

Communication with Aboriginal Speakers of English in the Legal Process¹

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This paper provides an overview of sociolinguistic issues concerning communication in the legal process between non-Aboriginal people using General Australian English and Aboriginal people using other varieties of English. It draws on three types of evidence: published research, specific cases, and communication with Aboriginal people, lawyers, judges and magistrates. Specific cases exemplify distinctive Aboriginal features of English in grammar, accent, vocabulary, pragmatics, discourse structure and cultural presuppositions. The paper also considers some of the ways in which legal professionals are engaging with intercultural communication issues raised by sociolinguists. Despite some promising recent developments, a recent case highlights implications for other legal decision-makers, namely jurors.

Keywords: English; Aboriginal English; Law; Intercultural Communication

1. Introduction

It is 20 years since the Royal Commission into Aboriginal Deaths in Custody handed down its wide-ranging multi-volume report addressing the ‘overwhelmingly different’ rate at which Aboriginal people are taken into custody (Johnston 1991: 6). But the rate remains disturbingly high, and Aboriginal people are still 20 times more likely to come into contact with the criminal justice system than non-Aboriginal people (Findlay *et al.* 2005: 326). Statistics for 2010 show that Indigenous people are imprisoned at 14 times the rate of the general population (age adjusted figures), while Indigenous young people are in juvenile detention at 22 times the rate

¹ This article is based on part of a talk presented in the AIATSIS ‘Language in Public’ seminar series in May 2011, and draws from a number of my publications, as cited here.

of the general population (SCRGSP 2011).² These statistics, and the central role of language in all legal processes, indicate the significance of legal contexts for consideration of any language and communication issues involving Aboriginal people. This paper provides an overview of sociolinguistic issues concerning communication in the legal process between non-Aboriginal people using General Australian English and Aboriginal people using other varieties of English. It draws on three types of evidence: published research, specific cases and my ongoing communication, informally with Aboriginal people, and both formally and informally with lawyers and judicial officers (=judges and magistrates).

In addition to the area of criminal justice, the other main legal contexts in which Aboriginal people participate are the tribunals and courts which deal with land claims and, more recently, native title claims. In the more remote regions of Australia, 'traditional' Aboriginal languages play an important role in both of these areas of law.³ This paper will not deal with issues affecting people who use traditional Aboriginal languages in their dealings with the law (see Cooke 1995a, 1995b, 1995c, 1996, 1998, 2002, 2004, 2009; Goldflam 1995; Gray 2000; Henderson & Nash 2002; Mildren 1999; Neate 2003; Walsh 1994, 2008). Also this paper will not deal with Kriol (see Malcolm 2008a, 2008b; Munro 2000). Given the need for speakers of creole languages who are not also fluent in English to be provided with interpreting assistance, the intercultural communication issues affecting them differ from those for speakers of varieties of English, and are outside the scope of this paper. However, it should be noted that there are complex relationships between the creoles and 'heavy' (basilectal) Aboriginal English, which warrant future research in terms of intercultural communication in the legal process.

There are several different kinds of English spoken by Aboriginal people. In much of southern Australia, traditional languages are no longer spoken fluently or on a daily basis, but Aboriginal ways of communicating remain strong through the use of dialectal varieties of English often termed 'Aboriginal English' (Malcolm 2008a, 2008b; Malcolm & Grote 2007). Aboriginal English involves systematic dialectal differences from General Australian English in accent, grammar, word choice and meaning, pragmatics, discourse structure and cultural presuppositions. There are no statistics indicating the proportion of Aboriginal people who speak Aboriginal English. It is possible that some Aboriginal people who speak no traditional language also use no features of Aboriginal English. And it is certain that some people use features of Aboriginal English in in-group interactions with family and friends, but not in out-group interactions, while many people speak Aboriginal English in all contexts.

In many remote northern and central regions of Australia, varieties of English are spoken in addition to traditional languages and Kriol. Some people who speak traditional languages as mother tongues speak a dialectal variety of Aboriginal English

² Note that while the SCRGSP figures do not separate Aboriginal people from Torres Strait Islanders, it is beyond the scope of this paper and my expertise to consider Torres Strait Islander people in the legal process.

³ While the use of the term 'traditional' to refer to certain Aboriginal languages and groups can be problematic, it appears to be the most suitable term for non-English related Aboriginal languages.

as a second (or third or *n*-th) language. Others are not fluent in English, but speak it as an interlanguage. This term refers not to a stable, rule-governed language variety, but to the linguistic systems of learners of English, which are often in flux and highly variable, while nevertheless showing some patterned variation. Thus, Aboriginal people who speak traditional languages as their first language may also speak a dialectal variety of Aboriginal English, or they also may speak interlanguage English (Aboriginal Learner's English in Cooke's (2002) terms). In this paper I use the description 'Aboriginal speakers of English as an additional language' to refer to both groups of people, when distinguishing them from people who speak Aboriginal English as their first language.

The term 'Aboriginal ways of speaking English' refers to the use of (some) features distinctive to Aboriginal speakers: this includes dialectal varieties of Aboriginal English (ranging from 'heavy' to 'light', or further from and closer to General Australian English) as well as Aboriginal Learner's English. In Section 2, I discuss some examples where distinctive Aboriginal features of English have been shown to impact on intercultural communication in the legal system. Section 3 turns to the provision of (socio)linguistic information to lawyers and judicial officers about Aboriginal ways of using English. In Section 4, I raise the problem of assuming that education and awareness will necessarily lead to more effective intercultural communication and respect for different ways of using English. Section 5 considers developments aimed at providing (socio)linguistic information about Aboriginal ways of using English to members of juries. In Section 6, the paper concludes with the inherent reciprocal nature of intercultural communication, and the ongoing need for sociolinguists to engage with legal professionals, including judicial officers, about communication with Aboriginal speakers of English.

2. Distinctive Aboriginal Features in English

2.1. Grammar, Accent and Vocabulary

Investigations of distinctive features of grammar, accent and vocabulary in the legal process have primarily focused on Aboriginal people in the Northern Territory who speak English as an additional language.

For example, Cooke (2002: 9) has found a recurrent problem with Aboriginal suspects' understanding of the basic right to silence, which is a fundamental entitlement. Police officers are obliged to inform suspects of this right at the beginning of any interview. This speech act, which is referred to legally as 'the caution', typically centres on the expression *you don't have to answer my questions*. While this is clearly Plain English and does not involve complex grammar or vocabulary, it can be confusing to Aboriginal speakers of English as an additional language. There are two possible negations of the English modal clause *you have to*, namely *you are obliged not to* and *you are not obliged to*, which can be expressed in General Australian English as *you mustn't* and *you don't have to* respectively. For many Aboriginal people in the Northern Territory who speak English as an additional

language, there is confusion over these two English expressions, and the expression *you don't have to* is often used to mean *you must not*. Cooke points out that this difference is crucial to understanding the standard caution in police interviews. When police officers say to suspects *you don't have to answer my questions* (meaning *you are not obliged to answer my questions*), this can be confusingly interpreted by some people as *you must not answer my questions* (meaning *you are obliged not to answer my questions*). Clearly this linguistic difference and resulting confusion between obligation and permission can have serious implications for the rights of Aboriginal suspects in police interviews. Evans (2002: 87–92) also discusses linguistic difficulties with English modal verbs in the Northern Territory, in his study of a native title sea claim.

Linguistic problems in land claim hearings were first highlighted more than 25 years ago, when Koch (1985) drew attention to a number of problems which stem from differences—often unrecognized—in grammar, accent, word choice and meaning in the English used in the evidence of Aboriginal people in Central Australia who were speaking Kaytetye or Warlpiri as their first language (Koch 2011: 440). In this study, valuable evidence of miscommunication was provided by the official typewritten courtroom transcript, which contains a number of discrepancies (see also Walsh 1999). An apparently simple example illustrates accent, grammar and vocabulary. An Aboriginal witness explained to the court about the relationship between a particular man, and another whose name was Charcoal Jack. His explanation *Charcoal Jack properly his father*, would translate into General Australian English as 'Charcoal Jack is his real father'. But it was heard (and transcribed) as '... probably his father' (Koch 1985: 180) as the transcriber did not know that many Aboriginal speakers of English as an additional language do not distinguish voicing in stop consonants.⁴ This example also illustrates lexical and grammatical difference, as the adverb *properly* is used by many Aboriginal speakers of English as an additional language with the same meaning as the General Australian English adjective *genuine*. These phonological, grammatical and lexical differences combined with a cultural difference, namely the use of the word *father* to refer to a person's biological father as well as any of this biological father's brothers (and thus the qualification *properly* to specify a person's 'real' or biological father). The witness was not expressing lack of certainty about the relationship. On the contrary, he was being specific about what kind of father-relationship was involved. A small example such as this reveals the extent of potential miscommunication between related varieties of English, where even seemingly small differences can cause considerable communication difficulties.

The impact of small differences in the meanings of words is also highlighted in a 2005 criminal case involving an Aboriginal man on the NSW central coast, who speaks English as a first language, and no other language. Elsewhere (Eades 2010:

⁴ This example also illustrates a distinctive grammatical feature commonly used by Aboriginal speakers of English, in which equational sentences are expressed by juxtaposition of two noun phrases, with no need for the copula verb.

173–175), this man has been described as a speaker of a light variety of Aboriginal English. The accused man was charged with murder after he stabbed his drunk and out-of-control brother. In his police interview, the accused gave specific details of his brother's drunken violence on numerous occasions. He also summarized this behaviour in several answers, in terms such as *that's the way he carries on when he's drunk*, and *he carries on silly like that*. The expression *carrying on silly* in General Australian English could refer to actions such as singing the national anthem in a falsetto voice. But this is not what the accused was talking about: for Aboriginal speakers of English, *silly* is often used to mean 'wild or violent as a result of being drunk' (Arthur 1996: 110). As his answers in the police interview should have made clear, the accused was talking about his brother *smashing up things*, and causing serious injury to people, such as fracturing the spine of the accused with a golf club on one such occasion. But, in their written summary of the police interview, the police focused on the accused man's repeated use of the expression *he was carrying on silly*, which they decontextualized and interpreted in terms of the General Australian English meaning, writing '[the accused] said he'd had enough of his brother's antics'. This police summary obscured the reason for the accused making the attack on his brother, explaining it in terms of impatience with antics, rather than an attempt to stop a dangerously violent person. This case reveals how dialectal differences in word meaning can sometimes make a crucial difference in understanding: following receipt of the sociolinguistic report, the prosecutor dropped the murder charge, substituting it with a charge of manslaughter to which the accused pleaded guilty. This case also highlights the importance of Arthur's (1996) lexicon of Aboriginal English.

Examples of grammar, accent and vocabulary difference impacting on communication with Aboriginal speakers of English as their first language (and often their only language of regular usage) are little reported. I found few such examples in a mid-1990s study over several months in the District (intermediate) Court of a country town in New South Wales, referred to by the pseudonym of Mapletown (Eades 2000). However, where communication problems involving differences in accent, grammar and vocabulary did occur, the strict controls on talk in court, combined with the ignorance of many lawyers and judicial officers about the possibility of such differences, sometimes lead to humorous situations. Thus, one Aboriginal woman began an answer to a question with *My helders told me*. The judge interrupted at that point, unable to understand the word *helders*, and seemingly unaware of the common Aboriginal English tendency to use hypercorrection by adding *h-* to the beginning of vowel-initial words. The witness appeared unable to understand what the judge could not understand, and repeated the word with raised volume. This misunderstanding-exchange was repeated several times, much to the amusement of people in the public gallery—relatives of the people involved in the hearing, plus me—all of whom knew exactly what the witness meant. But we all knew we could not speak in court (without the risk of being charged with contempt of court). The judge then settled on the meaning *eldest*, asking *your eldest son? or*

daughter? At this point the witness's lawyer finally realized what she had meant, and gave the General Australian English translation *elders*.

2.2. Pragmatics

For Aboriginal speakers of English as their first language (and often their only language of regular usage), it is features of pragmatics which appear to have the greatest importance for their participation in the legal process. The two most relevant features are silence, and gratuitous concurrence. It appears that these pragmatic features of use are also relevant to communication with Aboriginal speakers of English as an additional language as well as speakers of traditional languages (see Cooke 2002, 2009; Liberman 1981, 1985; Mildren 1999; Walsh 1994).

The widespread Anglo convention of interpreting silence as indicating some kind of communication trouble can play an important role in the legal system, where silence in answer to a question is generally 'interpreted to the detriment of the silent person', such as implying that the person being asked the question has something to hide (Kurzon 1995: 56). This interpretation is not shared with many Aboriginal people, who often use lengthy silences in either formal or informal interaction, and who find them neither uncomfortable or remarkable (Eades 2007a; Mushin & Gardner 2009). Indeed, silence is an important and positively valued part of many Aboriginal conversations, often indicating a participant's desire to think, or simply to enjoy the presence of others in a non-verbal way.⁵ This difference in the use and interpretation of silence can have serious implications for police, lawyers and courtroom interviews of Aboriginal people. Aboriginal silence in these settings can easily be interpreted as evasion, ignorance, confusion, insolence or even guilt. According to law, silence should not be taken as an admission of guilt, but it can be difficult for police officers, legal professionals or jurors to set aside strong cultural intuitions about the meaning of silence, especially when they are not aware of the cultural differences. Further, a misunderstanding of Aboriginal ways of using silence can lead to lawyers interrupting an Aboriginal person's answer. Interruption is typically defined in terms of a second person starting to talk before the first speaker has finished talking. But given that the first part of an Aboriginal answer often starts with silence, then to start the next question before the Aboriginal interviewee has had the time to speak, is in effect to interrupt the first part of the answer.

Compounding the impact of Aboriginal silences in the legal process, is the very common Aboriginal conversational pattern of freely agreeing to propositions put to them in Yes–No questions, regardless of their actual agreement, or even their understanding of the question. This interactional feature, which is found in Aboriginal conversations throughout Australia, has been named 'gratuitous concurrence' by Liberman (e.g. 1981, 1985), who explains it as (1981: 248–249):

⁵ Some similarities can be noted with the use of silence in Native American societies (e.g. Basso 1970).

a strategy of accommodation [that Aboriginal people have developed] to protect themselves in their interaction with Anglo Australians. Aborigines have found that the easiest method to deal with White people is to agree with whatever it is that the Anglo-Australians want and then to continue on with their own business. Frequently, one will find Aboriginal people agreeing with Anglo Australians even when they do not comprehend what it is they are agreeing with.

This phenomenon has long been recognized by people working with Aboriginal people. One-hundred-and-thirty years ago, a British settler in western Victoria (Dawson 1881: iii) documenting the 'languages and customs of several tribes of Aborigines' in that region, explained that:

in obtaining information from the aborigines, suggestive or leading questions have been avoided as much as possible. The natives, in their anxiety to please, are apt to coincide with the questioner, and thus assist him in arriving at wrong conclusions; hence it is of the utmost importance to be able to converse freely with them in their own language.⁶

Further references to earlier and later twentieth century discussions of this pattern can be found in Eades (2008: 92–96). One reason that this pragmatic feature is particularly prevalent in Aboriginal societies relates to the widespread cultural norm that harmony and agreement should be preserved at an immediate level, and differences can be worked out in due time. But the use of gratuitous concurrence in legal contexts can be problematic for Aboriginal interviewees. Once a person has agreed to a proposition in a context such as a police interview, it can have life-changing consequences. It is likely that this pragmatic feature, which has been observed in intercultural communication with Aboriginal Australians for many decades, is also found in some other situations around the world (e.g. Berk-Seligson 2009). Further, it is undoubtedly more prevalent in situations of power asymmetry, which characterize interactions in the legal process. In my experience, this strategy is particularly common where a considerable number of questions are being asked, the situation with both police and courtroom interviews. Undoubtedly, there are now a number of legal professionals who are aware of this Aboriginal strategy of 'gratuitous concurrence', and who exploit this strategy in their questioning of Aboriginal witnesses. Thus it is possible for this strategy to work even more strongly, either in favour of, or against, the Aboriginal witness.

For specific examples of these two pragmatic features, see Eades (2007a, 2007b).

2.3. *Discourse Structure*

The central speech event throughout the legal process is the interview, which relies on one-sided questioning. My early work in southeast Queensland (e.g. Eades 1982) pointed to the significant difference between Aboriginal and non-Aboriginal ways of

⁶ I am grateful to Piers Kelly for drawing my attention to this quote.

seeking information, particularly contrasting the central role of questions in mainstream Anglo communication with much less direct approaches in Aboriginal interactions. Thus, there are a range of problems for Aboriginal people in the law's reliance on interviews (see e.g. Eades 1992, 1994a). This was an important issue in the sociolinguistic evidence in the successful 1993 appeal of Robyn Kina in Queensland, which resulted in her murder conviction being quashed (see Eades 1996, 2003). Kina's own lawyers had never heard her full story, and thus had been unable to provide her with a proper defence. A compelling illustration of cultural differences in the understanding and evaluation of discourse patterns is found in a comparison of the reports of the people involved. The lawyers reported that Kina had been very difficult to communicate with, but she reported that they had asked her questions, and not waited for the answers (also exemplifying the consequences of unrecognized differences in the use of silence).

The impact of discourse structure differences was also powerfully illustrated for a Northern Territory speaker of English as an additional language who was charged with murder, following a police interview in English about an incident in which she had stabbed her abusive partner. Cooke's (1996, 2002) analysis contrasts the police interview, structured by questions and answers (and with no interpreting assistance), with the trial, in which evidence was elicited from the accused through a guided narrative with occasional language support from an interpreter. Being allowed to give evidence in narrative form enabled her to explain 'her feelings, her motivations, and, most importantly, her state of mind' (1996: 283). The person whose short answers to questions structured by interviewing police officers had appeared as a perpetrator of 'wilful murder', was able in court to 'place the killing (which she admitted to) in perspective as a reaction to extreme and continuing violence. Following her evidence, the charge of wilful murder was withdrawn in favour of manslaughter' (Cooke 2002: 10–11).

2.4. Cultural Presuppositions

The NSW Mapletown research (Eades 2000) referred to above also revealed another significant dimension of intercultural communication between non-Aboriginal and Aboriginal speakers of English in court: namely the central role of cultural presuppositions, or taken-for-granted background knowledge shared by members of a sociocultural group. (See also Cooke (1995a) for a powerful example of Western cultural presuppositions about sickness and health in a lawyer's questions which are at odds with Arnhem Land Aboriginal presuppositions in the answers of a speaker of English as an additional language).

The Mapletown study found that cultural presuppositions played an important part on a number of instances in which Aboriginal witnesses were prevented from telling their story by their own lawyer, and in some cases by the judge. This silencing of witnesses was brought about sometimes by interruption of the witness, and at other times by metalinguistic comments about how to answer a particular question,

such as *I don't think it's an answer to the question*. It appeared to occur particularly in situations where legal professionals (whether lawyer or judge) were ignorant about fundamental aspects of the everyday cultural values and practices of Aboriginal people, such as family structure and obligations, and residential arrangements.

The study revealed that lawyers and judges appear to be overly preoccupied with courtroom procedure, which is bound by rigid discourse patterns. It is the individual answers to questions which are the focus of the courtroom interaction, rather than the story which a witness is trying to present to the court. And the study showed how an obsession with the question–answer discourse structure prevents lawyers and judges from realizing how much they fail to understand about some of the Aboriginal witnesses and their evidence. The New South Wales study showed that this lack of understanding resulted not primarily from linguistic difference, but from cultural difference, compounded by limiting linguistic practices, here courtroom discourse structure. For example, when an Aboriginal defendant gave evidence to her good character about having set up a legal service, the judge asked *How did you set up a legal service?*, seeming to invite an explanation. But when the defendant began to explain this, by talking about the social and housing problems in the town she was living in, her own lawyer interrupted, suggesting to the judge that he might be *able to cut through some of this*. The judge replied *Good . . . you put it in legal terms for me*. Interestingly, the ‘legal terms’ did not involve any special vocabulary, merely the lawyer organizing and summarizing the defendant’s story in short *yes–no* questions. Any attempts by the witness to give more than a *yes* or *no* answer were interrupted by her lawyer’s next question (see Eades (2000: 181–186) for details).

The Mapletown study focused on the questioning of Aboriginal witnesses by their own lawyers in direct examination, or by the judge. The finding that witnesses were often silenced corresponded to a widespread feeling in the Aboriginal community that ‘the court doesn’t really want to hear what people have to say’ (Eades 2000: 168). It was impossible to determine the impact of this silencing on the judicial outcomes for Aboriginal defendants. It may be possible that while disempowering Aboriginal defendants in terms of having their voice heard in court, such silencing strategies actually work positively in terms of judicial outcomes.⁷ That is, there may be strategic advantages for Aboriginal witnesses in saying very little in court in sentencing hearings, despite the frustrations at not being heard. Such frustration is of course not limited to Australian Aboriginal witnesses (see Conley & O’Barr 1990: 172); it connects to bigger questions about the legal process, which impact many people, such as the right to tell your own story in your own way versus the strategic reasons for allowing lawyers to control and manipulate it.

The central role of culture in communication is now recognized by the legal system in the workings of recently established Indigenous courts, such as Nunga Court in South Australia, Circle Sentencing in NSW and ACT, Koori Court in Victoria, Murri

⁷ This dilemma is not unlike that discussed by Trinch (2003) about the transformations made by lawyers to the stories of Latina women in domestic violence cases in the United States.

Court in Queensland, Community Court in Western Australia and the Northern Territory. In these courts, elders and respected people from local Indigenous communities sit with the magistrate to talk with defendants who have pleaded guilty, before the magistrate decides on the sentence. As these Indigenous courts are an addition to the sentencing process, they are not bound by rules of evidence, and witnesses speak directly, without lawyers. Defendants' personal, family and social situations are examined in a 'power-sharing' legal context in which local cultural beliefs, lifestyles and practices (including ways of communicating) are recognized as central to the issues which need to be addressed in relation to the offender's actions, relationships and sentencing (see Marchetti & Daly 2007; Stobbs & MacKenzie 2009; Eades 2010: 225–228). Stroud's (2006) initial investigations in the Koori Court in Victoria suggest that the participation of Aboriginal elders is an important factor in this court's recognition of cultural values and Aboriginal speaking styles. This positive development in the participation of Indigenous people in the legal process is, however, currently limited to some of the lower court matters where accused persons have pleaded guilty.

3. Intercultural Communication Awareness for Legal Professionals

The first publication specifically providing (socio)linguistic information to the legal profession about Aboriginal ways of using English appears to be the lawyers' handbook titled *Aboriginal English and the Law* (Eades 1992), published by the Queensland Law Society. Since then, there have been a number of reports and articles about communicating with Aboriginal people in the legal system directed to the legal profession, written by linguists (e.g. Cooke 2002, 2009; Eades 1994b) and judicial officers and lawyers (e.g. Gray 2000; Mildren 1997; Lauchs 2010). Growing recognition within the legal process of the need to be informed about Aboriginal ways of using English appears to be due, to a considerable extent, to the firm belief of informed and experienced legal professionals—including some very senior judges—that an understanding of this issue is essential to the delivery of justice. On some occasions a particular case appears to have been the catalyst, as for example in the reaction of the Queensland Attorney-General to the 1993 appeal court decision in the case of Robyn Kina (mentioned in Section 2.3 above). On the day following the decision to quash Kina's conviction, the Attorney-General spoke about 'the need for the legal system to have knowledge of the problem of cross-cultural communication and be sensitive to it' (7.30 Report, ABC television, 30 November 1993).

The *Aboriginal English and the Law* lawyers' handbook (Eades 1992) has been extensively drawn on in a number of government publications, including the Queensland Criminal Justice Commission's report on Aboriginal witnesses in criminal courts (CJC 1996). In 2000 it was adapted by the Queensland Department of Justice (2000) to form the basis of its *Aboriginal English in the Courts* handbook, and it is the source for the section titled 'Dealing with Aboriginal children' (pp. 9–11) in that department's guide for legal practitioners about juvenile justice (1997).

Although based on Queensland research, and written for legal practitioners in that state, it has been cited as helpful and relevant to lawyers in Northern Australia (Lavery 1992: 13), and to the native title process nationally (Ritter & Garnett 1999: 3). Much of the handbook is now incorporated in the benchbooks of several states: these are books prepared for judicial officers on a range of topics about the conduct of court proceedings (not on substantive law). The most comprehensive such publications in relation to communication with Aboriginal witnesses are the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith 2008), and Chapter 9 in Queensland Supreme Court's (2005) *Equal Treatment Benchbook* (see also Section 2 in the NSW *Equality before the Law* benchbook).

To date, there has been no published sociolinguistic work which deals with Aboriginal speakers of English in police interviews, which is clearly an area for future research, but a team of Western Australian linguists who carried out a small interview study with police officers about their communication with Aboriginal people have urged the need for greater linguistic and cultural awareness training for the police (Rochecouste *et al.* 2009).

There is evidence that many legal professionals have some awareness about Aboriginal ways of using English. For example, in a workshop I presented to Western Australian judges and magistrates in 2008, most of the 50 or so present reported that they were aware of the phenomenon of gratuitous concurrence (although on the other hand none of them appeared to know the distinctive Aboriginal use and meaning of the word *deadly*).⁸ And my courtroom observations provide cause for optimism that some magistrates, judges and lawyers are aware of some of the relevant communication issues. For example, the Mapletown study, discussed in Sections 2.1 and 2.4 above, found that some lawyers used their knowledge of the positive Aboriginal use of silence to the advantage of their clients, as illustrated in the example below, from a sentencing hearing in the case of an Aboriginal defendant who pleaded guilty to assault. In answering questions which could help to establish grounds for minimizing the severity of his sentence, he was invited by his lawyer to show remorse for his actions to the judge (Eades 2000: 172):

29. DC: And do you tell His Honour that you know you shouldn't- and that you're sorry for having done that?

30. W: Uh well- yeah- I am- sorry (6.7) when we're not- oh sorry- when we're not drinkin' you know- we don't even fight or nothin'- you know- when we're drinking it's a bit of a problem- it's one of them things- drinking.

The witness answered with a formulaic apology, and the very long 6.7 second silence which followed would not be allowed by many lawyers. But we can see the power of the witness's silence, which was not interrupted by the lawyer (or judge). After this long silence, the defendant provided a personal, honest-sounding

⁸ In Aboriginal English *deadly* means excellent or fantastic, in contrast to the General Australian English meaning of capable of producing death.

explanation. This can be helpful to a typical defence strategy of suggesting that the most appropriate sentencing should include alcohol rehabilitation (which was the outcome in this case), rather than a prison sentence.

4. Using Intercultural Communication Awareness Against Aboriginal Witnesses

But informing and educating lawyers and judicial officers provides no guarantee that communication with Aboriginal people will be more respectful and accommodating of different ways of using English. Indeed, an important Queensland case in the mid-1990s highlighted the danger of assuming that intercultural communication awareness can improve communication with Aboriginal witnesses. This was the Pinkenba case, in which three young teenage Aboriginal boys were prosecution witnesses in the case against the six police officers charged with their abduction. (There was never any dispute that the boys had been approached by police officers late one night, who took them 14 kilometres out of town ‘for a ride’ and abandoned them in a swampy industrial wasteland.)

For example, the manipulation of Aboriginal ways of using English was central to the cross-examination of the boys, particularly in relation to gratuitous concurrence, and silence. This was made overt in comments by defence counsel such as *we have to take your silence as ‘no’* (Eades 2008: 111), and *your silence probably answers [the question]* (114). It was clearly impossible for the 13- and 15-year-old young teenagers to provide a metalinguistic analysis in answer to such questions. And it would be hard to argue that such questions were naively asked in the absence of a knowledge of Aboriginal ways of using English, given that the two defence counsel had at the Bar table a copy of the handbook for lawyers (Eades 1992). As I have discussed elsewhere (e.g. Eades 2004, 2008, 2012), this handbook, which had been written to assist lawyers in more effective communication with Aboriginal witnesses, appears to have been used to make things worse in terms of intercultural communication.

Should we conclude, therefore, that providing information about Aboriginal ways of using English simply provides a weapon that can be used against Aboriginal witnesses? When I asked lawyers about this possibility before writing the handbook, I was assured that the adversarial balance of the common law trial process would ensure that this is not the case. This is probably true for most cases, but the Pinkenba case was both unusual and extreme, because it involved a very serious and highly contested hearing, in which not one, but six police officers were charged with abuse of Aboriginal people, and in which the only evidence against the charged police officers was that of the Aboriginal boys. Further, the case reversed the typical situation in which police officers provide prosecution evidence against accused Aboriginal people.

Elsewhere (e.g. Eades 2006, 2008, 2012), I have argued that the Pinkenba case has to be understood in terms of the ongoing struggle—which began early in the colonial period—between the State and Aboriginal people over the rights of police to control their movements. Further, detailed analysis has shown that much more was involved

in this hearing than the manipulation of Aboriginal ways of using English. Such linguistic mechanisms as asking questions with damaging presuppositions, and making subtle and not-so-subtle changes to the words used by witnesses to describe their experiences, are used to varying degrees in many courtroom hearings: in this case it was their extreme use, combined with the manipulation of Aboriginal ways of using English, that worked to retell the boys' story. As a result, rather than being acknowledged as victims of police abuse, the boys were redefined as criminals with 'no regard for the community', and their alleged abduction was reinterpreted as the boys voluntarily giving up their liberty while the police took them for a ride.

5. Jury Directions about Aboriginal Ways of Speaking English

While the previous two sections have considered intercultural communication awareness for lawyers and judicial officers, in many cases the legal decision-makers are the members of the jury. In this section we consider the issue of recognition by jurors of Aboriginal ways of using English. In 1995, the Criminal Justice Commission in Queensland asked Justice Dean Mildren of the Northern Territory Supreme Court and myself to prepare a set of directions to be given to juries in Queensland cases involving Aboriginal witnesses who are speakers of Aboriginal English (published in CJC (1996: A9–11), and see also Mildren (1997, 1999)).⁹ These directions have also been published in Queensland Supreme Court's 2005 *Equal Treatment Benchbook* (Appendix B in Chapter 9). While Justice Mildren has been using such jury directions in the Northern Territory Supreme Court for more than 10 years, they are reportedly not used in Queensland (Lauchs 2010: 17; see also Fryer-Smith 2008: 7.9–7.10).

The problems in trying to provide such information to jurors are highlighted in a 2006 New South Wales murder trial of a (non-Aboriginal) man for the murder of one of three local Aboriginal children in the small country town of Bowraville.¹⁰ The prosecution was intending to call 50 Aboriginal witnesses from a northern NSW Aboriginal community where Aboriginal ways of interacting, including ways of using English, are strong. The investigating police officer asked me to report on communication issues which might cause difficulties for the Aboriginal witnesses to tell the court what they had seen and what they knew that was relevant to this case, and for their evidence to be understood. In this report I wrote about several ways in which Aboriginal ways of using English differ from mainstream Anglo ways, such as gratuitous concurrence and the use and interpretation of silence, discussed in Section 2.2 above. This report included a recommendation about directions to the jury similar to those prepared for the Queensland CJC (1996) report, discussed above. However the barrister who led the prosecution in the trial was not willing to take up my report's recommendation about directions to the jury. The brief courtroom

⁹ A version of the directions was modified by Helen Harper for speakers of Torres Strait Creole.

¹⁰ This case is an important one for Aboriginal people's participation in the criminal justice system for many reasons, some of which are discussed in Knox (2010), and the 2011 ABC TV Four Corners documentary titled *Bowraville: Unfinished Business* (4 April 2011).

discussion about the substance of the sociolinguistic report is illuminating. The defence barrister said that he ‘did not dispute the general thrust of Dr Eades’ observations’, saying that ‘many people from the background of a large number of witnesses in this case do have the sorts of communication eccentricities, to put it neutrally, as suggested by Dr Eades’. The fact that a lawyer can refer to dialectal features described in a sociolinguistic report in terms of ‘communication eccentricities’, and can attribute ‘neutrality’ to such a derogatory description of linguistic features, shows just how little recognition and understanding there is about dialectal differences.

6. Conclusion

This paper has introduced some of the sociolinguistic issues at the heart of communication in the legal process between non-Aboriginal people using General Australian English and Aboriginal people using varieties of English. To conclude, I turn to a central dimension of any intercultural communication process, namely that it has to be a two-way process. While this inherent reciprocal nature may seem self-evident—even from the label ‘intercultural communication’—it is ignored by many people.

This is exemplified in the judge’s brief general comments to the jury in the 2006 NSW case introduced in Section 5 above. After a short general discussion before the jury came into court in which the defence counsel, prosecuting counsel and judge all agreed not to present anything specific to the jury about Aboriginal use of English, the judge said to the jury:

I understand that some of the witnesses are going to be Aboriginal and some people, particularly where their first language is not English, have some problems in terms of understanding or expressing themselves. Whether that is going to occur in this case, I have not got the foggiest idea. When it does, I will deal with it as I think appropriate, but you, in considering what you think of a witness, also bear in mind their apparent level of education or any other attributes.

While the judge’s stance here is not overtly demeaning or deficit-based, his comments are arguably more disturbing than the defence counsel’s comment discussed in the previous section. Here, the implication is that the possibility of jurors misunderstanding Aboriginal witnesses occurs only to the extent that Aboriginal people might have problems of communication. It gives no indication of the much more common cause of intercultural miscommunication between Aboriginal and non-Aboriginal people, namely where there is no recognition of different ways of using English, for example that silence is used and interpreted differently, and that there are differences in the use of *yes* answers to questions. Further, this comment to the jury effectively invites jurors to base their evaluation of witnesses on ignorance, stereotypes or even misunderstanding of Aboriginal communication, as it was made in the absence of any specific information about this topic. These comments by the judge to the jury also

reveal apparent ignorance of the nature of the dialectal differences involved, as well as ignorance of the fact that Aboriginal people in the state of NSW are not second language speakers of English.

There is clearly a need for further research, and for ongoing intercultural communication between sociolinguists and members of the legal profession about communication with Aboriginal speakers of English in the legal process.

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