

Indigenous Australians and the Criminal Justice System

The Honourable Justice Dean Mildren RFD

The principal purpose of the criminal law is the protection of society from conduct which is both wrongful and deserving of punishment. The purpose of punishment includes deterrence. Another purpose of punishment is to mete out retribution, so as to prevent or deter victims of crime and their supporters from taking the law into their own hands. Rehabilitation is also recognised as a legitimate end of the criminal law because it reduces recidivism and, to that extent, the protection of the public is enhanced.

Most people are law-abiding and accept society's rules as provided for by the criminal law. Most people have an interest to do so. Involvement in an investigation by the police can be troublesome in itself. It is seen as shameful. It may result in loss of employment. It consumes time which would otherwise be spent on earning a living and devotion to family and friends. If a charge is brought, bail might be refused resulting in months of incarceration awaiting trial. For many, it can also be an expensive exercise, not only because of income lost, but also because of the legal costs involved. A conviction resulting in a prison sentence magnifies these consequences many-fold. But there

are some who are prepared to break the law and risk the consequences. Why this is so is not susceptible of a single answer, but my experience suggests that the principal factors are jealousy, anger, alcohol and drug addiction, poverty, depression, psychotic states, greed and pure selfishness. One or more of these factors are usually present in most cases regardless of cultural background, but amongst Aboriginal Australians, there are also factors which are the result of cultural and social conditions, which are quite different from the mainstream population. Cultural triggers are more prominent than is often realised. The system of promised marriages, where it is still practised, and social rules restricting marriage only within the right clan or moiety, can lead to sexual offences, jealousy and violence. Breaches of social rules, such as rules relating to religious issues can cause significant tensions sometimes resulting in violence. More prominently, many Aboriginal people are so strongly attached to family – including extended family – and traditional lifestyle that priority is given to observing the social imperatives which these engender. Bail is not answered because there has been a death in the family. Conditions of a suspended sentence may be ignored to attend a sorry camp or initiation ceremony. An elder may be drunk and tired and insist on being driven home even though the family member chosen for this task is drunk, unlicensed or disqualified.

Refusal is often not an option if the offender wants to remain connected with the family or clan.

Social conditions also are a more prominent factor in Aboriginal society. Many Aboriginal people are illiterate, do not speak adequate English, and cannot even tell the time of the day in order to keep an appointment. Employment is limited and not well rewarded when it is available. Housing is often inadequate and severely over-crowded. There may be no work ethic encouraging individuals to improve themselves. Many have become institutionalised mendicants following a century or so of failed government policies, reliant on “sit down” money; or traditional hunting and gathering for survival. Even when work does become available, cultural pressures may intervene and the job is lost. For those living in the bush, great distances will need to be travelled to access goods, medical and dental assistance, to visit relatives, or to purchase alcohol, often over unsealed roads in over-crowded vehicles, because public transport by road is either not available or unreliable, and air travel, when it is available, is too expensive. For the children living in such conditions, getting a decent education is very difficult. Many parents see no value in a Western education and do nothing to encourage school attendance. Those who are keen may find homework

virtually impossible in a house with 15 other people in it, especially if the occupants are often intoxicated. Sports are limited to AFL and soccer. There is not enough to keep children and adults occupied. Alcohol, petrol-sniffing and drugs are often the means to escape parental disinterest, boredom and indolence.

The curious thing is that, although these factors are at force as much with women as with men, the vast majority of Aboriginal persons who become involved in the criminal justice system are males between the ages of 14 and 35. A similar discrepancy in imprisonment rates between males and females exists in the non-Aboriginal population. Why is this so? One possible explanation is that male children, particularly in Aboriginal society, often receive lesser parenting and even less discipline, especially by fathers, until their early teenage years. Another is perhaps limited to the different brain architecture between males and females. Research in the United States suggests that young males are more competitive than young females, who try to find similarities with each other rather than boast about or exaggerate their prowess. Yet the ultimate goal – peer acceptance – is the same, although different strategies are employed. Does this sexual difference

hold one of the keys towards altering anti-social behaviour amongst males, whether indigenous or non-indigenous?

An understanding of these cultural and social differences between Aboriginal people and the rest of the community is a necessary step towards providing justice to victims of crime and those charged with offences. Obviously, this is very necessary when dealing with Aboriginal people who live in remote areas, but even people who live in the major cities and towns are often strongly influenced by their social or cultural background – even if they speak English quite well, and even if English is their first language. I do not mean that these differences apply equally to everybody to the same degree because, obviously, the extent of their importance in individual cases can vary considerably and, in some cases, may be of little or no importance at all. But one should start with the premise that they are likely to be of significance and not make assumptions to the contrary until satisfied otherwise. Thus, in cases of serious crime involving bush people, it is most unwise for police to take a witness' statement from, or conduct a record of interview with, an Aboriginal person whose first language is not English without the assistance of a competent interpreter. This may mean that the persons concerned will need to be transported to a major town or city where

proper interpreter services are readily available. I have seen, on many occasions, statements taken by local police from Aboriginal witnesses which are far from satisfactory. The local police officer, who may well have several years of experience in the community may think he has understood what he has been told, because his perception is that he believes he can understand and be understood by local inhabitants when, in fact, that may not be the case when discussing serious matters. All too often, the result is a statement full of errors which the witness does not subscribe to when giving evidence. This creates opportunities for defence counsel to submit to the jury that the witness has so far departed from his or her statement that the evidence should not be believed. On the other hand, the local police officer will often have useful knowledge about the local community which is valuable if the right information is to be accurately obtained and, ideally, he or she should be present when interviews take place. Even if the witness has good conversational English and feels he or she does not need an interpreter, it is my belief that, at the very least, a standby interpreter should be used. If an interpreter is not provided when conducting a formal record of interview, the police run the risk that the trial judge may not admit the statement into evidence. This may be because the accused has not properly understood the caution, or because the information gathered is

so obviously muddled that it is patently unreliable. It was in order to overcome problems of this kind that the *Anunga* Guidelines were devised, the spirit of which has now been incorporated into Police Standing Orders in most jurisdictions. Obviously, leading questions must also be avoided, and usually are when conducting interviews with suspects, because of the well-known susceptibility of persons of Aboriginal descent to descend into gratuitous concurrence. However, the difficulty remains when taking witness' statements which are not in question and answer form, but are expressed as a narrative. Whether the interviewing police officer compiled the statement using leading questions or not cannot be so readily ascertained. Sometimes statements plainly demonstrate that the process used has not reliably obtained the witness' meaning. One obvious sign is where the words and structure of the language used in the statement are clearly not the words of the witness perhaps because the words are not likely to be known to the witness, or perhaps because the sentences are so removed from the witness' normal pattern of speaking that even a layman can see the difference.

It goes without saying that properly trained interpreters must be available to an accused or to witnesses, where necessary, at sentencing

hearings and trials. But I emphasise the words “properly trained”. It is not satisfactory to use interpreters who have not undergone appropriate training because court interpreting is a skilled profession. Interpreters need to be able to convey accurately meaning from one language to another on the spot, unlike translators who have time to ponder over the best way to achieve this. This can be difficult if the language used is complex or technical, or if concepts from one language to another are incapable of being interpreted without an explanation. If an explanation of a concept is required, we will sometimes see a long discussion between the interpreter and the witness, ending with the interpreter telling the court that the witness has answered “No”. When this occurs, the lawyers, the Judge and the jury are left wondering what this was all about. The first problem is that no-one knows that the interpreter had needed to explain the concept before the witness can answer the question, although some of us might guess what is happening. The second problem is that no-one can tell if the interpreter has accurately explained the concept to the witness. What should occur is that the interpreter should advise the court that there is no way of interpreting that concept to the language of the witness or, for that matter, the accused. The lawyer who asked the question can then decide if he wants to pursue the question or not. If he or she does wish to pursue it,

the lawyer can explain the concept through the interpreter. If the lawyer cannot explain it, the judicial officer might then provide a suitable explanation. Certainly, it is not the interpreter's job.

Many judicial officers and lawyers also need some basic training in how to use an interpreter. The literature is full of complaints about judicial officers and lawyers who do not have any real understanding of what can reasonably be expected from a skilled interpreter. Some people think that interpreting is all about translating word-for-word what is said from one language to another. I suspect that this belies a failure to have learned a second language. The task of the interpreter is to convey meaning, not just the words used. Meaning is affected by nuances, euphemisms, metaphors, jargon, double-speak and innuendos. It is not only what is said, but how it is said, which conveys the true meaning. Meaning is also affected by the context of what is said, as well as by body language, emphasis, word order, cultural politeness and other factors. There is a big difference between saying "the red book **was** on the desk" (implying it was not usually there, but it was there at the relevant time), and "the red book was on the desk" which implies nothing. We all use body language also to convey meaning. It may be a shake or nod of the head, or a gesture of some

kind, for example. Aboriginal people frequently use sign language as part of their ordinary means of communication.

There are also problems with interpreting what are called discourse markers and tags, which often have no equivalent in other languages. A typical discourse marker is a word such as “well”, “now”, “you see” or “so”, at the beginning of a sentence. For example, the question might be: “See, I suggest that you were yelling and screaming at this stage.” Discourse markers are frequently used in cross-examination as a sign of contradiction or confrontation, and as an indication to the jury that the witness should not be believed. Often, such sentences are also followed by a tag, such as “weren’t you” or “didn’t you”. So you have a very controlling, coercive question: “You see, you were yelling and screaming at that stage, weren’t you?” The question is almost always leading. Failure to interpret the discourse marker or tag does not convey to the witness the full meaning of the question, especially if what is rendered comes out in non-leading form: “Were you yelling and screaming at that stage?”

There are also situations where an interpreter should warn the court that, although the interpreter has accurately given a literal rendering of a witness’s evidence, that literal rendering is misleading. A

good example of this occurred in the trial of Queen Caroline for adultery, in 1820. In that case, an Italian-speaking witness was asked what time she had passed through the garden of a certain villa. She replied, "At about one or half past one." The interpreter drew to the attention of the court that Italian and English time is reckoned differently, so when the matter was further explored by counsel, it turned out that the witness was conveying an hour and a half after sunset.

Similarly, many Aboriginal people have different ways of expressing time, often by reference to the position of the sun in the sky, and of numbers, which are relatively well known. Sometimes these types of problems become evident when a stand-by interpreter, by which I mean an interpreter who is used by a witness only when the witness feels the need for an interpreter's services, is being used. Stand-by interpreters should be particularly alert to misunderstandings and be encouraged to intervene where-ever necessary.

Of course, it is not only English words which can be hard to translate. Most Aboriginal languages have words in them which have no precise English equivalent, reflecting the different culture and lifestyle of the people who use that language. It is well to recognise that language and culture go together. For example, the Pintupi language has a word

Katarta, which roughly translates as the hole left by a goanna when it has broken the surface of its burrow after hibernation. There is no equivalent word in English. Some Aboriginal languages do not have words for left or right, but refer instead to compass points. Instead of saying 'he sat on my right', the words used will convey 'he sat to the east of me'.

Most languages have social rules of cultural politeness, which, when literally translated, do not convey the true meaning of the speaker. For example, in Bahasa Indonesian, if asked the question 'are you married yet?', the response is likely to be "belum" meaning "not yet", rather than "tidak" which means "no". If the response had been "tidak", this would convey the meaning that "I am not married now and hope I never will be." English speakers are the masters of cultural politeness because we constantly use "sorry", "please" and "thank you" in ways not used in other languages. "Sorry to bother you, but can you help me, please?", for example. Other languages have polite and formal pronouns, especially for the word "you". Some languages do not have pronouns which distinguish between sexes, as they do in English. In English, "you" can be either singular or plural. Cultural politeness has its forms amongst Aboriginal people as well, for example, gratuitous

concurrence which very often does not mean that the Aboriginal speaker is agreeing with you, although he has answered 'yes' to the question.

Moreover, languages borrow words from each other, particularly when new words become necessary to express an idea. The word "police", for example, is recognisable in many different languages, although spelt and pronounced quite differently. However, it is not necessarily the case that a borrowed word has the same meaning as it had in its original language. In Kriol, the word "kill" does not necessarily mean to cause death; it is more likely to mean "injure". Words like "kill" can also be used by Aboriginal English speakers in the same way and care must be taken to ensure that the meaning is properly conveyed.

I presided over a trial where the accused was charged with making a threat to kill. The language in which the threat was made was a Kriol dialect. The interpreter interpreted the Kriol word "kill" to mean "cause the death of". Neither counsel was alive to the fact that this word usually means "to injure". I intervened, and the interpreter was called by the Crown to give evidence. He agreed that the word usually meant "to injure". That was the end of the Crown case.

Similarly, there are common English words which have no equivalent in some Aboriginal languages. One example which comes to mind is the word “rape” which has no equivalent in some Aboriginal languages. I have presided over a trial where an Aborigine apparently confessed to raping a woman during the police record of interview, which was conducted in English without an interpreter. The evidence concerning the circumstances of the offence strongly suggested that the alleged victim was a willing participant. The accused gave evidence that he thought the word “rape” meant “to have sex with”. He was acquitted. Obviously, the police officer who conducted the interview and the prosecutor were quite unaware of the problem.

Aboriginal people are often shy when attending court, especially the superior courts, and this can apply to interpreters as well. It is important that courts recognise the importance of their work and do whatever is reasonably necessary to make them feel welcome. Simple things, like ensuring the interpreter has a glass of water, can make a big difference. Judicial officers should advise interpreters that they can interrupt if they need time to interpret, or to seek clarification of what is being asked or said. Interpreters should be treated as professionals.

They are, after all, officers of the court and are entitled to the same protection as witnesses and counsel.

Courts in Australia are not designed as well as they might be when interpreters are needed. It is not satisfactory that interpreters, when asked to interpret court proceedings to a defendant sitting in the dock, must sit next to the defendant in the dock. The first problem this causes is that the interpreter is often out of the line of sight of the barristers. This means that the barrister examining a witness is unable to see if the interpreter is keeping up with the witness. Secondly, the interpreter is also at a disadvantage because he is unable to watch the barrister's lips, and cannot signal to the barrister to slow down or stop whilst he catches up. Thirdly, the dock does not have a desk for the interpreter to use to write notes or on which to place dictionaries or other aides. Fourthly, because the interpreter is sitting next to the accused, the accused is likely to think that the interpreter is there, not just to interpret, but as his personal adviser, which is not uncommon with Aboriginal defendants. Indeed, sometimes defendants feel that they can express their feelings and thoughts to the interpreter without realising that the interpreter is bound to translate them to the court. Fifthly, experience shows that Aboriginal members of the public mistake the role of the interpreter,

particularly when the interpreter is interpreting the Judge's sentencing remarks. It is not uncommon for the defendant's family members to believe that it is the interpreter who is sending the defendant to prison.

It is also unsatisfactory for the interpreter to be sitting next to the witness in the witness box for much the same reasons. Witness boxes are usually designed to accommodate one person only, so they are not designed to comfortably seat two people.

The solution is to have a designated place for the interpreters to sit where they can see and be seen by the lawyers. The logical place is in an area near where the Judge's associate is sitting. This will require a microphone and head phone for the interpreter, linked to the witness and the dock with headphones for the use of the defendant. This was the technology used in the war crimes trials at Nuremberg at the end of World War 2, so the system I am advocating is nothing new. There should be an interpreter's box specially designed for interpreters to use. As it will be necessary for the interpreters to be able to see and hear the court's video-conferencing equipment when that is being used, the interpreter's box needs to be positioned so that the interpreter can attract the Judge's attention if needs be. It may be necessary to design the box to accommodate two interpreters to deal with a case where a

witness speaks a different language from the accused. For example, the witness may be giving evidence in German whilst the accused is an Aboriginal language speaker; or there may be a joint trial where the accused speak different languages.

Interpreters should be treated as officers of the court, and not agents of the party engaging them. This is important for a number of reasons. First, as officers of the Court they should receive the same protection and immunities as other officers of the Court. They should not be forced to be placed in close physical proximity to a possibly violent offender. Secondly, separating them in this way will enhance the appearance of independence from the parties. I suggest that interpreters should have, at the very least, name plaques visibly worn indicating that they are court interpreters. The name plaques should bear the coat of arms as a sign of their independence. If this can be done, it will enhance their standing with the parties, the lawyers, the jury and the public gallery, and may contribute towards interpreters feeling comfortable when in court.

I would also recommend that consideration be given to establishing a system whereby interpreters are engaged through the courts, rather than directly with the interpreter service agencies. The

Northern Territory may not have the population base to warrant a system where all interpreters are actually employed by the courts.

Nevertheless, I think it would be preferable for an interpreter to be engaged through the court registry or perhaps the Courts Liaison Officer.

Payment for services should also be made to the registry. The registry staff or liaison officer can then organise the interpreters through the interpreter service bodies, and remit the fees payable to those bodies.

The point of doing this is to make it clear to everybody that the interpreters are engaged by the courts, not by the parties, and it is to the courts and no-one else that the interpreters owe their allegiance. It enhances the independence of the interpreters.

Moreover, it also gives the courts some control over the interpreters, another matter which I think needs to be recognised. Not all interpreters are competent, and some seem to have difficulty in arriving on time. The courts should be in a position to ensure that only capable and reliable interpreters are engaged for the task which is expected of them. There are some cases where the work of the interpreter will require a much higher degree of proficiency than others. Obviously, new interpreters will not have the same proficiency and experience than those who have been serving for many years. The

courts need to ensure that new interpreters are not asked to perform work beyond their capabilities. Systems would need to be devised to ensure that these needs can be achieved, such as feedback forms. Recordings could also be checked by experienced interpreters for quality, proficiency and training purposes.

In major litigation, such as trials in the Supreme Court, it is important that interpreters are properly briefed before the trial begins. The interpreter should be given a copy of the charges, a summary of what the case is all about, the names of the witnesses to be called who need an interpreter or of the accused if he or she is the person concerned. This will enable the interpreter to prepare in advance and reduce the possibility of misunderstanding. It will assist in cases where there could be cultural problems if the wrong interpreter is engaged. It should be standard practice to require this information to be given to the registry or Courts Liaison Officer at the time of the request for the interpreter to ensure this in fact occurs. In some cases, it will be necessary to engage more than one interpreter. This could arise because of cultural factors, or because both a witness and the accused need an interpreter, or because of the length of the time needed for the services of an interpreter. It needs to be recognised that interpreting for

long periods of time is mentally exhausting. An interpreter may need a rest at least every hour for possibly 30 minutes, before being asked to resume. In other forums, organisations use two interpreters who rotate every 30 minutes, and this would be ideal. However, there are such shortages of good interpreters in some Aboriginal languages that this may not be feasible. If only one interpreter is available, the presiding judicial officer should consider adjourning more frequently than usual to give an interpreter a rest.

Lawyers and judicial officers, when working with interpreters, need to follow some basic rules if the system is to work at its best. Short, simple sentences are a lot easier to interpret than long, convoluted ones. Simple, common words should always be preferred to synonyms which are less commonly used by ordinary English speakers. Questions should be limited to one idea, rather than double or triple-barrelled questions.

Judicial officers who are sentencing Aboriginal people, whether an interpreter is being used or not, need to remember that the accused has the right to understand what is being said. I think, too often, judicial officers get into the habit of using stock phrases which are well understood by lawyers and courts of appeal, but mean little to the

prisoner. Words and phrases like “general deterrence”, “specific deterrence”, “recidivist” and “rehabilitation” should be avoided. Instead of saying, “You need a sentence which reflects general deterrence”, judicial officers could say something like this:

“What you did was very wrong. I must sentence you for a long time. This is to show everybody that, if they do what you did, they will also go to gaol for a long time. Maybe that will stop others from trying to do what you did.”

My suggestion is that judicial officers should use simple words and sentences which convey the same meaning as the stock phrases we commonly use. Some judges of the Supreme Court have taken the trouble to make a collection of suitable simple words to replace these stock phrases when the need arises. I commend that idea to the members of the judiciary.

Lawyers, especially prosecutors, need to give more thought to the way in which technical words can be interpreted. It is very common in trials for evidence to be given by a pathologist or medical specialist concerning injuries caused to a person, whether deceased or not. Similarly on a sentencing hearing, the Crown facts will often contain a

description of the injuries using technical medical terms. Some of these words are not even understood by the judicial officer, who has to consult a medical dictionary. Why say “haemorrhage” if you mean “bleeding”? Why say “comminuted fracture of the right fibula” if all you mean is that he broke his right leg? If a witness uses technical words in evidence, it should be standard practice to ask the witness to explain what is meant in simple English.

The most common problem with technical words is, without much doubt, the use of legal terms, which in many cases is unavoidable. Interpreters would be much assisted by a dictionary of common words used by lawyers. These words are not always technical legal terms. Some of them are ordinary English words which are not commonly used by ordinary English speakers. In other cases, the word used may have a meaning commonly used by ordinary English speakers, as well as a special meaning when used by lawyers. Take the word “swear”, for example. In ordinary English, it means to use bad language, but lawyers often use it to mean something quite different.

When it comes to considering what sentence to impose, there are now a wide range of options available. Prison should be a last resort to be used, especially in the case of minor offences, only when all other

options have been exhausted. The Northern Territory government has put a lot of resources into making these options real and relevant. Community work orders and home detention orders are commonly used, but there are still recidivists who do not take the opportunities which the justice system provides for reform. It is important for courts to know the social and cultural issues which are at work when tailoring a sentence if the sentence is likely to be effective. Sometimes a suspended sentence with a condition of exile to a remote dry community will be more effective than an actual prison sentence, if the offender is welcome in the community and has community support. But there are limits to what the courts can do unless there is social change in improved housing, education, and employment opportunities, particularly amongst the poor, and those living on remote communities. The Commonwealth intervention has made a serious attempt to address some of these problems, but it will take many years for these measures to have a significant effect.

It must not be thought that prison in the Northern Territory is all about locking up prisoners for 18-plus hours a day. There are many programs both inside and outside of the prison system which are aimed at changing anti-social behaviour. The main ones address drug and

alcohol addiction, anger management, and violence, especially domestic violence, and there are also programs both inside and outside of prison to train people in learning a trade. I think the main weakness with the current system is the lack of much, if any, organisational help for those prisoners released from gaol who are not subject to supervision. These prisoners leave the gaol with little money, often nowhere to go, no job prospects and no family support, or no effective family support.

Although it will not be easy, there should be a lot more thought given to an effective means of assisting those people to make something of their lives to become useful citizens.