the Law[190] have recommended training judicial officers and other court staff about Aboriginal customs, society and the social factors that have lead to their disadvantage. One-off seminars and presentations should be avoided as they would simply be tokenistic.[191] It would be preferable that longer term continuing education programs, developed by or at least in conjunction with Aboriginal people, should be implemented.

There is some belated recognition in both the judicial and policing institutions of the deplorable history of Aboriginal/non-Aboriginal relations in Australia. Cullen has argued that the recent decision by the High Court finding that native title existed for the Meriam people[192] was in part a recognition of the "brutal history of Aboriginal repression in Australia".[193] Both the Queensland and Northern Territory police services have recognised a lack of cross cultural awareness in their respective services. In response to the Deaths in Custody Report, the Queensland police service set up a Cross Cultural Support Unit. The unit aims to resolve cross cultural policing needs, identify Aboriginal and Torres Strait Islander perspectives when developing policy, provide advice and resources on cross cultural issues and liaise with Aboriginal and Torres Strait Islander people.[194] Other programs include special training for those police who will work on Aboriginal communities.[195]

Training to these groups should include "interpreter literacy" training;[196] both police and the judiciary need to learn how interpreters should be involved in the criminal justice process. There appears to be growing acceptance in the legal community that interpreters are not mere "conduits",[197] and the training should reflect this. Interpreters see themselves as professionals who are often misunderstood and misused by the legal profession.

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188 See for example N O'Neill, R Handley, *Retreat From Injustice: Human Rights in Australian Law*, Federation Press (1994), ch 20.

189 Note 10 *supra* at recommendations 73, 78, 96 and 97.

190 Australian Law Reform Commission Report No 57, *Multiculturalism and the Law*, 1992 at [2.27].

191 Yeo, note 67 *supra* at 264.

192 *Mabo (No 2) v Queensland* (1992) 175 CLR 1.

193 R Cullen, "Rights to Offshore resources After *Mabo* 1992 and the *Native Title Act* 1993 (Cth)" (1996) 18 *Sydney Law Review* 125 at 150.

194 Aboriginal Deaths in Custody Secretariat *et al*, *Progress Report on Implementation Practices to December 1994*, 1994 at 88.

195 *Ibid.*

196 Laster and Taylor, note 99 *supra* at 77.

197 *Ibid* at 83.

D. Privilege and the Prisoner's Friend

The prosecution has sometimes arranged for the friend's comments to the suspect to be transcribed and translated.[198] Some have flagged the possibility of arguing a privilege for the prisoner's friend,[199] but this was rejected by the Supreme Court of South Australia.[200] In any event, the translation often assists the defendant by exposing inadequacies in the prisoner's friend's conduct during the interview. For example, in *R v Inkamala* the transcript of two prisoner's friends showed that their translation to the accused was incorrect.[201] Such a privilege is unlikely to be of much assistance.

E. A Separate Criminal Justice System for Aboriginal People

A separate criminal justice system for Aboriginal people has been suggested by some. Although it is not within the scope of this paper to discuss this in depth, it is a significant issue to raise. The suggestion that Aboriginal people are not subject to the criminal law was flatly rejected by Mason J in *Walker v State of NSW*.[202] From time to time, however, the radical notion of establishing a separate criminal justice system for Aboriginal people is mooted.[203] Goldflam suggests that the only prospect for "breaking the silence" which confronts Aboriginal people dealing with the criminal justice system is to provide an alternative model of justice, or to "Aboriginalise" criminal justice.[204] Others have suggested the allowance of greater autonomy in Aboriginal communities with respect to criminal justice. This would allow the establishment of criminal law and procedures which reflect differing cultural values.[205] Experience in the United States, where, in defined areas, Indigenous people have significant powers in relation to criminal justice,[206] demonstrate this is possible. Generally, the Australian response to this suggestion has been poor.[207] There should, however, be more examination of this possibility.

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198 For example, *R v Inkamala*, note 95 *supra*.

199 Conversation with David Bamber, Senior Lawyer, Central Australian Aboriginal Legal Aid Service, 15 May 1997.

200 *R v Muscio* (1991) 55 SASR 274.

201 *R v Inkamala*, note 95 *supra*.

202 (1994) 126 ALR 321.

203 Mildren, note 53 *supra* at 8; Mildren J describes this as the radical view.

204 Goldflam, note 77 *supra*, p 54; see also C Cuneen, "Judicial Racism" in S McKillop (ed), *Aboriginal Justice Issues. Proceedings of the Australian Institute of Criminology Conference 23-25 June 1992*, Australian Institute of Criminology (1993) at 131, who shares a similar view.

205 Baker, note 19 *supra* at 75.

206 *Iron Crow v Oglala Sioux Tribe* 231 F 2d 89 (8th Cir 1956). Note also the argument that the *Mabo* decision may suggest a review of Aboriginal sovereignty and thus a review of the position of Aboriginal people in relation to the criminal law: See J Blokland, M Flynn "Five Issues for Criminal Law After Mabo" in G Bird *et al*, note 67 *supra* at 217, and see I Watson, "Law and Indigenous Peoples: The Impact of Colonisation on Indigenous Peoples" in C Arup, L Marks (eds), *Cross Currents: Internationalism, National Identity and Law*, LaTrobe University Press (1996) at 117.

207 See for example Mildren, note 53 *supra* at 8.

F. Legislating Requirements for Police Interrogation

Existing provisions in relation to police interviewing of Aboriginals in Queensland and the Northern Territory are currently to be found in the *Police Standing Orders* in the Northern Territory and the *Police Service Operational Manual* in Queensland. However, as previously noted, these are guides only and are not binding. At this time Aboriginal people in the Northern Territory receive more protection during police interrogation than do their Queensland counterparts[208] (mostly as a result of a more stringent application of *Anunga* by the judiciary in the Northern Territory). However, the protections afforded in practice by the police guidelines and by the *Anunga* rules are unsatisfactory.

In 1975, the Australian Law Reform Commission produced the *Criminal Investigation Report*. After setting out many of the difficulties that Aboriginal people face in the police interrogation process, the report made a number of recommendations including legislating to provide Aboriginal suspects with access to an interpreter and a prisoner's friend in the police interview.[209] The report also recommended that Aboriginal Legal Aid organisations should be contacted when an Aboriginal person is arrested.[210] Subsequent to this report, a bill, reflecting the current *Crimes (Investigation of Commonwealth Offences) Amendment Act* (Cth) 1991, *Crimes (Investigation) Act*), was drafted.[211] The bill remained shelved for some years before finally being debated and enacted.

Over ten years after the *Criminal Investigation Report* was produced, the *Customary Law Report* again discussed legislating protections for Aboriginal interviewees.[212] Ultimately the Commission reached the view that "the basic principles underlining the [*Anunga*] guidelines be enacted in legislation, to make it clear both to the police and to the courts that the interrogation rules, to the extent that they are applicable in particular cases, are to be taken seriously.[213] Since this report was written the *Crimes (Investigation) Act* has been passed. This legislation effectively enacts the *Anunga* rules. The debate in the Senate which preceded its passing suggests that a number of factors influenced its final format. These factors included the *Criminal Investigation Report, Anunga,* the *Customary Law Report* and also the case of *R v Williams*.[214]

The *Crimes (Investigation) Act* leaves it to the interviewing police officer to decide whether a person is an Aborigine and then, if satisfied that the suspect is an Aboriginal person, the legislation must be followed.[215] While this Act offers

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208 Compare *R v Aubrey*, note 49 *supra* and *Butler [No 1]*, note 35 *supra*.

209 Note 16 *supra* at 121.

210 *Ibid.*

211 *Crimes (Investigation of Commonwealth Offences) Amendment Act* (Cth) (1991), referred to subsequently as the *Crimes (Investigation) Act*.

212 *Customary Law Report*, note 15 *supra* at [426].

213 *Ibid* at [427].

214 Australia, Senate, Debates, Vol S143, pp 629, 630, 633-4, 1253, 1256, 1258-9. In *R v Williams* (1986) 161 CLR 278, Williams was detained for over 24 hours for questioning. The trial judge considered this was unreasonable and rejected the confessional evidence on the basis of unfairness.

215 *Crimes (Investigation) Act*, note 211 *supra* at s 23 F. See also *NT Police Orders*, note 45 *supra* at Q2 [4] which sets out information police should take into account when deciding whether the Aboriginal accused is entitled to the benefit of the special guidelines.

greater protection to Aboriginal people, some who may need protection could well still be excluded. For example, the fair skinned suspect who speaks a light variety of Aboriginal English will not necessarily be recognised by a police officer as an Aboriginal person. Ideally, rather than the police deciding, the suspect should be asked if they are Aboriginal.[216] The *Crimes (Investigation) Act* provides a right to the Aboriginal suspect of a prisoner's friend during the interview.[217] The Act defines those who would make an appropriate prisoner's friend and also establishes a list of appropriate friends. The list is maintained by the minister in consultation with the relevant Aboriginal Legal Aid organisation.[218] This may assist in ensuring that the friend is an appropriate person, it would appear that the investigating officer can override a choice made by the suspect.[219] The *Crimes (Investigation) Act* mandates the use of an interpreter where the investigating officer "believes on reasonable grounds that ... [the accused] ... is unable, because of inadequate knowledge of the English language or physical disability, to communicate orally with reasonable fluency in that language".[220] The Act places an upper limit of two hours on police questioning for Aboriginal suspects.[221]

The legislation as it relates to Aboriginal suspects is progressive and has been received fairly positively.[222] It has so far been the subject of little (if any) judicial comment. This may suggest that it has been effective in terms of making sure police interviews with Aboriginal people are fairly conducted, although more likely that it reflects the fact that relatively few Aboriginal people are charged with Commonwealth offences.

The *Police Powers and Responsibilities Act* (Qld) 1997 *(PP&R Act)* was passed late last year and came into effect on 8 April 1998. It is obviously impossible to comment on the effectiveness of the *PP&R Act* at this stage. However, it is interesting to note that some of the provisions in the *PP&R Act* are similar to particular sections of the *Crimes (Investigation) Act*. For example, s 96 of the *PP&R Act* provides for notification of a legal representative and access to an interview friend if the police officer "reasonably suspects" that the person is an Aboriginal and that the person "is at a disadvantage in comparison with members of the Australian community generally".[223] Section 101 of the *PP&R Act* requires a police officer to arrange for the attendance of an interpreter where the police officer "reasonably suspects" that the person to be interviewed is unable "because of inadequate knowledge of the English language or a

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216 D Sweeney, "Police Questioning of Aboriginal Suspects for Commonwealth Offences - New Laws" (1992) 54 *Aboriginal Law Bulletin* 10.

217 *Crimes (Investigation) Act*, note 211 *supra* at s 23H(2)(c).

218 *Ibid*, ss 23H(9), 23 J(1), (2), (3).

219 *Ibid*, s 23J(2).

220 *Ibid*, s 23N; note *NT Police Orders*, note 45 *supra* at Q2 [17]; it would appear that an interpreter is only required where the accused answers in a language other than English. The *Qld Police Manual*, note 45 *supra* at [6.3.7] is less restrictive, it suggests an interpreter should be present where the suspect can not understand English because of cultural or physical difficulties.

221 *Crimes (Investigation) Act*, note 211 *supra* at s 23C(4)(a).

222 Sweeney, note 216 *supra* at 10.

223 Section 9 (4) *PP&R Act*.

physical disability, to speak with reasonable fluency in English".[224] To a limited extent the *PP&R Act* also reflects the *Anunga* rules.

On balance, it would seem appropriate to legislate the *Anunga* rules in Queensland and the Northern Territory in an attempt to provide the necessary safeguards to Aboriginal accused. It will be interesting to examine the effectiveness of the *PP&R Act* in the future in relation to the issues raised in this paper.

G. Discretion and the *Anunga* Guidelines

Ultimately, the requirements of the *Anunga* rules offer some limited protections to Aboriginal people during a police interrogation. Bearing in mind that the rules were developed to obviate disadvantage to Aboriginal suspects at the interrogation stage, they should be more expansively[225] and carefully applied by police. Special protections should not be limited to tribal Aboriginals in remote communities; they should be provided where there is *disadvantage* compared to the rest of the Australian community. The emerging recognition of Aboriginal English is important, as without such recognition the system fails to offer necessary protections in terms of the provision of interpreters.

There are two points at which the *Anunga* rules are important to the criminal justice system: The first is their implementation by police at the interviewing stage, the second is their application by trial judges at the hearing stage. Both ends of the spectrum involve the exercise of a discretion either to implement the rules or to use them to exclude unfair or involuntary material. Neither the comments of the judiciary nor the police guidelines present a clear picture of the requirements necessary for the exercise of either discretion. This is dangerous for the accused, especially at the police interviewing stage where it is likely to be argued, or at least perceived by police, that the implementation of the *Anunga* rules is too difficult or will impede the course of justice, something which was expressly not intended by the rules.[226]

It is clear that discretion is an integral part of the criminal justice system and to rely on rules alone without discretion would make the entire criminal justice process too inflexible and rigid and thus potentially unfair.[227] Strict rules cannot be expected to provide for every circumstance and where the rules run out discretion begins.[228] Police interviewing of Aboriginal suspects is complicated by a number of factors (which have been outlined above). It is my view that police interviewers in the Northern Territory and Queensland, especially the latter, have far too much discretion when it comes to interviewing Aboriginal suspects. Although it may well be countered that there is still the protection of the courts which can reject unfairly obtained material, it is almost certain that the usual police practices do not provide a fair environment for police interviewing.

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224 Section 101(1) *PP&R Act*.

225 See *R v Albury*, note 49 *supra* at 26, obiter dicta of Fitzgerald P (dissenting).

226 *Anunga*, note * *supra* at 416.

227 See M Findlay *et al*, *Australian Criminal Justice*, Oxford University Press (1994), p 93.

228 *Ibid.*

If Aboriginal people are not treated fairly at the interrogation stage, they are more likely to confess to crimes which they have not committed, leaving them more open to inappropriate convictions. Laster comments that reliance on discretionary judgement by police is "politically unacceptable".[229] In consideration of the historical relationship between Aboriginals and police and the continuing friction between the two groups "more stringent measures are called for".[230] Legislating requirements in the states may be the appropriate response and the *Crimes (Investigation of Commonwealth Offences) Amendment Act* (Cth) (1991) may provide a starting point. Such legislation could still leave room for a more structured discretion to be exercised by the judiciary in relation to these issues.

Aboriginal people often have contradictory views of police as both enemy and authority; views which are based on the historical tensions of the past and which have continued into the present. Numerous cultural disadvantages continue to exist for Aboriginal people. Language difficulties, in particular, make it extremely difficult for many Aboriginal people to properly understand the criminal justice process and take part in it in a truly informed way. In order to make the criminal justice process fair for all who find themselves enmeshed in it, the law of evidence and procedure must continue to strive to reflect the needs of the multicultural community which it serves. Special protections for Aboriginal people at the police interview stage must be strongly embedded in the law in order to ensure fairness at the early stages of their interaction with the criminal justice system.

229 Laster and Taylor, note 103 *supra*, p 144.
230 *Ibid.*