The Australian Journal of
INDIGENOUS EDUCATION

Section D: Students' Perspectives

Aborginal English in the Legal System[1]

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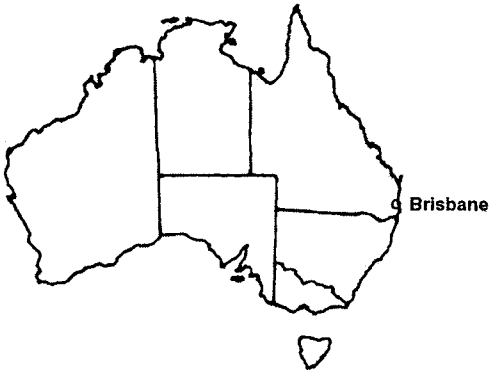


The Australian legal system is based on the principle of *equality before the law* for all its citizens. The government of Australia also passed the international Human Rights and Equal Opportunity Commission Act in 1986, although these rights are not accessible to all Australians in the legal system (Bird 1995:3). The Australian legal system has failed to grant equality for all its people. The Aboriginal community is severely disadvantaged within the legal system because the Australian criminal justice system has "institutionalised discrimination" against Aboriginal people through communication barriers (Goldflam 1995: 29).

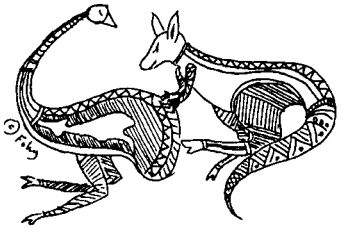
The Australian legal system imposes foreign language, culture and structures on Aboriginal people (Goldflam 1995: 29) and consequently there is an incredibly high incarceration problem among the Aboriginal community. In Queensland, Aboriginal people make up only 3% of the population, yet in relation to imprisonment the figures are very different. Aboriginal people constitute 18% of the State's prison population and 28% of the police custodial population (Eades 1992: 1). It must therefore be considered why there is such a high percentage of Aboriginal people involved in legal problems. This essay will argue that one of the contributing factors to these imprisonment figures is the discrimination by the legal institution against speakers of Aboriginal English.

The Aboriginal community and the non-Aboriginal community are speaking two different varieties of a language and consequently the Aboriginal community is being misinterpreted. Legal language can be very frightening and extremely complex for speakers of any language, but due to the discrimination against Aboriginal people in all aspects of life, the legal system can perpetuate that fear.

Poor communication by Aboriginal people within the courtroom has been largely ignored and is only one aspect of discrimination with which they are forced to deal. Diana Eades suggests that this is due to language barriers:

> *"93% of Queensland's Aborigines are using some kind of English in talking to non-Aboriginal people. But the kind of English that the majority of these people speak is non-standard English. They speak a dialect of English, which is distinctly Aboriginal and is thus known as Aboriginal English." (1992: 4)*

There is a great failure by the Australian government and legal system to recognise the differences between standard English and non-standard English or Aboriginal English. Eades defines Aboriginal English as the "continuum of dialectal varieties which differ from standard Australian English in structural features of phonology, morphology and syntax" (1993: 141). Aboriginal English and standard English can vary dramatically in terms of pronounciation, grammar, vocabulary, phonology, discourse structure, use and style as well as pragmatics or meanings.



These language differences can discriminate against Aboriginal English speakers within the legal system. Individuals may have a general day-to-day grasp of standard English, yet under the duress of legal questioning, their abilities to communicate will deteriorate (Bird 1995: 13). The misunderstanding of the pragmatics of Aboriginal English can be attributed to the failed acknowledgement by standard English speakers to identify the differences between the language varieties. Standard English speakers recognise that there is a designated rhetoric of speech required by the courts. Aboriginal English speakers do not recognise the difference between day-to-day English and the rhetoric required by the courts. The failure to understand the necessity of this rhetoric severely disadvantages Aboriginal English speakers in the court system (Liberman 1981:254).

Eades, a professional in socio-linguistics, argues that the main differences between standard English and Aboriginal English are answer-seeking, silence, eye avoidance, either/or questions, quantifiable specification and gratuitous concurrence. To understand the speaker's meaning, there needs to be a better knowledge of the cultural differences as well as the grammatical variations.

Correct answer seeking and answer receiving are imperative in a court of law. Methods used to seek information are dramatically different between speakers of standard English and Aboriginal English. Failure to appreciate these differences can result in a misunderstanding of information. Direct questioning of Aboriginal English speakers is usually a statement with a rising intonation, "You were eating?", whereas standard English speakers use an auxiliary verb with rising intonation, "Did you do that?". Aboriginal English speakers do not use an auxiliary verb, and if they did, it would not be emphasised.

Answering questions is also very different between speakers of standard and Aboriginal English. The auxiliary verb is used in the answer by standard English speakers "Yes, I did." Aboriginal English speakers do not use the verb in questioning and would therefore not use it in answering (Eades 1993: 143-44).

Culturally, there is a marked difference in answer-seeking between Aboriginal English and standard English. Enquiries about specific information made by standard English speakers is often in the form of an interview, where the individual is set apart from the information seeker. "Aboriginal participation in interviews typically involves much hesitation, silence and dysfluency" (Eades 1993: 144), and consequently Aboriginal English speakers will not give the same information to a standard English speaker because of the pragmatic differences between the languages. Answer-seeking is one of the main elemental differences between Aboriginal and standard English, which needs to be acknowledged by the courts.

Silence is a valued aspect of Aboriginal English but is generally misinterpreted by standard English speakers. The use of silence by Aboriginal English speakers is positive and can be a signal to other Aboriginal English and traditional Aboriginal language speakers that the individual is taking a moment to reflect. Also, the silence may indicate that they are just enjoying the other individual's company. Standard English speakers within the legal system need to recognise the

positivism of silence and not interpret it as a sign of guilt or ignorance about the subject at hand (Eades 1992: 46).

Another cultural misunderstanding between the two dialects is the use of eye avoidance in conversation and "direct eye contact is frequently avoided in Aboriginal interactions where it is seen as threatening or rude" (Eades 1992: 47). On the other hand, within non-Aboriginal society, eye avoidance is viewed with extreme negativity and interpreted as a sign of dishonesty or being sneaky. This cultural difference can be extremely detrimental to an Aboriginal English speaker's case in a court of law. The legal system needs to recognise that Aboriginal English speakers are not hiding anything with their eye avoidance, but rather that they are being polite within their own cultural connotations (Eades 1992: 47).

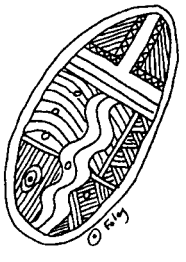
Answering questions poses another significant problem for Aboriginal speakers of English. They have a difficult time answering either/or questions. There is no useage of either/or questions within the Aboriginal English dialects, consequently answering these types of questions is increasingly difficult. When Aboriginal English speakers do answer these types of questions, they usually direct their answer to the latter portion. Kenneth Liberman, a professor in sociology and ethnolinguistics, complies with this notion. He says that when Aboriginal English speakers are asked an either/or question, they will adhere to the second part. If asked "Did you or did you not do that?" the Aboriginal English speaker will answer "yes", meaning "yes, I did not do it" (1081: 248).

Aboriginal English speakers also have difficulty being specific when answering questions. Aboriginal English speakers do not use quantifiable specification and this disadvantages them with questions which seek specific information (Eades, 1992: 48). Standard English speakers express specifics with time, size, quantity and distance but Aboriginal English speakers tend not to express such specifics. In traditional Aboriginal languages, there is no counting system and there are usually only specific words for "the numerals 'one', 'two', and a few different words indicating 'several' and 'many'" (Eades, 1993: 145). Items, people and places are also not cited specifically, but rather listed or named by Aboriginal English speakers. When being specific, Aboriginal English speakers refer to "physical, geographical and climatic events and states of affairs" (Eades 1993: 145). Non-Aboriginal English speakers within the legal system will view these responses as being vague or defiant to give the specifics.

The most troubling difference between Aboriginal and standard English speakers is the Aboriginal belief that if they answer 'yes' to whatever is being asked of them they will get out of trouble faster and will be seen as being cooperative.

> *"Aboriginal English speakers often agree to a question even if they do not understand it. That is, when Aboriginal people say 'yes' in answer to a question, it often does not mean 'I agree with what you are asking me'. Instead it often means 'I think that if I say 'yes' you will see that I am obliging and socially amenable and you will think well of me and things will work out between us'." (Eades 1992: 26)*

Liberman has called the Aboriginal 'yes' phenomena "gratuitous concurrence" (1981: 249). This 'yes' phenomenon is a problem culturally rather than linguistically. Aboriginal people have been repressed within the legal system since they were accepted into it and realise that the more they comply with the non-Aboriginal society the easier it is to continue with their day-to-day affairs without continuous harassment.



"Aborigines carry this practice into the courts, thinking that if they provide the court with what it wants, then they will be released more quickly" (Liberman 1981: 249). Aborigines usually feel extreme anxiety when being questioned and find it easier to agree with whatever is being asked of them in the hope that the more they agree, the sooner they will be left alone.

If these pragmatic and linguistic differences are not acknowledged, Aboriginal English speakers will continue to be discriminated against in the legal system. A total lack of knowledge by the legal institution about the disciplines of linguistics and socio-linguistics perpetuates the discrimination against speakers of Aboriginal English (Eades 1993: 158).

There have been many cases where these differences have not been acknowledged and Aboriginal people have suffered tremendously. For example, there are cases of two different Aboriginal English speaking men who were incarcerated on an alleged 'confession'. Both were convicted and sent to jail while pleading innocent. At the time of their trials, no consideration was taken by the legal service that there may have been language differences.

In 1983 an Aboriginal man in Mt Isa named Kelvin Condren was apprehended by the Queensland police for drunkenness, the next day he was convicted for the murder of his girlfriend Patricia Carlton. Condren spent the next seven years in jail, but maintained his innocence (Tarnished Images 1994-5). Condren's conviction was based upon a police record of interview (PRI) which contained a signed 'confession'. Condren claims that he was 'verballed' by the arresting officer into signing the 'confession' (Eades 1993: 148). Eades describes 'verbal' as 'to verbal someone' and uses the definition from the Macquarie Dictionary "to represent (an accused person) as having made a statement containing admissions and presenting it to a court as evidence" (Eades 1995: 147). She also expresses the word 'verbal' with extremely negative connotations.

After many failed appeals by Condren and his solicitors to the Queensland government, Eades was asked by Condren's solicitors to examine the PRI and give a professional linguistic opinion. Eades compared Condren's use of English in the PRI with two other interviews. She used the *Voire Dire* (VD), an interview with Condren held in Mt Isa prior to his trial in the Supreme Court. The second interview was with Condren, his solicitor and Eades held in 1986 at the Stuart Prison in Townsville, entitled CES (Eades 1993: 149).

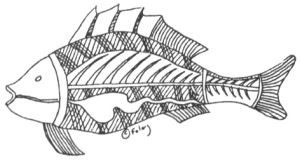
Eades analysis of Condren's language usage found many non-standard English dialectal styles, which are found in Aboriginal English. She found a lack of subject and verb agreements in the VD and CES and a great deal of non-standard English past tense verbs used, for example "and then he come over ..." (Eades 1993: 150). Establishing Condren's language variety through lexical and grammatical tactics was difficult for Eades because the answers in the VD and PRI were far too short to distinguish. Eades based her analysis of Condren's speech on pragmatics, language in context, in terms of Aboriginal English (1993: 150).

Linguistic analysis by Eades proved that some sort of forgery had to have occurred with Condren's alleged 'confession' in the PRI. The PRI contained many questions and answers using the auxiliary verb, which is not used by Aboriginal English speakers. Eades' analysis found that the auxiliary verb was used 31% of the time in the PRI, 0% in the VD and only 1% in the CES (1993: 151). The PRI also contained answers which gave specific information. The VD and CES did not demonstrate any of the following yet the PRI showed: "considerable definiteness, lack of words showing hesitation, qualification or approximation and a frequent quantifiable specification" (Eades 1993: 151). Useages of these specifics are not attributes of the Aboriginal English dialect. Eades concluded:

> *"Condren's relative lack of experience with numeric*

> *specification, accompanied by his extremely poor mathematical ability, and the unprepared nature of the information supposedly given by him in PRI, make it unbelievable he would have answered all of the WH-questions in the words attributed to him in PRI." (1993: 151-2)*

The arresting officer who conducted the PRI upholds that the 'confession' was a verbatim account of Condren's words. Condren's conviction was also based on two alleged witnesses Stehen McNamee and Louise Brown.



Both witnesses claim the Queensland police forced them into admitting Condren's guilt. McNamee claims that the officer made him blame Condren and if he didn't the officer told him that he would whack him over the head with a shovel. Brown also claims she was forced to sign something she did not say (Tarnished Images 1994-5). The linguistic evidence done by Eades, the forced allegations from the witnesses and Condren's insistence of his innocence suggest that the confession may have resulted from 'verballling' by police. "The socio-linguistic analysis provides evidence which supports Condren's claim that he was verballed in the 'confession', which formed the basis of his murder conviction" (Eades 1993: 153).

After evaluating the Condren case, Eades found many similarities with a case that occurred in 1959. Rupert Max Stuart was convicted for raping a young white girl.[2] Stuart was also convicted for his crime based on an alleged 'confession'. Stuart, like Condren, maintained his innocence and claimed that the arresting officer intimidated him and that the confession was false. There are many connotations that lead to the conclusion that Stuart was also 'verballed'.

Stuart claims "... police hit me, choke me, make me said those words, that I killed her' (Eades 1995: 153). Eades found examples in Stuart's confession, like Condren's, that masked his usage of Aboriginal English.[3]

Another example of discrimination due to pragmatic differences between Aboriginal English and standard English can be seen in the Pinkenba incident. In May, 1994, three Aboriginal boys were apprehended in Fortitude Valley by Brisbane police. The 12, 13 and 14 year old boys were transported out to Pinkenba and allegedly terrorised by the police officers. The three young boys were left alone at four in the morning, after police had allegedly taken their shoes away. There was no evidence to prove that the three young boys did anything to break the law. Finally, after nine months, the police officers were taken to court for deprivation of liberty of the youths. The most severe crime against the three youths occurred within the court (Black and Blue, 1996).

In court, the solicitor for the police officers harrassed the boys. The children were threatened into answering questions. While on the stand, the three young Aboriginal boys displayed many pragmatic features of Aboriginal English. When brutally questioned, the boys exerted silence and eye avoidance. When the boys were silent, the defence attorney repeatedly called them 'liars'. The three young boys finally answered 'yes' to any question, although only after many tears and repeated liar comments. In a video interview, Eades responded:

> *"The cross-examination of these boys was an obscene travesty of justice, the literal court interpretation of their words to questions serves no course of justice while questions were badgering, confusing, exploiting, which are cultural differences between Aboriginal English and standard English." (Black & Blue 1996)*

The Australian legal system is based on *equality before the law* for all its citizens, yet the truth of this has obviously not been upheld. There has been a failure by the Australian legal institutions to recognise socio-linguistic differences. Article 14 of the International Covenant on Civil and Political rights (ICCPR), which Australia has signed and passed through the HRECOA, has provisions which ensure equality:

> *Provision (1) All persons shall be equal before the courts and tribunals.*
>
> *Provision (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*
>
> *(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court*
>
> *(Bird 1995:6).*

Article 14 grants the right of an interpreter for disadvantaged individuals, although it is ambiguous as to the fluency of the speaker and interpreter. The authority to implement an interpreter is then granted to the judicial officers rather than a linguistic expert (Bird 1995: 6-7).

The right to an interpreter resides under the discretion of the judge, the justice will determine an individual's ability to understand and speak standard English when there is an absence of statutory guidelines to follow. When guidelines are prevalent it is still left up to the court whether or not to implement an interpreter. There are many problems with the court having to make this decision. Firstly, justices are not trained in linguistics and therefore do not have a professional opinion on an individual's ability to comprehend a language. Secondly, and more importantly, there is a general disdain felt by the court to allow individuals to use an interpreter (Bird 1995: 7-12). There is also a general belief within the legal system that using an interpreter will somehow aid the defendant in their case. Not all justices of the peace are against interpreters and many sympathise with the plight of non-standard English speakers due to communication barriers. Honour Mr Justice Gobbo, from the Victorian Supreme Court, claims:

> *"There is a popular mythology that the presence of an interpreter is in some ways an advantage to the litigant or witness who uses an interpreter ... In my view, the fact that you have to give evidence through an interpreter is by and large a considerable disability" (Bird 1995: 13).*

In 1976, Justice Forster of the Northern Territory government acknowledged the differences within the language varieties, which were being spoken by Aborigines in the court system. The nine Anunga rules were accredited in the trial R V Anunga, in which Forster was the magistrate. The main objective of these rules was to acknowledge and facilitate the Aboriginal notion of and right to silence (Goldflam 1995: 32). The problem with the Anunga Rules is that they are only guidelines, they are not obligatory or legally binding and they also only apply within the Northern Territory (Eades 1993: 146). Within the Northern Territory the Anunga Rules are being used improperly by the legal system, consequently the rules are harming instead of facilitating Aboriginal litigants (Goldflam 1995: 33).

The Anunga Rules in the Northern Territory have come to mean the same as Police Orders. The Police Orders are not nearly comparable to the Anunga guidelines in which Forster advised.

Justice Forster sought to help Aborigines within the legal system whereas police in the Northern Territory do not generally take time to acknowledge the pragmatic differences between standard English and Aboriginal English. The Anunga Rules under the interpretation of Police Orders state that the prisoner's friend "may be the same as the interpreter" (Goldflam 1995:33).

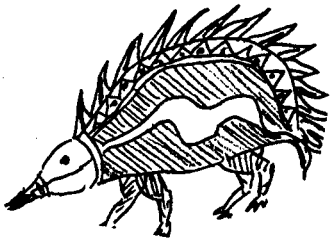
This clause is regularly abused in the Northern Territory and instead of attempting to administer an interpreter, police use the litigant's friend. The use of a 'friend' as an interpreter is generally much more accessible for the police than an interpreter. The friend of an Aboriginal English speaking litigant will most likely also speak Aboriginal English, which will not aid the victim but most likely confuse the situation even more. Friends are not trained in the specifics of legal language and are unlikely to have the ability to mimic a true legal interpreter. The use of a prisoner's friend as an interpreter also undermines the professionalism of interpreters. Friends will always be a biased party, whereas the role of a translator is to be an independent and credible third party (Goldflam 1995: 33).

The use of translators by Aboriginal clients within the legal system has been minimal. Australia has only one Aboriginal Interpreter Service, which is based at the Institute for Aboriginal Development in Alice Springs. In 1992, a coordinator for the service declared that the reason why interpreters are not used is because "the police don't ring us up for anything ... we get about five or six calls a year from the police" (Goldflam 1995: 33). Interpreters may not be that accessible to the general public and/or the police. There may be many reasons why interpreters are not viewed as a dependable entity within the court system and consequently are not used all too often, but that is beyond the focus of this paper.

The legal institution within Australia in many ways discriminates against Aboriginal people. The use of Aboriginal English within this institution:

> *"constructs them [Aborigines] as silent, and hence unknowable, depersonalised, and objectified Others. They are admitted not as participants in the system but as components which are processed by it" (Goldflam 1995: 38).*

The consequence of these language differences contributes to legal statistics where 18% of Queensland's prison population and 28% of the police custodial population are people of Aboriginal descent (Eades 1992: 1). The use of Aboriginal English by Aborigines does not convict them, yet failure by the courts to acknowledge the language differences strengthens the chance of misinterpretations and consequently, false incarcerations. Relations between speakers of Aboriginal English and the legal system need to be addressed.



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1. Lecturer's Note:
The subject ID333, *Aboriginal Politics and Political Issues*, has enjoyed a relatively high number of international 'study abroad students' in its past and present enrolments. Megan Suarez, from the University of Wisconsin, Milwaukee, USA, was a proactive student enrolled in Semester 1, 1999. This assignment illustrates the high level of research that our international students achieve at this University. They begin their studies with a very limited knowledge of the Australian social and political environment, yet within a month or two assignments of this quality are produced. I accept that the assignment is not academically perfect and may raise an eyebrow in some academic circles. However, it is very sobering to realize that this student, and many before (and no doubt many in the future) have achieved an understanding of and empathy with Indigenous Australian studies in just one semester. It is a credit to Megan's application of research methodology and should not go unrewarded, which is why I have recommended that the assignment be included in this publication. In future issues I hope to recommend further assignments for publication, written by Indigenous Australian students, to illustrate their dedication to study and research.

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2. The Stuart case is extremely complex and beyond the scope of this paper. Most of the information written on this case is extremely biased and ignores the language differences between SE and AE, consequently it is impossible to give cogent evidence to support his innocence due to language differences.

3. Extensive work by TGH Strehlow, the linguist in the Stuart case, provides sufficient evidence on the falsification of Stuart's 'confession'. Strelow terms Stuart's speech as Northern Territory English language, which will later be added to the Aboriginal English grouping.