Taking evidence from ABORIGINAL WITNESSES SPEAKING ENGLISH

SOME SOCIOLINGUISTIC CONSIDERATIONS

By Diana Eades

Most Aboriginal Australians speak English in their dealings with the law, but a range of linguistic and cultural differences can impede communication.

This article takes a sociolinguistic approach to taking evidence from Aboriginal people who speak varieties of English as their first or main language.[1] Before turning to some of the issues about language and culture that can impact upon communication with and assessment of witnesses, it is important to acknowledge the diversity of Aboriginal cultures, experiences and ways of communicating.

Despite this diversity, there is also much that is widely shared between Aboriginal groups around the country. Thus, it is possible to provide brief generalisations about some of the factors involved in intercultural communication with Aboriginal witnesses and clients. But it is important to remember that no one is a robot. And many people also belong to more than one cultural group, and there are differences between Aboriginal groups.

It is also important to realise that just because an Aboriginal person does not look very dark, it does not mean that they are necessarily using English in a non-Aboriginal way. Language use has no direct connection to biological factors, such as skin colour. It depends on socialisation: that is, how a person has learned to become a member of a social group. Further, Aboriginal ways of communicating and often subtle aspects of Aboriginal culture remain strong in many family groups and communities throughout the south and east of the country, as well as the north, the west and the centre. Lifestyle and language can change while many aspects of culture continue.

The ability of some people to switch between two (or more) different cultures and different ways of communicating is also relevant to any discussion of the Aboriginal use of English. This bicultural (and bidialectal) ability is evident in the increasing number of Aboriginal professionals, including lawyers and magistrates, and can be likened to bilingual ability. Bicultural (and/or bilingual) ability develops from prolonged successful interaction with people from the second cultural (and/or linguistic) group. Many Aboriginal people giving evidence in criminal and native title proceedings may not have had prolonged opportunities to develop bicultural abilities, such as the ability to use either English Aboriginal or Standard Australian English.

INTRODUCING ABORIGINAL ENGLISH

'Aboriginal English' is the name given to varieties of English spoken by Aboriginal people, which differ in systematic ways from Standard Australian English (SAE). Aboriginal English has developed over more than two centuries of intercultural communication. In many ways, it is the result of the Aboriginalisation of English, and it shows influences at all levels of language from traditional languages and communication patterns. While the term Aboriginal English usually refers to dialectal varieties, often spoken as the first and main language of Aboriginal people, it is also sometimes used to refer to the way that Aboriginal learners of English speak English, often with limited proficiency.

In remote Australia, many people speak an Aboriginal language as their first language, and English may be their second or third (or fourth …) language. Most people who do not speak English as their first language should have an interpreter in interviews with police and lawyers, and in court.[2] This includes speakers of Kriol, the fastest growing Aboriginal language, which is historically related to English and to traditional languages, but is a separate language.[3]

ABORIGINAL ENGLISH ACCENT, WORD MEANING AND GRAMMAR

Subtle and not-so-subtle differences between Aboriginal English and SAE can result in miscommunication. For example, none of the 260 traditional languages spoken before British settlement had an *h* sound. Thus, it is not surprising that the Aboriginalisation of English over the decades has resulted in dialectal varieties in which English words which start with an *h* sound are pronounced without this initial consonant. Further, in an example of a linguistic pattern which typifies contact between different languages, many Aboriginal people add an *h* sound to the beginning of some words which begin with a vowel in SAE. In a NSW court, a judge could not understand a witness's explanation about what her *helders* had told her, until the lawyer repeated the word with a SAE accent, as 'elders'.

In another NSW case, a suspect summarised repeated serious violence from a relative as *carrying on silly*. The suspect also gave details of injuries inflicted on family members when that relative came home drunk and was *carrying on silly*. However, the details were ignored and it was this summary phrase that dominated the preparation of

the police Facts Sheet, which reported that the suspect 'was sick of his brother's antics'. This is an example of dialectal meaning difference: while *carrying on silly* in Aboriginal English can refer to what in SAE we might call 'antics', it can also refer to 'violent behaviour when drunk'.[4] It is not always possible for non-Aboriginal police officers, lawyers and other legal professionals to be aware of specific subtle differences between Aboriginal English and SAE. But an awareness that such differences may be involved can alert people to listen carefully to the details of what is being said, and not simply generalise from a summary expression such as *carrying on silly*.

Inability to recognise Aboriginal ways of communicating can be relevant to the way that police have conducted interviews, as well as how that evidence is given and evaluated.

Traditional languages are like many other languages throughout the world in not distinguishing between masculine and feminine gender in the third person pronoun system. This grammatical pattern has influenced many varieties of Aboriginal English, particularly in more remote areas, so that the pronoun *e* (or *he*) is used to refer to both masculine and feminine referents.

ASSUMPTIONS ABOUT HOW LANGUAGE WORKS

Understanding what people mean involves more than accent, word meaning, and grammar. In intercultural communication, an important role is played by cultural assumptions about language use. Such assumptions might seem like commonsense, yet they are culturally based assumptions, not facts. And they are not shared with all sociocultural groups. The remainder of this article considers some key assumptions in the culture and practice of the law which are not shared by many Aboriginal people, and which can have a significant impact on how we assess or evaluate Aboriginal people in formal interviews, specifically in the legal process. Each of the three points below begins with assumptions (arabic numerals) about language use that are at work in the legal process and are followed by contrasting Aboriginal assumptions (roman numerals).

Assumptions about finding out information

1. *The most effective way to find out information is to ask questions.*
2. *The most effective way to find out a lot of information is to ask many questions.*

These two assumptions are central to the legal process, and to all mainstream institutional contexts in this country, such as education and government. They are also shared more widely in Anglo (and many other) cultures, and probably most Australians have been socialised with these assumptions. However, questions are not the only way of finding out information, and many Aboriginal people have been socialised with rather different assumptions, namely:

(i) *With important personal information, it is often best to use indirect ways of finding things out, such as talking around a topic, or hinting and waiting until the other person is ready to share information.*

(ii) *Asking many questions is rude, and it is a very ineffective way of finding out information.*

In many Aboriginal groups, questions are used for information about who people are related to, where they are from, where they are going, and similar. But for important personal information, such as reasons for actions, much less direct means of communication are often used. Thus, many Aboriginal people who are not bicultural are disadvantaged by the interview format, which is based on assumptions about the central role of questions in seeking information.

Assumptions about conflicting answers and inconsistency

3. *A good way to test a person's truthfulness is to put conflicting propositions to them and see what they agree to. Conflicting answers in an interview often indicate a speaker's dishonest and untrustworthy character.*
4. *Further, when a person is interviewed about a personal story they have talked about in an earlier interview, inconsistency suggests problems with their reliability and/or credibility.*

While these assumptions are central to cross-examination, they are also shared more widely in Anglo cultures. Although in many contexts people are able to argue about and explain apparent inconsistency, opportunities for such argument and explanation are seriously restricted in cross-examination.

However, it should be pointed out that these assumptions about conflicting answers and inconsistency ignore the normal variation that occurs in everyday retelling of stories (or accounts). While such variations may often be slight, they have been shown to result from what we might call 'interlocutor feedback'.[5] That is, whenever we tell another person about an event or situation, our account is shaped to some extent by how this person reacts to the account; for example, with surprise, confusion, lack of interest, or disbelief. Further, sociolinguistic research on the impact of interviewer questions in legal contexts shows that they play a significant role in organising the story, deciding what parts can be told, and in what order, as well as what parts cannot be told.[6] This research highlights the co-constructed nature of most storytelling: that is, even when a person recounts an event to a person who was not present, that person's participation in the conversation or interview has an impact on how the event is described.

So while inconsistencies in evidence can result from individual failings, such as untruthfulness, or memory problems, inconsistency can also be achieved through interactional work.[7] That is, variations between different

tellings of the same story can also result from the way that interviewers control, guide or organise the recount or retelling through their questions.

Thus, there can be a disjunction between the law's assumptions (3) and (4) about how variation in retold stories can be attributed to the individual speaker and findings of sociolinguistic research about the way that such variations can result from interviewers' questions. Notwithstanding this disjunction, the law's assumptions about conflicting answers and inconsistency underpin cross-examination, and particularly the strategy of raising prior inconsistent statements.

But, yet again, these assumptions are not shared by many Aboriginal people. Understanding the following two assumptions about how communication works in Aboriginal societies provides some indication of the difficulties that may affect the participation of many Aboriginal people in courtroom questioning:

(iii) *If you want to find out if a person is honest and trustworthy, you need to take time to get to know them; don't rush them, and don't talk all the time you are with them.*

(iv) *If someone asks many questions, especially in a pressured situation, the best thing is to say 'yes' and keep them happy.*

The contrast between Aboriginal assumption (iii) and legal assumption (3) is not surprising, given the contrast discussed earlier concerning the use of direct questions to find out information. Assumption (iv) is central to a serious miscommunication that arises in many interviews with Aboriginal people. The label 'gratuitous concurrence' is used to refer to the pattern of saying *yes* in answer to a question (or *no* to a negative question), regardless of actual agreement, or even understanding of the question.[8] Gratuitous concurrence is sometimes used by people who are being questioned in a language they do not speak well. It can be easier to answer 'yes' than to reveal lack of language proficiency or to give an answer based on only partial understanding of the question.

But its use by Aboriginal Australians is not restricted to people being questioned in a language they do not speak well. It is also widely used by Aboriginal people who speak English as their first language, and it has been reported and commented on by non-Aboriginal people for more than a century.[9] There appear to be cultural reasons at the heart of the widespread Aboriginal use of gratuitous concurrence, including a preference for withholding from contradiction during an interaction, and dealing with areas of disagreement over time, and where possible with some indirectness. In the Northern Territory, Kriewaldt J explained the implications of this Aboriginal interactional pattern for courtroom hearings in *Dumaia*.[10] Also in the NT, the significance of this difficulty in understanding Aboriginal 'yes' answers is addressed by Forster J in the third of his rules for police interviewing of Aboriginal suspects in *Anunga*.[11]

Assumptions about silence/pauses in interviews

5. *Silence in answer to a question indicates ignorance or shyness or lack of knowledge or unwillingness to co-operate.*
6. *And silence in answer to an accusation (which may be made in the form of a question) indicates guilt.*

Once again, these assumptions which underpin communication in the legal system are also central to interviews in western Anglo societies, and are shared culturally more widely. Many Australians are subconsciously socialised to avoid conversational silences or pauses. Sociolinguistic research has established that in western Anglo societies the 'standard maximum tolerance for silence' in an interview or conversation is one second.[12] This means that after about one second someone fills the silence, because it indicates something is not working in the interaction. It should be acknowledged that in legal contexts, silence cannot be legally taken to imply guilt. However, it can be hard to set aside assumptions and interpretations that operate below the level of conscious awareness.

This one-second norm about silence is not shared by all sociocultural groups. The literature indicates that among those groups who comfortably use longer conversational silences are Japanese people, Indigenous American people, some Scandinavian people, and Australian Aboriginal people.[13] Thus, assumptions (5) and (6) above need to be contrasted for Aboriginal Australians with assumption (v):

(v) *People who use silence in conversation or interviews should be respected for their thoughtfulness and their recognition of the value of time.*

While Aboriginal people do not use silence in every conversation or interview, it is not unusual for silences or pauses to last for more than one second. Such silences, and

even much longer ones, are typically not considered to be remarkable or uncomfortable, but rather to be an indication of mutual respect, and the fact that people sometimes need to take time to answer questions. Sometimes, people will come back to an earlier topic from a previous occasion in order to provide more information or explanation.

The intercultural communication clash which can result from the difference between assumptions (5) and (6) on the one hand and (v) on the other, can be seen in terms of interruptions. Thus, if a lawyer asks a question and after receiving no answer within one second, asks a follow-up question, this second question can be seen as an interruption. That is, the follow-up question may well have interrupted the first part of the Aboriginal person's answer, the silent part.

FURTHER READING FOR LAWYERS

Further information about issues which impact intercultural communication in English between Aboriginal people and lawyers can be found in a lawyer's handbook;[14] a court manual which draws to a considerable extent on that handbook;[15] a research report by Queensland's Criminal Justice Commission (CJC);[16] and benchbooks for several states.[17] An important issue dealt with in the benchbooks and the CJC report are jury directions about Aboriginal ways of using English, often referred to as 'Mildren directions'.[18]

In the Western Australian *Bowles* case, an appeal court refused to rule against a trial judge's use of Mildren directions about communication features such as gratuitous concurrence, saying that there 'may be a danger that a jury drawn from the dominant culture will unthinkingly assess a witness based upon their own unconscious assumptions ...'.[19]

Finally, inability to recognise Aboriginal ways of communicating can be relevant to the way that police have conducted interviews, as well as the way that evidence is given and evaluated. A powerful example is found in the systemic failures of the legal process over more than two decades in the case of the three Aboriginal children who were murdered in the small New South Wales town of Bowraville in 1990-1991.[20] ■

Notes: **1** Information about the Aboriginal use of English in this article is largely drawn from work by the author, including Diana Eades, *Aboriginal Ways of Using English*, Aboriginal Studies Press, 2013, Canberra; Diana Eades, '"I don't think the lawyers were communicating with me." Misunderstanding cultural differences in communicative style', (2003) 52 *Emory Law Journal* 1109–34; Diana Eades, 'Telling and retelling your story in court: Questions, assumptions, and intercultural implications', (2008) 20(2) *Current Issues in Criminal Justice* 209-30. See also Peter RA Gray, 'Do the walls have ears? Indigenous title and courts in Australia', (2000) 28 *International Journal of Legal Information* 185-211; Dean Mildren, 'Redressing the imbalance against Aboriginals in the criminal justice system', (1997) 21(1) *Criminal Law Journal* 7–22; Graham Neate, 'Land, law and language: Some issues in the resolution of Indigenous land claims in Australia'. Paper delivered to the conference of the International Association of Forensic Linguists, 2003, Sydney accessible at http://www.nntt.gov.au/News-and-Publications/Pages/Forms-and-Publications.aspx; Michael Walsh, '"Which way?" Difficult options for vulnerable witnesses in Australian Aboriginal land claim and native title cases', (2008) 36(3) *Journal of English Linguistics* 239-65. **2** See Michael Cooke, *Indigenous Interpreting Issues for the Courts*, Australian Institute of Judicial Administration Incorporated, 2002, Carlton, Victoria; Michael Cooke, 'Anglo/Aboriginal communication in the criminal justice process: A collective responsibility', (2009) 19 *Journal of Judicial Administration* 26-35. **3** Kriol, which is spoken widely in the Kimberley region of WA, the Barkly Tablelands in the NT and the Gulf country in Qld, developed over a hundred years ago from Aboriginal Pidgin Englishes. Unlike Aboriginal English, it is not a variety of English. Although many non-Aboriginal English speakers might believe they can understand Kriol, there are many important differences which can lead to serious miscommunication. (See Ian G Malcolm, 2008, 'Australian creoles and Aboriginal English: Phonetics and phonology', in Kate Burridge & Berndt Kortmann (eds), *Varieties of English 3: The Pacific and Australasia*, pp124-41. Berlin: Mouton de Gruyter; Ian G Malcolm, 2008, 'Australian creoles and Aboriginal English: Morphology and syntax', in Kate Burridge & Berndt Kortmann (eds), *Varieties of English 3: The Pacific and Australasia*, pp415-43. Berlin: Mouton de Gruyter.) **4** Jay M Arthur, *Aboriginal English: A Cultural Study*, Oxford University Press, 1996, Oxford, p110. **5** For example, Neal Norrick, 'Retelling stories in spontaneous conversation', (1998) 25(1) *Discourse Processes* 75-97. **6** For example, Shonna Trinch, *Latinas' Narratives of Domestic Abuse: Discrepant Versions of Violence*, 2003, John Benjamins, Amsterdam; Katrijn Maryns, *The Asylum Speaker: Language in the Belgian Asylum Procedure*, St Jerome Press, Manchester, 2006, UK: St Jerome Press; Linda Jönsson and Per Linell, 'Story generations: From dialogical interviews to written reports in police interrogations', (1991) 11(3) *Text* 11(3): 419–40. **7** Gregory Matoesian, *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*, 2001, Oxford University Press, Oxford, pp37-8. **8** Kenneth Liberman, 'Understanding Aborigines in Australian courts of law', (1981) 40 *Human Organisation* 247–55. **9** See Diana Eades, *Courtroom Talk and Neocolonial Control*, Mouton de Gruyter, 2008, Berlin, pp92-6. **10** *R v Aboriginal Dulcie Dumaia* 1959, NTJ 697. **11** *R v Anunga* 1976, 11 ALR 412 (NTSC). **12** Gail Jefferson, 'Preliminary notes on a possible metric which provides for a 'Standard Maximum' silence of approximately one second in a conversation', (1989), in Derek Roger and Peter Bull (eds), *Conversation: An Interdisciplinary Perspective*, Multilingual Matters, Clevedon, 1989 Phil, pp166–96. **13** See Diana Eades, '"I don't think the lawyers were communicating with me." Misunderstanding cultural differences in communicative style', (2003) 52 *Emory Law Journal* 1109–34; Ilana Mushin and Rod Gardner, 'Silence is talk: Conversational silence in Australian Aboriginal talk-in-interaction', (2009) 41 *Journal of Pragmatics* 2033–52. **14** Diana Eades, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners*, Queensland Law Society, 1992, Brisbane. **15** Queensland Department of Justice, *Aboriginal English in the Courts: A Handbook*, Department of Justice, 2000, Brisbane. **16** Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*. Criminal Justice Commission, 1996, Brisbane. **17** Queensland Supreme Court, *Equal Treatment Benchbook*, Supreme Court of Queensland Library, 2005, Brisbane; Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, 2nd edition, Australian Institute of Judicial Administration, 2008, Perth; Judicial Commission of New South Wales, *Equality before the Law Benchbook*, Judicial Commission of New South Wales, 2009, Sydney. **18** See Dean Mildren, 'Redressing the imbalance against Aboriginals in the criminal justice system', (1997) 21(1) *Criminal Law Journal* 7–22. **19** *Bowles v WA* 2011, WASCA 191, at [52]. **20** New South Wales Parliament Legislative Council Standing Committee on Law and Justice, 'Inquiry into the family response to the murders in Bowraville', 2014, accessible at http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/V3ListReports The issues raised in this article in general terms comprise one of the major areas of analysis in this report, especially pp54-60.

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