- **Traditional Aboriginal concepts of collective responsibility or guilt may influence the making of confessions or admissions**

  Case: *Bolton v Nielsen* (1951) 53 WALR 48

  Facts: the two Aboriginal appellants had been convicted, along with two others, of the theft of a car battery. There had been no evidence implicating them in the theft: they had been arrested on the basis of a conversation which apparently implicated them in the theft. Ultimately the appellants had confessed to the theft.

  Held: appeal allowed. Dwyer CJ emphasised that since Aboriginal notions of "guilt" are often collective ones the courts must be vigilant in admitting the confessional evidence of Aboriginal persons leading traditional lifestyles[53].

7.6.3 *The Anunga* Guidelines

- **The Anunga Guidelines are intended to ensure that the confessional statements of Aboriginal accused persons are obtained fairly**

  In *R v Anunga*[54] Forster J formulated nine guidelines (*Anunga* Guidelines) intended to reduce the difficulties experienced by Aboriginal people in police interrogations, in particular:

  - that Aboriginal people often don't not understand English words or concepts, many of which are incapable of translation into Aboriginal languages;
  - that many Aboriginal people tend to answer a question in the manner which they suppose the questioner wishes;
  - that many Aboriginal people find the police caution bewildering ("because, if they do not have to answer the questions, why then are the questions being asked?")[55]

  The principles formulated by Forster J in *Anunga* are set out below:

  1. When an Aboriginal person is being interrogated as a suspect, unless he is fluent in English as the average white man of English descent, an interpreter….should be present.

  2. When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) is present. He may be a mission or settlement superintendent or a member of the staff of one of the institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has apparent confidence, by whom he will feel supported.

  3. Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer to administer it in the usual terms and say "do you understand that?" or "Do you understand that 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 the Aboriginal has apparent understanding of his right to remain silent….The problem of the caution is a difficult one but the presence of a prisoner's friend or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.

  4. Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not is not suggested in any way…..

[53] *Bolton v Nielsen* (1951) 53 WALR 48 at 51-52.
[54] (1976) 11 ALR 412
[55] *R v Anunga* (1976) 11 ALR 412 at 413.

5. Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources…..

6. Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen it is particularly important that they be offered a meal…when a meal time arrives. They should also be offered tea or coffee…..[or] a drink of water. They should be asked if they wish to use the lavatory….

7. It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness….

8. Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance…

9. When it is necessary to remove clothing for forensic examination or the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

- **The *Anunga* Guidelines are not they universal, nor are they static**

In *Coulthard v Steer*[56] Muirhead J pointed out that not all Aboriginal people suffer the disadvantage with which the Court in *Anunga* was concerned. His Honour stated that the Guidelines are not absolute and that they do not apply to every situation in which Aboriginal people are questioned. Muirhead J noted that in *Anunga* the Forster J had not suggested that the Guidelines were "universal"[57].

In *Gudabi v R*[58] the Full Court of the Federal Court (Woodward, Sheppard and Neaves JJ) commented that the *Anunga* Guidelines are not rules of law, breach of which in any respect would result in confessional material being rejected as inadmissible. The Court noted that the *Anunga* Guidelines had been formulated in 1976; that social conditions and values, community standards and expectations had changed, and would continue to change. While the basic principles underlying the *Anunga* guidelines remained valid their application "must reflect changes in society." [59]

The Court also emphasised that the choice of a "prisoner's friend" must be left entirely to the choice of the person to be interviewed, that person having been told that the role of the prisoner's friend is to give support or help. Although police officers should not try to influence the choice of prisoner's friend, that did not mean that the investigating officer should not give assistance in securing the services of a prisoner's friend, so long as that assistance is at the express request of the suspect.

7.6.4 The Application of the *Anunga* Guidelines in Western Australia

- **Western Australian caselaw generally indicates that the *Anunga* Guidelines provide a useful yardstick in assessing the fairness of a confessional statement**

Recently, in *Siddon v State of Western Australia*[60] McKechnie J commented that "[t]he exact status of the *Anunga Rules*….in Western Australia has been the subject of differing views".[61]

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[56] (1981) 12 NTR 13.
[57] *Coulthard v Steer* (1981) 12 NTR 13 at 17.
[58] (1984) 52 ALR 133.
[59] *Gudabi v R* (1984) 52 ALR 133 at 139. See also *inter alia R v Weetra* (1993) 93 NTR 8; *R v Mangaraka* (Unrep. Sup Ct NT, Martin J, No 29 of 1993, 9 June 1995); *R v Echo* (1997) 136 FLR 451.
[60] [2008] WASC 100.
[61] *Siddon v State of Western Australia* [2008] WASC 100 at [21].

In 1982, in *Brooking v Dunlop*[62] Pidgeon J commented that s 49 (1) *Aboriginal Affairs Planning Authority Act 1972* (WA) (AAPAA), not the Anunga Guidelines, was the applicable law. [63] However, his Honour went on to say that "some of the guidelines expressed in the *Anunga case* may be of assistance in deciding, in a particular case, whether the evidence is admissible or whether there is unfairness." Pidgeon J added:

> "Circumstances surrounding an accused person may in a particular case may make it necessary, if practical, to have present a "prisoner's friend" in order to establish that the confession was voluntary."[64]

In 1983, in *Gibson v Brooking*[65] Wallace J commented that the Anunga Guidelines:

> "are not law in the State of Western Australia and are not absolute in any event."[66]

Subsequently, in a series of Western Australian cases, including *Webb v R* (below), affirmed the relevance of the Guidelines.

Case: *Webb v R* (1994) 13 WAR 257

Facts: the appellant, an Aboriginal male of low intelligence, and with mental impairment, had been convicted of aggravated sexual assault. At trial counsel for the appellant had informed the presiding judicial officer that he intended to challenge an oral admission, and a confession made in a written record of interview, which the Crown had applied to admit into evidence. A voir dire was held, after which the judicial officer ruled that that evidence was admissible, but gave no reasons. On appeal it was argued *inter alia* that the Commissioner had failed to consider the voluntariness of the confession and whether, in all the circumstances, the admission of the confession was unfair to the appellant [67].

Held: appeal allowed. Malcolm CJ concluded that the Commissioner should have taken the Anunga Guidelines, which indicate what is required by way of fairness when a person of Aboriginal descent is questioned by police, into account. His Honour affirmed the remarks of Wallace J in *Gibson v Brooking* that "the *Anunga* rules do not have the force of law in Western Australia and are not absolute" and continued:

> "[The *Anunga* rules] are essentially guidelines indicating what is required by way of fairness when a person of Aboriginal descent is being questioned by police."[68]

Ipp J also affirmed that the *Anunga* Guidelines are not binding in Western Australia, or absolute, but added that in appropriate circumstances:

> "the Anunga Rules give a very good indication of what ordinarily would be regarded as a fair interrogation. In *Williams* [(1992) 8 WAR 265] Rowland and Owen JJ remarked (at 273) that 'something akin to a departure from the Judges' Rules or the Anunga Rules" can give rise to unfairness.'"[69].

In 1996, in *R v Nandoo*[70] Owen J commented that the Anunga Guidelines were to be regarded as "a very convenient and desirable guide when looking to the circumstances in which confessional material is obtained."[71]

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[62] Unrep., Sup Ct WA, Pidgeon J, Appeal No. 365 of 1982.
[63] Until its repeal in 2004, s 49 (1) AAPAA provided inter alia that in any proceedings in respect of an offence punishable in the first instance by a term of imprisonment for six months or more, the court shall refuse to accept an admission of guilt before trial in any case where the court is satisfied upon examination of the accused person that he is a person of Aboriginal descent who from want or comprehension of the nature of the proceedings alleged, or of the proceedings, was not capable of understanding that that admission or confession
[64] *Brooking v Dunlop* (Unrep., Sup Ct WA, Pidgeon J, Appeal No. 365 of 1982) p 8.
[65] [1983] WAR 70.
[66] *Gibson v Brooking* [1983] WAR 70 at 75.
[67] A further ground of appeal was non-compliance with the requirements of s 49(1) 49 *Aboriginal Affairs Planning Authority Act 1972*.
[68] *Webb v R* (1994) 13 WAR 257 at 259.
[69] *Webb v R* (1994) 13 WAR 257 at 266.
[70] Unrep., Sup Ct WA, Owen J, No 130 of 1996, BC 9605522).
[71] *R v Nandoo* (Unrep., Sup Ct WA, Owen J, No 130 of 1996, BC 9605522) at 7.

In *R v Njana*[72] Scott J expressed the view that the *Anunga* Rules should be used as guidelines within the flexibility dictated by commonsense, and should be adhered to where practicable."[73]

Note 1: in 2004 s 49 AAPAA was repealed and the scope of s 129(2)(b) of the *Criminal Procedure Act 2004* (WA), which replaced it, is not as broad. In that context, the *Anunga* Guidelines may assume increased importance: see the discussion of the recent Kimberley TaskForce cases, below.

Note 2: The *Anunga* Guidelines have been incorporated into the Western Australian Police Commissioner's Orders and Procedures Manual (COPS Manual).

- **Recent developments: the Kimberley TaskForce prosecutions**

McKechnie J has discussed the application of the *Anunga* Rules in a number of cases being prosecuted in 2008 pursuant to the Kimberley TaskForce initiative, including *Siddon v State of Western Australia* (below).

Case: *Siddon v State of Western Australia* [2008] WASC 100

Facts: the accused, who had been charged with indecent dealing, applied for an order to exclude a video record of interview (VROI) from evidence. Two policemen had approached the accused and asked him to accompany them to the police station (located two houses away) to speak with them about the events in question. The accused had been placed in the "cage" at the back of a police vehicle and driven to the police station. One of the police officers gave inconsistent evidence about whether the accused had been told at any time that he was under arrest. At the police station, the officer had asked the accused whether he needed anyone to come and sit with him while they had "a bit of a chat" and the accused had replied in the negative.

Held: the VROI had been made involuntarily, and was therefore inadmissible. McKechnie J found that the accused had not been told at any time that he was not under arrest or that he was otherwise free to go. The events established that, far from being "a bit of a chat", the interview was a formal interview relating to a serious allegation. McKechnie J stated that the diminution of the importance of the interview to the accused meant that he could not be satisfied that the accused "understood his rights to have a support person available".[74] Noting that the *Anunga* Rules had been adopted by the Western Australian Commissioner of Police in the COPS Manual, McKechnie J commented that, while the *Anunga* Guidelines are not binding, a failure to follow them "may give a strong indication that an interview was not voluntary"[75]. His Honour was not satisfied that the accused had understood the caution; rather the interviewing officers had paid only "only lip service…. to the need to ensure that the accused understood his right to answer questions"[76]. McKechnie J's conclusion that the confession had been made involuntarily was "reinforced by the unlawful detention of the accused for the purpose of questioning and the failure to emphatically inform him that he was free to leave."[77]

[72] (1998) 99 A Crim R 273.
[73] *R v Njana* (1998) 99 A Crim R 273 at 280.
[74] *Siddon v State of Western Australia* [2008] WASC 100 at [20].
[75] *Siddon v State of Western Australia* [2008] WASC 100 at [21].
[76] *Siddon v State of Western Australia* [2008] WASC 100 at [24].
[77] *Siddon v State of Western Australia* [2008] WASC 100 at [34].

Case: *Bundamurra v State of Western Australia* [2008] WASC 106

Facts: the accused, who had been charged with sexual offences, was a senior warden at Kalumburu. He had sat in on interviews conducted by police with suspects in the past, but had no education or training in respect of the rights of accused persons in custody. The accused had been cautioned prior to and during the course of the video record of interview (VROI). He had chosen his brother as an "interview friend", but it appeared that his brother, who had not sat in on such interviews before, was not particularly aware of the purpose of his role.

Held: that although the accused had been unlawfully detained in custody at the time of the interview, the statements in the interview had been given voluntarily. McKechnie J remarked that the *Anunga* requirement of an interview friend "is in some respects patronising because it takes no account of the occupation, education, intellectual capacity or personality of a particular Aboriginal person and purports to be a blanket guideline"[78]. The accused's principal language was English and he had displayed no apparent lack of understanding during the VROI. McKechnie J stated that, on a review of the whole of the VROI, he was satisfied that the accused understood the caution, noting that " [n]ecessarily, such a finding is in part impressionistic, based on the record of interview."[79] McKechnie J emphasised that the VROI needed to be seen in its entirety, with paralingual features such as body language and gestures being taken into account:

> "Not only the verbal communication is important but the non-verbal communication, including nods and shakes of the head and other gestures are to be taken into account.[80]

McKechnie J concluded that the fact that the accused's detention had been unlawful, and that apparently the accused's brother had "no appreciation of his task" as an interview friend, were relevant to the voluntariness of the VROI, but they did not render it involuntary. His Honour ruled that the VROI (with the exclusion of certain inadmissible parts) could be admitted into evidence.

See also: *Djanghara v State of Western Australia* [2008] WASC 102. In that case the applicant sought to exclude a video record of interview (VROI) from the evidence. McKechnie J commented that the applicant was a traditional Aboriginal person from a remote community who lacked the advantages that others might have in interacting with police. The accused had chosen his wife as his interview friend, but she had left the room on two occasions. A mission superintendent, who was also present, at one point said to the accused that he thought he should answer the questions as "it would be to his advantage". McKechnie J found that the accused had understood the caution; that it was "not for the police to specify who the friend should be"[81]; and that the mission superintendent was not in a position of authority over the accused and had not induced him to respond to the questions. His Honour ruled that the VROI had been obtained voluntarily, and that there was no basis to reject it on the exercise of judicial discretion.

[78] [2008] WASC 106 at [15].
[79] [2008] WASC 106 at [20].
[80] [2008] WASC 106 at [21].
[81] [2008] WASC 102 at [4].