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PUBLIC LECTURE

ABORIGINALS IN THE CRIMINAL JUSTICE SYSTEM

ABSTRACT

The criminal justice system in the Northern Territory was employed harshly and unevenly in relation to Aborigines well into the twentieth century. Considerable progress has been made over the last 20 years to provide greater justice to Aboriginal defendants by the Courts and by the justice system generally. Nevertheless, Aborigines are still imprisoned at a rate which is disproportional. The underlying causes of Aboriginal crime and some of the steps taken to address them and to provide rehabilitation to Aboriginal offenders are examined.

INTRODUCTION

The Northern Territory became annexed to South Australia in 1863[1] and was first settled in 1869.[2] Until the period commencing with World War II, the majority of the population of the Northern Territory comprised indigenous Australians. At present, indigenous Australians represent about 30 per cent of the total population.[3] It is likely that this percentage will grow rather than retreat in the future.

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[1] Prior to 1863 the Northern Territory was part of New South Wales. By 24 and 25 Vic c 44, s 2 (Imp) the Queen was authorised to annex any separated territory from New South Wales to another colony. Letters patent annexing the Northern Territory to South Australia were issued by Queen Victoria on 6 July 1863.

[2] An attempt to settle the Northern Territory was made at Escape Cliffs between 1864 and 1867, but the attempt was abandoned because the site was unsuitable. The first permanent settlement was made in 1869 following an expedition led by the South Australian Surveyor-General, George Goyder: see P F Donovan, *A Land Full of Possibilities* (1981) Chs 2-3; Alan Powell, *Far Country* (1982) Ch 4.

[3] The Australian Bureau of Statistics Census results for 2006 indicated that there were 53 497 persons who identified as Aboriginal out of a total population of 191 002 persons, which represents approximately 28 per cent of the total population. The total figure includes 16 262 persons who did not state whether or not they identified as Aboriginal. The percentage of persons who identified as Aboriginal has grown from 26.7 per cent in the 1996 census and 27.1 per cent in the 2007 census.

Until the 1970s, most indigenous Australians lived on reserves or on cattle stations; spoke either no English or a form of pidgin-English; lived in squalid conditions and in extreme poverty; received little or no education; and enjoyed few of the rights which the rest of the population enjoyed. The principal criminal law in force in the Territory was the common law, supplemented by a variety of old South Australian Acts and local Ordinances which dealt with penalties and matters of procedure.[4] Then, as now, Aboriginal men were the most frequently prosecuted racial group.

In the 19th and early to mid-20th centuries, the criminal justice system was employed, at times harshly and unevenly, at every stage of the process. Whilst the Northern Territory remained part of South Australia, Aboriginal prisoners were chained together and marched overland from Alice Springs to the railhead at Oodnadatta, to be dealt with by the Court at Port Augusta, and then brought back again. The same applied if they were to be tried in Darwin.[5]

Well into the late 1920s and early 1930s, Aboriginal witnesses were often treated in the same way as prisoners and were held in police custody until they had given evidence.[6] Despite criticism by the Ewing Royal Commission in 1920[7] of this undoubtedly illegal practice, it continued until the early 1930s. Justice Bevan justified the practice stating that '[i]t was necessary to lock up native witnesses not only for their own protection and to prevent them getting away, but also for their maintenance and accommodation … The practice had existed for a

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4 Principally (1) the *Criminal Law Consolidation Act 1876* (SA), as amended by various South Australian Acts between 1880-1902 and Ordinances of the Northern Territory after 1928 and known as the *Criminal Law Consolidation Act and Ordinance 1928* (NT). This legislation was repealed by the *Criminal Code Act 1983* (NT) which came into force on 1 January 1984; (2) the *Children's Protection Act 1899* (SA) also repealed by the *Criminal Code Act 1983* (NT); (3) the *Justices Ordinance 1928* (NT) as amended, which repealed a number of South Australian Acts dealing with Courts of Summary Jurisdiction, committal proceedings, etc; (4) *Police and Police Offences Ordinance 1923* (NT) (as amended) now called the *Summary Offences Act 1923* (NT); (5) *State Children Act 1895-1902* (SA) as amended by the *State Children Ordinances 1934-1952* repealed and replaced by the *Child Welfare Ordinance 1958*, now repealed.

5 See Douglas Lockwood, *The Front Door* (1968) 105; Alan Powell, *Far Country* (1982) 125-6; Doris Blackwell and Douglas Lockwood, *Alice on The Line* (1989) 26-7.

6 Tony Austin, *Simply the Survival of the Fittest: Aboriginal Administration in South Australia's Northern Territory 1863-1910* (1992) 7, 9, 16-7.

7 Commonwealth, *Report on Northern Territory Administration*, Parl Paper No 28 (1920) 5.

number of years, and was followed and allowed by former Judges, who filled the position of Administrator, combining both positions as Government Resident.'[8]

Aboriginals suspected of having committed offences often were not given any caution that they need not answer any questions. Even if a caution were to have been administered, it was often unintelligible to them.[9] In 1928, Justice Mallam rejected the confessions of the two Aboriginal accused tried for the murder of Fred Brooks (whose death had led to the infamous Coniston massacre earlier in 1928).[10] Neither accused had been administered a caution, and the Judge, on reflection, indicated that they should not have been interviewed without the consent of the Protector of Aborigines.

Aboriginal accused were usually represented by legal counsel, but were not usually permitted to have an interpreter in Court to interpret the proceedings for them.[11] There were no trained interpreters in Aboriginal languages and there was no interpreter service.[12] Aboriginal accused also rarely gave evidence in their own defence. The result was, as some observers have commented, that the trial might just as well have been conducted in the accused's absence.[13] Aboriginal witnesses or accused who gave evidence in English were sometimes misunderstood by juries because the form of English used was Aboriginal English,[14] and most Aboriginal witnesses were not capable of being sworn. Aboriginal witnesses who were Christians, or at least had a belief in God and were otherwise competent to take the

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8 Commonwealth, *Correspondence Relating to Report of Royal Commissioner*, Parl Paper 46 (1920) 16-7; see also, A L Elkin, *Aboriginal Evidence and Justice in North Australia* (1947) *Oceania* vol XVII, 198.

9 In *R v Jaydeada, Wallagoola and Cadininie*, Northern Territory Times and Government Gazette, 11 December 1896 and in *R v Cammefor and Mungkin*, Northern Territory Times and Government Gazette, 10 August 1900 Dashwood J rejected confessions by Aboriginals who had not been cautioned. In the latter case, the accused had been charged with murder. Subsequently, the real offender was tried, found guilty and hanged at Shaw Creek. For further information see, Dean Mildren, 'A Short History of the Northern Territory's Legal System to the Time of Federation' in Lesley Mearns and Leith Barter (eds), *Progressing Backwards: The Northern Territory in 1901* (2002) 92.

10 *R v Padygar and Arkirka* (1928) NTJ 136. For a brief account of the Coniston Massacre and the subsequent Commission of Enquiry see Powell, above n 2, 179-80.

11 Andrew Markus, *Governing Savages* (1990) 113-4; Justice Martin Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960-1962) 5 *University of Western Australia Law Review* 1, 22.

12 An Aboriginal Interpreter Service was established in Alice Springs in the early 1990s. The Service in Darwin was established after a trial Aboriginal Language Interpreter Service was conducted. The Trial, which began in 1997 and was jointly funded by the Northern Territory and Commonwealth Governments, resulted in the establishment of the Aboriginal Interpreter Service in April 2000.

13 See Justice Martin Kriewaldt, above n 11, 23.

14 See the discussion in Dean Mildren, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7.

oath, could be sworn. However, many Aboriginals were incapable of being sworn. Early South Australian Ordinances[15] permitted Aboriginal witnesses who were incapable of being sworn to give evidence without being sworn and without any formality. The South Australian Ordinances continued to apply to the Northern Territory until repealed and replaced by *The Evidence Ordinance*.[16] This affected the weight to be attached to the evidence.[17] In addition, Aboriginal evidence was often not accepted to convict white men unless it was corroborated.[18] At times juries showed little interest in convicting Aboriginals accused of committing offences against other Aboriginals and acquitted in the teeth of the evidence.[19]

I RECENT DEVELOPMENTS

Considerable progress has been made over the past 20 years. Aboriginal Legal Aid agencies have been established and provide consistent legal representation in the 'bush courts' as well as in the major town and city courts. Legal Aid Agencies also employ field officers who assist their clients to attend their offices and court to answer bail and to enter into bail. In 1976 the Anunga guidelines adopted by the Supreme Court required that Aboriginals be properly cautioned by police and that, wherever possible, a suspect be offered a prisoner's friend to assist him with the interview, as well as an interpreter, if necessary.[20] The Anunga guidelines have since been enforced and supplemented by the Police Commissioner's General Orders.[21] As a general rule, police are required to advise Aboriginal Legal Aid if an Aboriginal has been arrested or taken into custody. It is now a requirement that police tape-record each Aboriginal suspect being told of his right to an interpreter

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15 Ordinance No 3 of 1848, SA; Ordinance No 4 of 1848, SA.

16 *Evidence Ordinance 1939 (No 2)* (NT).

17 See, for example, Kriewaldt J's directions to the jury in *R v Tiger and Captain* (1953) NTJ 211, 213-4.

18 Markus, above n 11, 108-10; Elkin, above n 8, 197.

19 See Elkin, above n 8, 199; Kriewaldt, above n 11, 16, 42. Sharwood AJ in a letter to the Minister for the Interior dated 11 July 1932 made similar observations and recommended that trial by jury be abolished except for Commonwealth offences and for capital offences. This recommendation was adopted: see *Criminal Procedure Ordinance 1933* (NT). Trial by jury was not restored until 1 July 1962 when the *Criminal Procedure Ordinance 1961* (NT) came into force. The right to trial by jury is now to be found in section 348 of the *Criminal Code Act 1983* (NT).

20 *R v Anunga & Ors* (1976) 11 ALR 412. The choice of the prisoner's friend must be the suspect's: *R v Gudabi* (1984) 1 FCR 187, 199-200. In regards to the police explaining the role of the prisoner's friend to the chosen prisoner's friend, see *R v Jimmy Butler (No 1)* (1991) 102 FLR 341. As to what the police should tell the suspect about the role of the prisoner's friend, see *R v Weetra* (1993) 93 NTR 8, 11.

21 See especially, Northern Territory Police, General Order A47.28, *Aborigines Arrested or Taken into Custody*; Northern Territory Police, General Order 14, *Interpreters and Translators*; Northern Territory Police, General Order Q2, *Questioning People who have Difficulties with the English Language — The 'Anunga' Guidelines*.

and to a prisoner's friend, as well as his right to let someone else know where he is.[22] Records of interviews of all serious offenders are now required to be electronically recorded, usually by videotape as well as audiotape.[23]

An Aboriginal Interpreter Service has been established, in both Darwin and Alice Springs, covering the main languages. The Service was established in Alice Springs in the early 1990s. However, the Service in Darwin was not established until after a trial Aboriginal Language Interpreter Service was conducted. The Trial, which began in 1997 and was jointly funded by the Northern Territory and Commonwealth Governments, resulted in the establishment of the Aboriginal Interpreter Service in April 2000. Training of Aboriginal interpreters to the basic level is now available at the Batchelor Institute of Indigenous Tertiary Education[24] and interpreters are regularly used in all courts.[25] Taking proper instructions without an interpreter can be hazardous, especially if the lawyer sees the accused for the first time at a bush court on the day of the hearing. Aboriginals can be very shy and it may take a considerable time to establish sufficient trust to obtain proper instructions. It is not unknown for Aboriginals to plead guilty to offences they did not commit even when legally represented.[26]

Today, Aboriginal witnesses can be sworn or give evidence on affirmation. Usually interpreters are provided for both the witness and the accused. The standard of understanding has much improved. In recent times it has been common for an Aboriginal accused to give evidence, although the requirement to do so is significantly lessened in practice if the prosecution tenders a video-recording of the record of interview. Recent changes to the positioning of the cameras in the interview rooms at police stations have improved the visual impact of the record of interview, which is important for jury trials.

Technological advances have allowed Aboriginal prisoners to be visited by relatives via video-conferencing facilities. This applies to both sentenced and remanded prisoners. All police stations are monitored by closed-circuit television cameras to

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22 *Police Administration Act 1978* (NT) ss 140, 141.

23 *Police Administration Act 1978* (NT) s 142. If this section is not complied with the confession or admissions made are inadmissible, unless the court is satisfied that the admission of the evidence would not be contrary to the interests of justice: *Police Administration Act 1978* (NT) s 143.

24 Formerly known as Batchelor College. The Institute is located at Batchelor, Northern Territory.

25 Nevertheless, there are difficulties in interpreting terms used in legal proceedings into Aboriginal languages. A legal glossary is available to assist interpreters in Murrinhpatha (see n 47), but not in other Aboriginal languages.

26 See, for example, *R v Deland & Ors ex parte Willie* (1996) 6 NTLR 72 (Kearney J). Cf *Marshall v Loundes* (1997) 138 FLR 313 where the Court refused to quash a conviction by the Juvenile Court even though the boy was excused from criminal responsibility because he was under the age of 10.

reduce the possibility of improper police conduct and deaths in custody. There are very few complaints now made about improper conduct by police.

The Commissioner of Police has developed an Indigenous Employment and Career Development Strategy, designed to increase the recruitment, selection, development and retention of indigenous employees and volunteers.[27] The Northern Territory Police Force has recruited some Aboriginal persons who have entered the force as constables, but most join as Aboriginal Community Police Officers, with the same or similar powers as constables. There are currently 74 Aboriginal Community Police Officers in the Northern Territory Police Force.[28]

Judges usually advise juries on the common problems which Aboriginal English speakers experience in giving evidence and a guideline instruction to the jury has been developed to be used when it is appropriate to do so.[29] Nevertheless, for many years Aboriginals have amounted to 80 per cent of the prison population in the Northern Territory. Notwithstanding law and order legislation designed to act as a deterrent to offending behaviour, imprisonment rates in the Northern Territory have climbed to 551 per 100 000 adults, by far the highest in Australia and over three and a half times the national average.[30]

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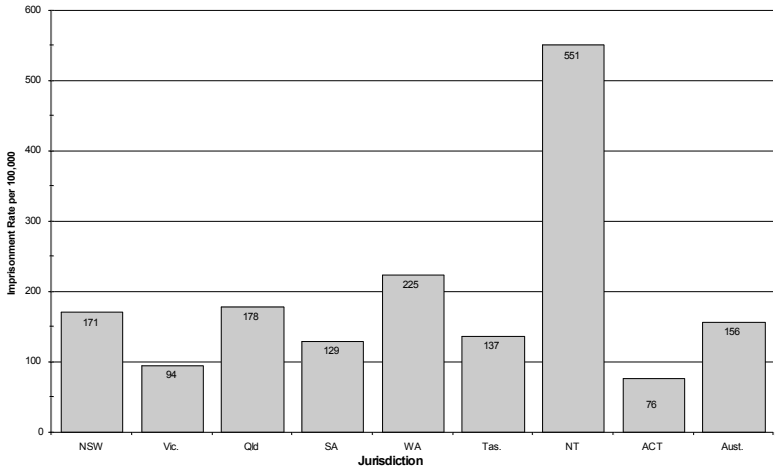
27 See *Annual Report of the Northern Territory Police, Fire and Emergency Services* (2006) 83.

28 Ibid 81.

29 The guideline instruction is based upon the proposed instruction published in Dean Mildren, 'Redressing the Imbalance against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7, 21-2 a copy of which is set out in the appendix to this paper. Care must be taken to tailor the instruction to the circumstances of the case. I always discuss with counsel before the trial begins whether the instruction is appropriate and what it should contain. Usually both counsel support the instruction where the accused is Aboriginal and his version of events is to be put before the jury either through the record of interview or by his giving evidence and where the Crown intends to call a number of Aboriginal witnesses. In *Stack v Western Australia* (2004) 151 A Crim R 112 the Court of Criminal Appeal of Western Australia criticised a trial Judge who used the instruction before there was any substratum of fact properly proved in the normal way (at 117); see also at 144. It is therefore important for the Judge to establish if there is a factual basis for the direction (perhaps by reference to the transcript of the committal proceedings) and to hear counsel before applying the direction, which must be directed to the circumstances of the case, if it is to be used before evidence is given to the jury. A form of the guideline was recommended by the Queensland's Criminal Justice Commission: see Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996).

30 Northern Territory Department of Justice, *Correctional Services Annual Statistics* (2005-2006) 2-3.

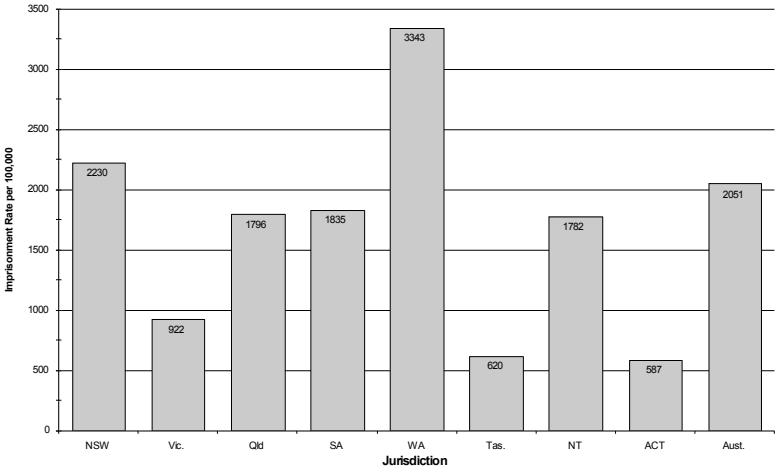
Figure 1 Estimated adult imprisonment rates by jurisdiction 2005-2006



Estimates of imprisonment rate per 100 000 adult population based on ABS Corrective Services Australia (4512.0)[31]

The rate for non-indigenous persons is 136 per 100 000, somewhat below the national average of 156 per 100 000.[32] The adult indigenous imprisonment rate is 1782 per 100 000, also below the national average of 2051 per 100 000.[33]

Figure 2 Estimated adult indigenous imprisonment rates by jurisdiction 2005-06



Estimates of imprisonment rate per 100,000 adult indigenous population based on ABS Corrective Services Australia (4512.0)[34]

31 Ibid 3.
32 Ibid 4.
33 Ibid 4.

The Northern Territory Correctional Services caseload is estimated at 1003 per 100 000 persons.[35] These are persons undertaking a community-based program or in custody in a correctional institution. Most Aboriginal prisoners are male, aged between 20-40 years (72 per cent), and single (53 per cent).[36] Female prisoners, including non-indigenous persons, represented four per cent of the Northern Territory prison population.[37] There is a similar statistical pattern with juvenile offenders.[38] Aboriginal offenders represent 81 per cent of the total adult prison population and nearly all are male.[39]

II UNDERLYING CAUSES

There are a number of underlying causes which explain these alarming statistics. A report of the Select Committee of the Legislative Assembly of the Northern Territory identified these causes as poverty; unemployment; lack of education; boredom; and overcrowded and inadequate housing which lead to excessive alcohol consumption, petrol sniffing and the use of cannabis and other drugs. This, in turn, leads to excessive violence and petty property crime, especially stealing, trespass and breaking and entering.[40] These conditions are reflected in most Aboriginal communities, which range from large towns such as Wadeye and Maningrida to small villages and even smaller out-stations, although some communities are much worse than others.

A *Poverty*

Wadeye, which is the Northern Territory's sixth largest town, has a population of between 2200-2500 persons, of whom only 140 are employed. Less than 50 per cent of the positions of employment are occupied by indigenous people. Of the total population in Wadeye, 82 per cent receive 'Community Development Employment Projects' (CDEP) payments or 'work for the dole'. The average income is $8000 per annum.[41] Figures are not available for other communities, but I would be very

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34 Ibid 4.

35 Ibid 1.

36 Ibid 13-4.

37 Ibid 4.

38 Ibid 7, 9.

39 Ibid 3-4.

40 See Select Committee on Substance Abuse in the Community, Legislative Assembly of the Northern Territory, *Petrol Sniffing in Remote Northern Territory Communities* (2004).

41 Information concerning Wadeye in this paper is principally derived from the Department of Families, Community Services and Indigenous Affairs (2008) <http://www.facsia.gov.au/internet/facsinternet.nsf/ indigenous/nav.htm> at 4 May 2008, and Wadeye Community (2008) Welcome to Wadeye <http://www.indiginet.com.au/wadeye/> at 4 May 2008.

surprised if they were much different. The indigenous unemployment rate for the Northern Territory is 19.4 per cent (the overall Northern Territory rate is only three per cent), but these figures do not include people on CDEP schemes. Most recipients of CDEP payments work only a few hours per week. In the report of the Royal Commission into Aboriginal Deaths in Custody, conducted in the 1990s, it was estimated that 80 per cent of people in Aboriginal communities over 15 years of age were not formally employed.[42] Since the enactment of the *Northern Territory National Emergency Response Act 2007 (Cth)* CDEP schemes have been targeted to be progressively replaced by real jobs, training and mainstream employment prospects, but those proposals have not yet been fully implemented.

B *Overcrowding and Lack of Housing*

Overcrowding and lack of housing is a widespread problem throughout most of the Northern Territory. Wadeye has only 154 dwellings to house a population in excess of 2200 people. Of this number 33 need to be demolished. The average occupancy rate is 16 per dwelling.[43] Maningrida has 157 houses and an average occupancy of 15.2 per dwelling.[44] Both towns are located on Aboriginal land granted under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which until recently prevented the sale of house lots to individuals. This was a common problem in the Northern Territory, because s 19 of the Act prevented Aborigines living on Aboriginal land from owning their own homes. Even if such individuals could afford to buy a home, no lending institution would have advanced a housing loan because the loan could not be secured by a registered mortgage. The position has since changed, but still requires the consent of the Minister except for leases not exceeding 40 years.[45] Theoretically an interest as mortgagee is now possible subject to the consent of the Minister.[46]

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42 Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 2* (1991) vol 2, 17.2.11.

43 Bill Gray, *Council of Australian Governments (COAGS) Trial Evaluation: Wadeye* (2006) 6.

44 Maningrida Council Incorporated, *Housing* (2008) <http://www.maningrida.nt.gov.au/council/content/ view/full/256> at 4 May 2008.

45 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19(2)(a).

46 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 19(4A).

C *Education*

Wadeye has less than 40 per cent of children under 15 years enrolled at school. Attendance rates are below 50 per cent. English is not widely spoken. Most Aboriginal children under 15 are illiterate and have either no English skills or speak only very basic English.[47] The figures for other communities are not available, but in my experience most Aboriginal offenders need the services of an interpreter.

D *Alcohol and Substance Abuse*

Many Aboriginal children begin petrol-sniffing at a very young age. The Report of the Select Committee of the Legislative Assembly of the Northern Territory into Petrol Sniffing in Remote Northern Territory Communities reveals that sniffing petrol or other volatile substances occurs in some communities with children under 10 years of age.[48] The Select Committee reported:

> There is little doubt that the major contributing factors which could be considered as indicating a propensity for petrol sniffing are socio-economic. Poverty, boredom, oppression, lack of services and facilities; parental drinking and gambling leading to hunger and neglect; poor education levels and lack of employment and aspirational opportunities; and so on. The boredom issue is a common cry from remote communities, where any sort of meaningful activity, whether work, sport or other recreational pursuit, is too often missing.[49]

Some indication of the nature of these problems and how they interact and feed on each other can be gleaned from a submission to the Select Committee from the Jawoyn Association Aboriginal Corporation, Katherine. The submission addressed the question of why indigenous people drink to excess, smoke 'ganga' and sniff petrol by describing a typical night for an extended family living on a community in overcrowded conditions, with little or no hope for a better future:

> For the most part, our people live in overcrowded circumstances. It's no exaggeration to imagine an extended family group of eight or nine people, ranging from babies and school kids through to aged pensioners, living in a three bedroom house. It's often worse than this. This is one night:

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47 See generally John Taylor, *A Report to Thamarrurr Regional Council and the Northern Territory Office of Indigenous Policy*, 2003, Centre for Aboriginal Economic Policy Research, Canberra, 43-9; and Dr Lysbeth Ford and Dominic McCormack, *Murrinhpatha — English Legal Glossary*, 2007, 11-13.

48 Select Committee on Substance Abuse in the Community, Legislative Assembly of the Northern Territory, *Report of the Select Committee of the Legislative Assembly of the Northern Territory into Petrol Sniffing in Remote Northern Territory* Communities (2004) 39.

49 Ibid 39.

It is a drinking household. It is noisy until late most nights. There are drunken arguments — occasional violence, not just between the drinkers but perhaps also — towards the young and old. Most adults are unemployed or underemployed on the local CDEP projects. A large proportion of the family income gets spent on grog, so there is often little food and bills are often unpaid. Perhaps the electricity is off, certainly there is no money to repair the broken fridge.

The kids are mostly hungry, which makes it impossible in the school next day. They are also tired as they were kept up last night. In any case, some of the kids are deaf — poor water supplies and hygiene take their toll on up to 100 per cent of school kids in some communities. The older kids have dropped out of school, either through truancy or the lack of secondary education. They have been up last night too, sick of being beaten by their uncle, they've spent the night wandering around the community with their mates.

Petrol was hard to get last night, so they have broken into the school to pinch glue. They got some money from a teacher's desk, so they will be able to buy some ganga later that day. They may not be old enough to get CDEP work: certainly other employment would be hard. Their spoken English is poor, and they can barely read or write — they have had only one year of 'post secondary' schooling.

Money has run out in the household, but fortunately grandma has her cheque coming through today; social security payments in the household can now be staggered so there is money for grog every second or third day. Grandma wants to spend money on food for the grandkids but her older grand son [sic] will skip going to CDEP to make sure when she gets her cheque he can humbug her for enough money to pool with others for the $200 taxi ride into Katherine to buy grog. In any case, he has the shakes and wouldn't be able to operate the tractor at work anyway. His wife won't be on that trip — last night she has been hit over the head with a star picket and had to be taken into hospital. There she will join her younger sister who has just had a baby. She's been there for nearly a month as the kid has been born underweight. Another long night for the Aboriginal Health Workers, as well. There is no ambulance so they have had to use a private vehicle to get into Katherine.

The community night patrol has had a long night as well. They had missed the kids breaking into the school because they had been called out to a disturbance. They had stopped the argument, and successfully encouraged that household to stop drinking for the night. When they heard what had happened at the school they had a good idea who had done it, and picked the kids up. Should they call the cops? At least one of the kids would get a mandatory sentence of 28 days in Don Dale if they did, so they decide to talk to the family the next day to see if something can be worked out. The kid is sick — a sniffer — it's hard to see how a month in detention will change that. Perhaps he can be sent to his cousins out bush. In any case, the coppers were elsewhere last night. There had been a bad smash on the road that night. Six people, all drunk, had missed the crossing on the dirt road and were also in

> hospital. Two were not expected to live. It would be a hard task for the Aboriginal Community Police Officer, who is related to all involved, taking that sort of news to the families the next day.[50]

Various government initiatives seeking to address these issues are in place. Many Aboriginal communities are now 'dry' areas where it is illegal to possess alcohol. This results in groups of hardened drinkers congregating on a daily basis to consume alcohol on the borders of the dry areas. Night patrols by the communities attempt to prevent intoxicated Aboriginals from entering the community and causing trouble. It is an offence to consume liquor in a public place within two kilometres of a licensed premises.[51] Dry areas have now been declared, even in the suburbs of Darwin, notably in public parks.

The sale of certain take-away alcohol, such as five litre casks of wine, has been banned in some areas. The drinkers have shifted to fortified wine. The connection between excessive alcohol consumption and serious crime is well documented. In the Northern Territory in 2001, only six per cent of all police activity Territory-wide was definitely not alcohol related (71 per cent was alcohol related and 20 per cent was undetermined).[52] Of homicides in the Northern Territory during 2000-2001, 63.6 per cent of male victims and 82.6 per cent of female victims were affected by alcohol at the time of their deaths; with respect to offenders, 82.6 per cent of males and 100 per cent of females were alcohol affected. The Northern Territory has the highest proportion of the population drinking at harmful levels, being 15 per cent of male and six per cent of females, compared with the national average of seven per cent and four per cent respectively.[53]

There are many government initiatives designed eventually to overcome poverty and housing shortages and to improve education outcomes and job prospects. Most of these initiatives will take many years before they result in any significant change. In the meantime, the focus is on the justice system to provide the main remedy. That is a task which, while it must be addressed, will not by itself result in significant change. The courts' principal role is in sentencing.

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50 Select Committee on Substance Abuse in the Community, above n 48, 20-1.

51 *Summary Offences Act 1923* (NT) s 45D.

52 Report of Select Committee, above n 48, 36. The figures given do not add up to 100 per cent.

53 Northern Territory Department of Justice, above n 30, 36.

E *Sentencing Issues*

The Northern Territory's *Sentencing Act 1995* does not contain any provisions which specifically relate to Aboriginal offenders.[54] The factors a court must consider in sentencing an offender are theoretically the same for all individuals, regardless of race, religion or socio-economic factors. However, in practice, the punishment of Aboriginal offenders does give rise to special considerations.

Most Aboriginal offenders are dealt with by the Court of Summary Jurisdiction. The Court sits not only in the main cities and towns but also in remote Aboriginal towns and communities. In some of the latter, the Court does not have a proper courtroom, but sits in a small room which is part of the local police station. The furniture is rudimentary, with witnesses in very close proximity to the Bar and Bench. There is scarcely enough room for the Magistrate, prosecutor, defence counsel, accused, witness and interpreter and almost no room for spectators. This creates serious issues about the appearance of the independence of the judiciary. Where possible the Court is able to use a room in a community building. However, there is often no room for the Magistrate to retire during adjournments. The lack of overnight facilities often means that the prosecutor, defence counsel, magistrate and court staff must fly in and out on the same day if the community is not accessible by road. These courts have no facilities for vulnerable witnesses, except perhaps a screen, and no video-conferencing facilities.[55]

Assistance to the Court is sometimes available on sentencing issues by a local Law and Justice Committee, usually by the provision of a written report. In North East Arnhem Land and Darwin, the Court is sometimes asked to sit as a 'Community Court.' In such cases, if the Magistrate and all the parties involved agree, the hearing may be conducted informally with the assistance of Aboriginal elders or other appropriate Aboriginal persons who may also act as interpreters. There is no legislation enabling this to occur. The Magistrate must still decide on the appropriate sentence according to law, but the process does often provide useful information and better sentencing outcomes. Apart from the lack of legislation, not all communities support the idea and not all people who might be interested want to get involved. In addition, not all Magistrates are willing to sit as a Community

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54 The only exception is an amendment passed in 2005 which deals with the way evidence relating to Aboriginal customary law or community attitudes may be presented to the Court: See *Sentencing Act 1995* (NT) s 104A. This section merely put in legislative form the requirements spelled out by the Court of Criminal Appeal in *Munungurr v The Queen* (1994) 4 NTLR 63.

55 Interview with Jenny Blokland, Chief Magistrate of the Northern Territory (held by author, 7 February 2007).

Court in the absence of legislation authorising this process and the process is very time consuming.[56]

The courts are sometimes invited to take into account the fact that the offender has been, or is likely in the future to be, punished in accordance with traditional law. The courts have recognised that tribal punishment, or the prospect of tribal punishment, is a relevant sentencing factor on the basis that it would be unfair for a person to be punished twice for the same offence.[57] This principle applies to any punishment received by an offender, irrespective of whether or not the punishment is lawful and whether or not the person punished is Aboriginal. Not all such punishment is in fact unlawful.[58] Bail will not be granted solely to enable tribal punishment to be carried out, unless the punishment is clearly not unlawful.[59]

Sometimes, although not often in recent times, the courts are asked to take into account a submission that the offence was brought about by community pressure,[60] or as a response to Aboriginal law.[61] There are cases where this has been taken into account, particularly where the offender had been given little choice about the matter.[62] The fact that an Aboriginal may have committed an offence in circumstances where he had no reason to believe that his behaviour amounted to an offence, may also be a mitigating factor. This is more likely to be the case where the Aboriginal had little contact with society apart from his own tribe or clan, and

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56 Ibid. See also Jenny Blokland, 'Northern Territory: Where Two Worlds Collide' (2006) 31 *Alternative Law Journal* 95.

57 *R v Minor* (1992) 2 NTLR 183; *Mununguri v The Queen* (1994) 4 NTLR 63; *R v Miyatatawwy* (1996) 6 NTLR 44, 49.

58 In *Mununguri v The Queen* (1994) 4 NTLR 63, the Court accepted that the 'punishment' did not involve any physical punishment and as part of the conditions of a bond required the offender to be dealt with in the traditional manner. A description of what this involved is at 76-7. See also *R v Minor* (1992) 2 NTLR 183, 185.

59 *R v Minor* (1992) 2 NTLR 183, 195-6; *Barnes v The Queen* (1997) 96 A Crim R 593; *Re Anthony* (2004) 14 NTLR 6.

60 *Hales v Jamilmira* (2003) 13 NTLR 14, 29, 37, 48; *Neal v The Queen* (1982) 149 CLR 305, 326.

61 Some restrictions have now been placed on the ability of Territory courts to take into account customary law in sentencing by s 90 of the *Northern Territory National Emergency Response Act 2007* (Cth). For a discussion of the issues concerning this legislation and the relevance of customary law generally, see Dean Mildren, 'Customary Law: Is It Relevant?' (2008) 1 *Northern Territory Law Journal* 69.

62 *R v Long Peter*, Northern Territory Times and Government Gazette, 28 September 1900, referred to in Dean Mildren, 'A Short History of the Northern Territory's Legal System at the Time of Federation' in Lesley Mearns and Leith Barter (eds), *Progressing Backwards; The Northern Territory in 1901* (2002), 69; *R v Charlie Mulparinga* (1953) NTJ 219 (killing carried out on orders of tribal elders in accordance with tribal law). In Papua New Guinea, a payback killing in accordance with customary law is not a mitigating factor: *Ranjigi v The State* [1994] PNGLR 44.

where the conduct was not considered unlawful by the social norms of his own community.[63] This is extremely rare in modern times.

The courts will also take into account the wishes of both the victims and his or her own community.[64] So far as the latter is concerned, a community may express the wish that the accused will or will not be welcome to return to the community in the future. This can affect whether or not a suspended sentence remains an option.

Hardship due to Aboriginality is also usually considered, but in cases of serious offending the Court will be obliged to give more weight to its duty to protect the community from violence, especially violence towards women and children.[65] These days, drunkenness is not usually regarded as a mitigating factor, but rather as an aggravating factor, or at best a neutral factor, depending on the circumstances.[66]

The courts do what they can to avoid imposing custodial sentences where that course is reasonably open.[67] In some cases, the law requires a custodial sentence as

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63 *R v Charlie Mulparinga* (1953) NTJ 219; *R v Herbert* (1983) 23 NTR 22, 25; *The Queen v GJ* (2005) 196 FLR 233, 239-40, 248-9.

64 *R v Minor* (1992) 2 NTLR 183, 197; *Munungurr v The Queen* (1994) 4 NTLR 63, 71. However, in *R v Bara* (2006) 17 NTLR 220, 225, the Court emphasised that the wishes of the victim that the offender not be imprisoned will not prevail in the face of serious criminal conduct.

65 *R v Wurramara* (1999) 105 A Crim R 512.

66 In cases involving committing a dangerous act contrary to s 154 of the *Criminal Code Act 1983* (NT) (now repealed), intoxication was prescribed as a circumstance of aggravation by the Code. In *R v Herbert* (1983) 23 NTR 22, 31, O'Leary J said that in the case of Aboriginals intoxication may be considered as at least giving some additional weight to other mitigating factors. In *R v Fernando* (1992) 76 A Crim R 58, 62, Wood CJ at CL said that problems of alcohol abuse are not normally mitigating but may be taken into account if it reflects the accused's socio-economic circumstances. *R v Fernando* has been approved by the Court of Criminal Appeal of New South Wales in *R v Newman* (2004) 145 A Crim R 361 and in *R v Williams* (2004) 148 A Crim R 325. See also *R v Juli* (1990) 50 A Crim R 31, 36, 40 (Court of Criminal Appeal, Western Australia). A contrary view was apparently taken by the Court of Criminal Appeal (Northern Territory) in *R v Wurramurra* (1999) 105 A Crim R 512, where the Court endorsed the views of the Court of Criminal Appeal of Queensland in *Daniel* [1998] 1 Qd R 499, 522 that the fact that the offender was intoxicated and came from a deprived and dysfunctional community due to alcohol abuse was not mitigating. However, there is a long line of authority in the Northern Territory which accords with *R v Fernando* (1992) 76 A Crim R 58: see the cases cited in *R v Juli* (1990) 50 A Crim R 31, 36-7. *R v Fernando* (1992) 76 A Crim R 58 was approved by Perry J in *Abdulla* (1999) 106 A Crim R 466, 470-2. Wood CJ at CL explained in *R v Ceissman* (2001) 160 FLR 252, 257 that the principles in *R v Fernando* (1992) 76 A Crim R 58 applied only where there was disadvantage by reason of being a member of a disadvantaged group.

67 Imprisonment is always considered as a last resort when sentencing any offender.

a mandatory minimum sentence.[68] In those situations an Home Detention Order (HDO) is not possible. Where the court considers that a short sentence of actual imprisonment is necessary, the court must also first consider an HDO as an alternative.[69] HDOs are available to Aboriginal offenders provided that they are assessed as suitable, have suitable premises and are willing to consent to the order.[70] In 2006, 57 per cent of all persons under HDOs in the Northern Territory were Aboriginal.[71] There are high completion rates for HDOs — between 89-92 per cent.[72] If a sentence of imprisonment is not required, a community service order is another option often considered. This also has a high completion rate of 69-72 per cent for adult offenders, and 78-84 per cent for juvenile offenders.[73]

Parole is also available, but only 51-64 per cent of all prisoners successfully complete parole orders.[74] There is also a very high recidivism rate for prisoners returning to prison after release: 42 per cent compared with the national average of 38.4 per cent.[75]

D *Diversionary Programs*

There are diversionary programs which are available and which may, if the program is successfully completed, result in the court either imposing no sentence, or at least a lesser sentence than would usually be the case. There are two such programs aimed at juvenile offenders: the Illicit Drug Pre-Court Diversion Program and the Juvenile Diversion Program. The former program is available to both adult and juvenile offenders who are first time drug offenders in possession of less than a trafficable quantity of an illicit drug. Non-compliance with the program results in the offender being prosecuted. In 2005-2006, 39 of the 40 persons involved in the program were juveniles and all had committed offences related to cannabis.[76]

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68 The *Sentencing Act 1995* (NT) provides for a mandatory head sentence of imprisonment for life in the case of murder with minimum non-parole periods of either 20 or 25 years depending on the circumstances: see *Criminal Code Act 1983* (NT) s 157(1), (2) and *Sentencing Act 1995* (NT) s 53A. A mandatory sentence of actual imprisonment for a violent offence is required if the offender has a previous conviction for a violent offence: *Sentencing Act 1995* (NT) s 78BA. A mandatory sentence of actual imprisonment is required for a sexual offence: *Sentencing Act 1995* (NT) s 78BB. In cases where s 78BA or s 78BB apply, the Court may determine a sentence to be partially but not wholly suspended.

69 See *Ross v Toohey* [2006] NTSC 92.

70 *Sentencing Act 1995* (NT) s 45.

71 Northern Territory Department of Justice, above n 30, 29.

72 Ibid 29.

73 Ibid.

74 Ibid.

75 Ibid 11.

76 Northern Territory Police, Fire and Emergency Services, above n 27, 56-7.

Adult offenders who are ineligible for the aforementioned program are able to access the Court Referral and Evaluation for Drug Intervention and Treatment Northern Territory Program (CREDIT NT), conducted by the Department of Justice. The CREDIT NT program is in effect a bail program. To be eligible the person must have a problem with the use of an illicit substance, must not have a criminal history of violent behaviour and must not be the subject of any other treatment program. By late 2006, the overall completion rate of this program was almost 80 per cent.[77]

The Juvenile Diversion program is aimed at diverting juvenile offenders from the courts by encouraging youths to take responsibility for their own actions. In 2005-2006, 34 per cent of juveniles apprehended were offered this program. Most were male and indigenous.[78] No recidivism rates have been made available.

In addition to these formal State-run programs, alcohol and substance abuse programs have been implemented. These are mostly residential programs run by agencies such as the Salvation Army and the Council for Aboriginal Alcohol Program Services Inc, both of which are Darwin-based. Residential programs also exist in Katherine and Alice Springs.

These programs are also available to the wider community and it is not unusual for persons facing court to be bailed to enable them to undertake the program prior to a sentencing hearing. Participation (in the program) may also be made a condition of a suspended sentence. In addition, there are programs available to prisoners, including the Ending Offending Program. Post-release, there is also the Darwin Prisoner's Aid Association which aims to assist in finding employment and housing, and satisfying other basic needs.

CONCLUSION

Sentencing is always a difficult exercise, as there are many different and sometimes conflicting matters to be considered. However, wherever possible, the courts do what they can to assist in the rehabilitation of persons who have committed offences. An offender who is able to be rehabilitated is no longer a threat to society and, as the criminal justice system exists primarily for protection of the community, rehabilitation is an important goal.

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77 Statistics provided to the writer by the Department of Justice.

78 Northern Territory Police, Fire and Emergency Services, above n 27, 56. This program, which was introduced on 1 September 2000 as the result of an agreement between the Commonwealth and the Northern Territory, is not supported by legislation, although it is the subject of an extensive General Order (General Order J1) made by the Police Commissioner pursuant to s 14A of the *Police Administration Act 2007* (NT).

The fundamental problems which underlie many Aboriginal communities make rehabilitation and the prevention of crime much more difficult than in the wider community. This is unlikely to change significantly in the near future because the underlying causes of these problems are intractable and difficult to address. However, an attempt is being made by the Commonwealth with the recent passage of the *Northern Territory National Emergency Response Act 2007* which seeks to deal with a number of these problems.

APPENDIX A

DIRECTION CONCERNING ABORIGINAL WITNESSES

Introduction

1. I understand that the Crown intends to call a number of witnesses in this case who are Aboriginal or of Aboriginal descent. I understand that the accused is also an Aboriginal or of Aboriginal descent, and that the Crown intends to lead evidence of a video recorded record of interview which the accused had with the police.

2. You are the judges of fact in this case. It is therefore your function to decide which evidence you accept, and which evidence you reject. You, and you alone, are the judges of the facts, and anything I may later say to you about the facts is not binding upon you. However, you may be assisted by what I am about to tell you, when it comes to the Aboriginal witnesses.

Aboriginal English

3. Many Aboriginal people in the Northern Territory, including Aboriginal people of mixed descent, do not speak English as their first language. And many, in all parts of the Territory, who do speak English as their first language have learnt to speak English in a manner which is different from other speakers of English in Australia.

Word Meaning, Grammar and Accent

4. It is important that you listen carefully to the context in which words are used in order to prevent misunderstanding as far as possible. Sometimes ordinary English words are used by Aboriginal English speakers in a way which is different from that of Standard English. Counsel will do their best to ensure that this becomes clear to you as the evidence unfolds, but you can often realise this for yourselves if you listen carefully to the context.

5. There may be grammatical differences between Aboriginal English speakers and other kinds of English. For example, the verb 'to be' may not be used in sentences, and all the verbs may be in the present tense, even though the context shows that it is past time or future time which is being talked about. You may also notice that pronouns such as 'he', 'she' and 'you' are used differently at times. Counsel will do their best to make sure that you understand what is being said, but if you are having any difficulty, please let us know immediately through the foreman that you are unsure of what the witness has been saying and counsel will try to clarify it for you.

6. Many Aboriginal people have trouble with some of the consonants used in the English language, especially *f, v* and *th. F* and *v* are often replaced with *p* or *b*, so the word 'fight' might sound like 'pight' or 'bight', and so on, and this can give rise to misunderstanding. Once again, if you have any difficulty understanding and it is not cleared up, please put your hand up, and get the foreman's attention and tell him or her what is wrong so that we can see if the matter can be remedied.

Ways of Communicating

7. Aboriginal English speakers may also have different cultural values which affect the way they speak and behave. These things I will tell you about now are common in a wide range of speakers of Aboriginal English, even among many who apparently speak English quite well. Remember that skin colour is not a reliable indicator of the way that an Aboriginal person communicates.

8. It is very common for Aboriginal people to avoid direct eye contact with those speaking to them, because it is considered to be impolite in Aboriginal societies to stare. On the other hand, in most non-Aboriginal societies, people who behave like this might be regarded as shifty, suspicious or guilty. You should be very careful not to jump to conclusions about the demeanour of an Aboriginal witness on the basis of the avoidance of eye contact, as it cannot be taken as an indicator of the Aboriginal witness's truthfulness.

9. It is customary among many Aboriginal people to have long lapses of silence from time to time, even in everyday speech. You should be careful not to jump to the conclusion that a witness who is doing this is being evasive or untruthful about the matter he or she is being asked about. Many Aboriginal people are not used to direct questioning in the way in which it is used in the courtroom, and they are used to having the chance to think carefully before talking about serious matters, so it may take some time for them to adjust to the question and answer method of imparting information.

10. It is very common for witnesses to be asked questions in a form in which the answer to the question is suggested by the question itself. Lawyers call this type of question 'a leading question'. An example of such a question is one like this: 'You saw the red car hit the blue car, didn't you?'. Many Aboriginal people will answer 'yes' to this type of question, even if they do not agree with the proposition being put to them in the question, and even if they do not understand the question. The same applies if the proposition is put in a negative question which is a leading question. For example, if the question was 'You didn't see the red car hit the blue car, did you?', they will often answer 'no' in the same way. Such an answer should not always be taken to mean 'I agree with what you have just put to me'. This is a very well recognised communication pattern in Aboriginal English speakers, and it can sometimes

cause difficulties, especially in the cross-examination of some Aboriginal witnesses. I will be doing my best to ensure that counsel do not exploit this cultural difference, and for this reason I may disallow some questions.

11. Similarly the answers 'I don't know' and 'I don't remember' do not always directly refer to the Aboriginal English speaker's knowledge or memory. They can be responses to the length of the interview or to the length of the question, and the difficulty which a number of Aboriginal people have in adjusting to the use of repeated questions.

12. You should also be aware that many Aboriginal English speakers use gestures which are often very slight and quick movements of the eye, head or lips to indicate location or direction.

13. Some concepts, such as time and number are understood by Aboriginal English speakers very differently from Standard English speakers. Hopefully witnesses who do not use numbers and measurements the same way you are used to using them, will not be asked questions by counsel about those sorts of things. The necessary information can be elicited in a different way. However, it may be that a witness will say that it was five o'clock, for example, or that there were six people present at the time, and if this happens you should be aware that this may not always be reliable. I would expect counsel will try to make this clearer to you with further questioning, should this kind of thing occur.

Hearing Problems

14. Many Aboriginal people suffer from hearing problems. It has been estimated that hearing loss is as high as 40 per cent in some Aboriginal communities. It may be that if a witness has a hearing difficulty, he or she may have problems understanding questions put to them, and answer inappropriately, or ask for the question to be repeated.

15. Sometimes Aboriginal English speakers speak very softly and are hard to hear. If you are having trouble hearing the evidence, please let me know at once. Usually what happens is that counsel, who is used to this, will repeat the witness's answer, and I will do my best, as will counsel for the other side, to ensure that the witness's evidence has been repeated to you accurately.