Judicial understandings of Aboriginality and language use*

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This paper raises issues involved in communication with Aboriginal witnesses speaking English in interviews with police or lawyers, or during courtroom questioning. Sociolinguistic features of an Aboriginal witness's evidence, such as conversational pauses and gratuitous concurrence, may lead to misunderstandings. Whether jury directions are appropriate and necessary lies in recognising an Aboriginal witness's bicultural and/or bidialectal ability.

Introduction

The prominent focus on Aboriginal people in the criminal justice system over the past 25 years has paid greatest attention to accused people. This article turns the spotlight to Aboriginal witnesses in court (including defendants and plaintiffs) and specifically to ways in which judicial officers understand Aboriginal identities, practices and cultures, as these factors impact on communication. The functioning of the legal process centres on fundamental questions about whose story can be believed, or which parts of which stories can be believed, and in these questions Aboriginal identity and culture can be important considerations.

This article argues that judicial officers need to distinguish between sentencing contexts on one hand, and contexts of communication in legal settings on the other, in their consideration of Aboriginality. The discussion of selected criminal cases, together with consideration of related judiciary-led

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developments, underline my argument[1] for the need for the legal system to recognise Aboriginal ways of using English.

The extent to which the lives of Aboriginal defendants are characterised by often extreme disadvantage, including illiteracy, alcohol abuse and violence, is often central to the judicial consideration of Aboriginality in sentencing. But there is no inherent connection between these negative (and distressing) living conditions experienced by many Aboriginal people and their language variety — in southern Australia, their Aboriginal use of English. Yet in cases in which communication with Aboriginal English speakers is central (for example with prosecution witnesses in a murder case), a focus on problems experienced by Aboriginal people can sometimes connect to a deficit view of Aboriginal identity and social practice. This can result in a situation in which the court may be prevented from engaging in effective intercultural communication.

In discussing the difficult task that judicial officers can be faced with in deciding whether and how Aboriginal identity is relevant in individual cases, it is not my intention to comment on legal reasoning or to analyse the complexity of individual cases, and nor do I have the expertise required.

Despite the likely relevance of the material in this paper to other legal contexts, discussion will be restricted to criminal cases. Further, it will not deal with issues involved when Aboriginal speakers of traditional Aboriginal languages give evidence.

Judicial attention to Aboriginal issues

In *Neal v The Queen*,[2] the High Court established that an offender's Aboriginality may be a relevant consideration in sentencing, with Brennan J's finding that material facts to be taken into account include "those facts which exist only by reason of the offender's membership of an ethnic or other group".[3]

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1 See D Eades, *Aboriginal English and the law: communicating with Aboriginal English speaking Clients: A Handbook for Legal Practitioners,* Queensland Law Society, Brisbane, 1992; D Eades, "'I don't think the lawyers were communicating with me': misunderstanding cultural differences in communicative style", (2003) 52 *Emory Law Journal* 1109–1134; D Eades, "Communicating with Aboriginal people in New South Wales", (2008) 20(10) *Judicial Officers' Bulletin* 85–86; D Eades, *Aboriginal ways of using English,* Aboriginal Studies Press, Canberra, 2013.

2 (1982) 149 CLR 305 at 305–326.

3 ibid at [13].

Less than a decade later, the comprehensive report of the Royal Commission into Aboriginal Deaths in Custody[4] illuminated the ways in which the "disadvantaged and unequal position" of Aboriginal people brings them "into conflict with the criminal justice system". While the most easily quantified measure of improvement — the extent of overrepresentation of Aboriginal people in custody — remains substantially unchanged,[5] there have been many other considerable developments. For example, in response to the Royal Commission's Recommendation 96, several States established court committees or programs to promote understanding among the judiciary of Aboriginal people and cultures, such as the Judicial Commission of NSW's Ngara Yura Program (since 1992).

At the national level, the National Judicial College of Australia incorporates in a number of its programs issues relevant specifically to understanding Aboriginal communities and witnesses.[6]

Other significant developments in the context of judicial understandings about Aboriginal people and cultures relate to the people being appointed to judicial positions. There is a very small, but growing number of Aboriginal judicial officers, for example in NSW: Mr Robert Bellear (District Court 1996–2005) and Mrs Patricia O'Shane AM (Local Court, 1986–2013).

Further, there are now judges at the highest levels who had earlier worked as young lawyers in the newly established Aboriginal Legal Services in the 1970s. Over decades, these Aboriginal organisations, which have provided unparalleled service to Aboriginal people, have also trained many lawyers in understanding Aboriginal social and cultural life, and many of these lawyers have gone on to work as judicial officers. One such example is the current Chief Justice of the High Court of Australia, the Honourable Robert French AC.[7]

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4 E Johnston, *Royal Commission into Aboriginal Deaths in Custody National Report: Overview and Recommendations,* Australian Government Publishing Service, Canberra, 1991, p 15, [1.7.1].

5 Australia Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators,* Productivity Commission, Canberra, 2014. Statistics for 2013 show that Indigenous people (of whom the majority are Aboriginal) are imprisoned at 13 times the rate of the general population (age-adjusted figures), while Indigenous young people are in juvenile detention at about 24 times the rate of the general population.

6 National Judicial College of Australia, "Communicating with Indigenous witnesses", Judging in Remote Localities Conference, April 2008, Alice Springs, NT; National Judicial College of Australia, "Solution Focused Judging Program", May 2011, Melbourne, Victoria and March 2012, Brisbane, Queensland; National Judicial College of Australia, "Witness Assessment Program", May 2012, Sydney, NSW and September 2014, Brisbane, Queensland.

7 F Skyring, *Justice: A History of the Aboriginal Legal Service of Western Australia*, UWA Publishing, Crawley, WA, 2011, p 13.

Other judges have had other close involvements with Aboriginal people and issues over many decades since their student days or early work as lawyers. For example, the Chief Justice of the NSW Supreme Court from 1988–2011, the Honourable James Spigelman AC QC was one of the 34 university students who made the 1965 Freedom Ride to expose and protest about segregation and racism against Aboriginal people in NSW country towns.[8]

"Grave social difficulties"

Ten years after *Neal v The Queen*, and with the benefit of a number of other cases, and the final report and recommendations of the Royal Commission, Wood J's 12 specific principles in *R v Fernando*[9] set out the most important and detailed principles for the sentencing of Aboriginal people throughout the country. At the centre of these principles is recognition of "grave social difficulties",[10] particularly "the problems of alcohol abuse and violence which to a very significant degree go hand in hand with Aboriginal communities" and that the "cure [of these problems] requires more subtle remedies than the criminal law can provide by way of imprisonment".[11]

But concerns have been expressed about the ways in which the *Fernando* principles are recently being "narrow[ed]" in application,[12] or "retreat[ed] from"[13] (see also Anthony,[14] Nicholson[15] and Yehia[16]). Edney argues that in a number of NSW appeal court judgments the application of these principles has been restricted because of judicial officers "fundamentally misapprehending the nature of [Aboriginal] identity in a post-colonial society".[17] Examples of this "misapprehended" approach to Aboriginal identity are cited from judgments which find that the *Fernando* principles are not relevant because

8 A Curthoys, *Freedom ride: a freedom rider remembers*, Allen and Unwin, Sydney, 2002.

9 (1992) 76 A Crim R 58 at 62–63.

10 ibid at 62.

11 ibid.

12 M Flynn, "Not 'Aboriginal enough' for particular consideration when sentencing?" (2005) 6(9) *Indigenous Law Bulletin* 15–18; M Flynn, "Fernando and the sentencing of Indigeneous Offenders" (2004) 16 *JOB* 67.

13 R Edney, "The retreat from *Fernando* and the erasure of Indigenous identity in sentencing" (2006) 6(17) *Indigenous Law Bulletin* 8–11.

14 T Anthony, *Sentencing indigenous offenders*, Indigenous Justice Clearinghouse Brief 7, 2010.

15 J Nicholson, *Sentencing Aboriginal offenders: A judge's perspective,* paper presented to the Uluru Criminal Law Conference, August, 2012.

16 D Yehia, *Admissibility of admissions: Aboriginal and Torres Strait Islander suspects,* paper presented to the Uluru Criminal Law Conference, August 2012.

17 above n 13.

of such factors as the defendant having an urban background,[18] or having a "part-aboriginal" grandfather[19] or having "had many dealings with the police, and [being] not intimidated by the idea of being questioned by them".[20] The Aboriginal identity of many people who have been described in these ways has been thus legally "erased" or "extinguished", in Edney's[21] terms.[22] Yet, such factors as fractional descent, place of residence and experience with the police manifestly do not enable many Aboriginal people to escape the "grave social difficulties" enunciated by Wood J. In *Bugmy v The Queen*,[23] the High Court held that "Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in *Fernando*".[24]

While *Fernando* has drawn attention to the relevance of problems of Aboriginality to sentencing, Nicholson[25] points out that an offender's Aboriginality can also be relevant to sentencing in positive ways (for example in cases where an offender has been making a positive contribution to the community in their role as an elder).

Communication with Aboriginal witnesses

The *Fernando* principles highlight the relevance of having "a deprived background" or being "otherwise disadvantaged", which must often be taken into account when a judicial officer sentences an Aboriginal offender. While such disadvantage may be common to many Aboriginal people who have not learned general Australian English, they are not necessarily relevant to the way that a person speaks English, which depends on the much richer fabric of socialisation, both primary and secondary (and further), and patterns of social networking, interaction and residence. That is, it is a person's experiences as a member of one or more social groups that most influences their ways of communicating.

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18 *R v Newman; R v Simpson* (2004) 145 A Crim R 361.

19 *R v Ceissman* (2001) 119 A Crim R 535.

20 *R v Helmhout* (2001) 125 A Crim R 257 at 259.

21 Above n 13.

22 This approach to Aboriginal identity and resulting legal erasure highlights the need for scholarly writing in the social sciences to be accessed in law school training, and more widely made available for judicial officers and other legal professionals.

23 (2013) 249 CLR 571.

24 ibid at [41].

25 above n 15, at p 4.

This chapter now turns away from issues involved in the sentencing of Aboriginal offenders, to those involved in communication with Aboriginal witnesses (including defendants) and to hearing their stories in the criminal justice process. In my view, Aboriginality is often relevant to the judicial officers' responsibility of ensuring that proceedings are conducted fairly. But, it seems that this relevance of Aboriginal identity — specifically in terms of communication in interviews with police or lawyers, or during courtroom questioning — may often be ignored.

Elsewhere[26] I have written about features of Aboriginal use of English — often referred to as Aboriginal English — which are particularly relevant to communication in the legal process.[27] These features can be structural (including grammatical patterns, word choice and meaning), and/or pragmatic, that is features of language usage (including patterns of discourse and conversation). Several pragmatic features impact on Aboriginal participation in legal interviews, even when structurally the variety of English may be close to general Australian English.

For example in many Western societies, silence (or a pause of more than about one second) in an interview is generally taken to mean that a speaker has nothing to say, or could be trying to invent an answer. In contrast, in much Aboriginal interaction (whether the language spoken is a variety of English or a traditional Aboriginal language) silence is used as a positive and productive part of communication. The implications of this difference in language use are extensive for the participation of Aboriginal people in legal interviews, as is the widespread use of the phenomenon known as "gratuitous concurrence".[28] This term refers to the act of saying yes to a question, regardless of whether the speaker agrees with the proposition being questioned, or even understands it. The strong Aboriginal tendency to use gratuitous concurrence in interviews has been documented since the mid-1800s, and makes many Aboriginal people suggestible, or highly

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26 See D Eades, *Aboriginal English and the law: communicating with Aboriginal English speaking clients: a handbook for legal practitioners*, above n 1; Eades, D, "A case of communicative clash: Aboriginal English and the legal system" in J Gibbons (ed), *Language and the Law*, Longman, London, 1994, pp 234–264; D Eades, "Communicating with Aboriginal people in New South Wales", above n 1; D Eades, "Telling and retelling your story in court: questions, assumptions, and intercultural implications" (2008) 20(2) *Current Issues in Criminal Justice* 209–230 and D Eades, *Aboriginal ways of using English*, above n 1.

27 For discussion of the advantages and disadvantages of the terms "Aboriginal English" and "Aboriginal ways of speaking/using English": see D Eades, *Aboriginal Ways of Using English*, ibid at Ch 1.

28 D Eades, "Telling and retelling your story in court: questions, assumptions, and intercultural implications", above n 26, at 219.

suggestible, in police interviews and courtroom questioning, an issue we will return to below. The use of Aboriginal patterns of communication (or pragmatic language features) is not inherently connected to "social difficulties" centred around abuse of alcohol and violence. Thus, criteria such as those derived from sentencing principles will not necessarily be relevant to questions about an Aboriginal person's English usage or patterns of communication.

Pre-trial communication issues for defendants

A 1993 Queensland Appeal Court case provides an example of how and why Aboriginal patterns of communication can be relevant. In *R v Kina*,[29] the appellant had appealed her murder conviction on the basis that her lawyers did not find out her story, and thus the jury had found her guilty in the absence of any opportunity for her to present her defence. Sociolinguistic evidence referred in part to some of the characteristics of Aboriginal ways of using English mentioned above.[30] The court was unanimous in finding there had been a miscarriage of justice. The judgment by Fitzgerald P and Davies J accepted the appellant's Aboriginality without qualification, and noted that none of her lawyers had "received any training or instructions concerning how to communicate or deal with Aborigines".[31] In finding that the appellant's trial had involved a miscarriage of justice, this judgment cited "cultural, psychological and personal factors" which "presented exceptional difficulties of communication between her legal representatives and the appellant". These factors "bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice".[32]

Another judgment in the same court, two years later, involved more detailed consideration of southeast Queensland Aboriginal identity — this time for a teenager from Cherbourg community — in relation to issues concerning his communication with arresting police officers: *R v Aubrey*.[33] The 16-year-old appellant was appealing his conviction for manslaughter following the death

29 [1993] QCA 480.

30 D Eades, "'I don't think the lawyers were communicating with me': misunderstanding cultural differences in communicative style", above n 1.

31 Above n 29, at [57].

32 ibid.

33 (1995) 79 A Crim R 100.

of a man whom he had punched outside a hotel. One of the grounds of the appeal was that the confession, contained in answers in the police interview, should not have been admissible. This was because the interviewing officers had not followed a Queensland police directive requiring the presence of a lawyer/legal officer when interviewing "persons under disability" (which included "many Aborigines", see below). The appeal was unsuccessful.

In his dissenting judgment, Fitzgerald P referred to "cultural problems associated with the reliability of confessional statements made by aborigines who are interrogated by white persons in positions of authority".[34] He held that the police commissioner's regulations, both about interviewing young people and interviewing Aboriginal people, had been ignored, and the resulting admissions that the appellant had made to police should not have been received into evidence.

The Aboriginality of this appellant from the largest Aboriginal community in Queensland was not contested. For Fitzgerald P, this Aboriginality needed to be taken into account in considering the non-application of the police directive. Further, Fitzgerald P described as "too narrow" the view of the trial judge that the regulations concerning police interviews of Aboriginal people were "particularly directed to tribal people withdrawn from the European way of living",[35] thus rejecting a consideration of Aboriginality in terms of the appellant living in a non-remote area and non-traditionally oriented lifestyle. Fitzgerald P found that "by reason of his aboriginality and life experience, the appellant was 'at a disadvantage in respect of the investigation, in comparison with members of the general Australia community'".[36] Here Fitzgerald P cited Kearney J's finding in *R v Butler (No 1)*[37] that the *Anunga* guidelines[38] — on which the Queensland police guidelines were based — were designed to overcome "a particular vulnerability of Aboriginals to police interrogation, and in the exercise of the right to silence".[39] (While Fitzgerald P did not refer specifically to gratuitous concurrence, this phenomenon is clearly one of the issues addressed in the *Anunga* guidelines for police interviews with Aboriginal people.[40])

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34 ibid at 109.

35 ibid at 108.

36 ibid at 111.

37 (1991) 57 A Crim R 451.

38 *R v Anunga* (1976) 11 ALR 412.

39 *R v Butler (No 1)*, above n 37.

40 H Douglas, "The cultural specificity of evidence: the current scope and relevance of the *Anunga* guidelines" (1998) 21(1) *UNSW Law Journal* 27–54.

While the two majority judges in this appeal did not question that the appellant was Aboriginal, they questioned whether he was an Aboriginal person under disability in terms of the police regulations. Unlike the trial judge in this case, and some of the judges in the sentencing cases referred to above, they did not draw on the fact that the appellant lived in a non-remote area and non-traditionally oriented lifestyle. Nor did they use the discourse of racial fractions or skin colour (as the appeal judges had in *Condren v R*[41]). Indeed the police commissioner's directive specifically eschewed such a consideration, in its statement that:

> Whilst many Aborigines and Torres Strait Islanders would fall into the category of persons under disability, pigmentation of the skin or genealogical background should not be used as a basis for this assessment. Whilst all of the factors outlined above [including age and developmental disability] should be considered, particular attention should be given to the suspect person's educational standards, knowledge of the English language, or any gross cultural differences.[42]

In taking account of the directive, Davies J found that the appellant had "no difficulty in speaking and understanding English". This finding was made on the basis of transcripts of the appellant's evidence in the trial court, and on the decision of the trial judge that his "command of the English language in the record of police interview [was good], … and he gave some quite long descriptive answers to questions".[43]

It is quite likely that, as with many other people in Cherbourg, the appellant's variety of Aboriginal English was close to general Australian English in terms of grammar and vocabulary, and thus he might be considered by many to have a "good command of the English language". However, this would be difficult to assess from reading answers to questions on a courtroom transcript. And it is also quite likely that he used pragmatic features, such as those outlined above, and presented in the Queensland lawyers' handbook, *Aboriginal English and the Law,*[44] which was referred to in Fitzgerald P's dissenting judgment.

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41 (1987) 28 A Crim R 261. See D Eades, *Aboriginal ways of using English*, above n 1; D Eades, "Judicial understandings of Aboriginality and language use in criminal cases" in P Toner (ed) *Strings of connectedness: essays in Honour of Ian Keen,* ANU Press, Canberra, 2015, pp 27–51.

42 *R v Aubrey*, (1955) 79 A Crim R 100, at 104–105.

43 ibid at 117.

44 See D Eades, *Aboriginal English and the Law: Communicating with Aboriginal English speaking clients: a handbook for legal practitioners,* above n 1.

It is relevant to point out that Fitzgerald P also took account of social conditions in Cherbourg, saying that the appellant's "all-too-common life experience had left him poorly educated, unemployed, angry, aggressive and sometimes violent, especially when intoxicated".[45] While this is consistent with some of the factors in the *Fernando* principles, it was invoked in *R v Aubrey*, not in relation to sentencing, but as part (but not all) of the context for the appellant's engagement with police, which impacted on the extent of his "disability" in the police interview.

The differing approaches in *Aubrey* highlight the complexity for judicial officers in understanding and assessing both the likelihood that a person may be using English in an Aboriginal way, and the fact that this may need to be considered, regardless of whether this person is living with the "grave social difficulties"[46] at the heart of the *Fernando* decision about Aboriginality and sentencing. And this same complexity is also faced by police officers in their decision about their interviews with Aboriginal suspects.

Trial communication: leading questions and jury directions

Since the Queensland appeal cases discussed above, a number of initiatives both from judicial officers and from State justice departments have addressed communication with Aboriginal witnesses in court. Several States have drawn from research on Aboriginal ways of communicating in English in their publications for judicial officers and court staff.[47] The Queensland lawyers' handbook[48] has been extensively relied on. Within the judiciary, the Honourable Dean Mildren AM RFD QC who was a Northern Territory Supreme Court judge from 1991–2013, has brought his extensive experience

45 *R v Aubrey* (1995) 79 A Crim R 100 at 103.

46 *R v Fernando*(1992) 76 A Crim R at 58.

47 See for example, Queensland Criminal Justice Commission, *Aboriginal witnesses in Queensland's criminal courts,* Brisbane, Criminal Justice Commission, 1996; S Fryer-Smith, *Aboriginal Benchbook for Western Australian courts*, 2nd edn, Australian Institute of Judicial Administration, 2008; Judicial Commission of NSW, *Equality before the Law Benchbook*, Sydney, 2006 at [3.1]ff; Queensland Department of Justice, *Aboriginal English in the Courts: A Handbook*, Department of Justice, Brisbane, 2000; Queensland Supreme Court, *Equal Treatment Benchbook*, Supreme Court of Queensland Library, Brisbane, 2005.

48 D Eades, *Aboriginal English and the law: communicating with Aboriginal English speaking clients: a handbook for legal practitioners*, above n 1.

and attention to sociolinguistic research to his judgments,[49] publications[50] and keynote addresses at conferences.[51] Mildren J has taken a strong lead in dealing with communication issues for Aboriginal speakers of English in court in two important areas. First, while leading questions are typically considered central to the testing of witnesses in cross-examination, Mildren J points out that the trial judge has the power "to disallow questions, or forms of questions, which are unfair".[52] Recognising the role of gratuitous concurrence in rendering some Aboriginal people too suggestible for the fair use of leading questions in cross-examination, Mildren J disallows leading questions in such situations.[53]

Second, for many years Mildren J has been giving directions to juries about Aboriginal ways of using English. In 1995, the Criminal Justice Commission in Queensland asked Mildren J and me to prepare a pro forma set of directions to be given to juries in Queensland cases involving witnesses who are speakers of Aboriginal English.[54] These directions have also been published in Queensland Supreme Court's *Equal Treatment Benchbook*[55] and discussed in equivalent NSW and WA publications.[56] These specific directions, sometimes referred to as "Mildren directions" or "Mildren-style directions", are "designed to assist a jury assessing the evidence of Aboriginal witnesses and/or an Aboriginal accused's record of interview. This is achieved by drawing the jury's attention to the possibility that sociolinguistic features of an Aboriginal witness's evidence may lead to misunderstandings".[57] Mildren J points out that the directions "would obviously have to be moulded to the circumstances of the case".[58] And

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49 For example, *R v Charlie* (unrep, 28/09/95, NTSC).

50 D Mildren, "Redressing the imbalance against Aboriginals in the criminal justice system" (1997) 21(1) *Criminal Law Journal* 7–22; D Mildren, "Redressing the imbalance: Aboriginal people in the criminal justice system" (1999) 6(1) *Forensic Linguistics* 137–160.

51 D Mildren, "Indigenous Australians and the criminal justice system", paper presented to the Uluru Criminal Law Conference, August 2012.

52 D Mildren, "Redressing the imbalance against Aboriginals in the criminal justice system" above n 50, at 14; Queensland Criminal Justice Commission, above n 47, at 52.

53 D Mildren, "Redressing the imbalance: Aboriginal people in the criminal justice system", above n 50, at 147.

54 Published in Queensland Criminal Justice Commission, above n 47, at pp A9–11. A version of the directions was modified by Helen Harper for speakers of Torres Strait Creole: D Mildren, above n 50.

55 Queensland Supreme Court, above n 47, at Ch 9 Appendix B.

56 Judicial Commission of NSW, above 47; S Fryer-Smith, above n 47.

57 S Fryer-Smith, ibid at 7.4.1.

58 D Mildren, "Redressing the imbalance against Aboriginals in the criminal justice system" above n 50, at 14.

an important feature of the pro forma directions is the explicit warning of variation in the ways that Aboriginal people use English, as well as the frequent use of modifying expressions such as "many Aboriginal people", "often", and "may". That is, the directions should be impossible to apply in a categorical manner, and jurors are explicitly reminded that it is their "function to decide which evidence [they] accept, and which evidence [they] reject".[59] While Mildren J has been using jury directions in the Northern Territory Supreme Court for at least fifteen years, they are also used in some Western Australian trials.[60] I am aware of their use in a western New South Wales trial a few years ago, and it is not clear if they have been used in Queensland.[61]

Despite Mildren J's experience in the Northern Territory, his understanding of Aboriginality is not restricted to a remote-area focus. Speaking at a national conference of criminal lawyers in 2012, he said "even [Aboriginal] people who live in the major cities and towns are often influenced by their social or cultural background — even if they speak English quite well, and even if English is their first language".[62]

But, how do courts decide when to use Mildren directions? How do they decide if information about Aboriginal ways of using English is relevant to the case at hand? Similarly, when is it relevant for a court to take note of expert evidence about differences between Aboriginal English and standard Australian English? It would presumably not be relevant if the Aboriginal witnesses in a case were Marcia Langton or Warren Mundine. But when is it relevant for others from southern Australia? What factors should courts consider when addressing this question?[63]

At the heart of these issues lies the ability to switch between Aboriginal ways of communicating in English in some situations, and mainstream Australian ways in other situations. Such bicultural and/or bidialectal ability is demonstrated in public life by Aboriginal political leaders, judicial officers, legal professionals,

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59 Queensland Criminal Justice Commission, above n 47, at A9.

60 S Fryer-Smith, above n 47 at p 7.5.9–7.5.10.

61 M Lauchs, *Rights versus reality: the difficulty of providing "access to English" in Queensland courts*, Faculty of Law, Queensland University of Technology, Brisbane, 2010, at p 17.

62 D Mildren, above n 51, p 5.

63 There are some similarities here with questions relevant in situations in police interviews and courtroom hearings for Aboriginal — and any other — witnesses who speak English as a second language: how do judicial officers (and police officers) decide if the L2 speaker needs an interpreter? See M Cooke, "Anglo/Aboriginal communication in the criminal justice process: a collective responsibility" (2009) 19(1) *Journal of Judicial Administration* 26–35.

educators, public servants, filmmakers, and more. But how can judicial officers (or lawyers, or police officers) know whether someone has considerable, or sufficient, bicultural and/or bidialectal ability? While this is clearly not always straightforward, to frame an answer to this question in terms of whether or not a person is a "tribal [person] withdrawn from the European way of living" (as in the judge's decision in *Aubrey*[64]) is clearly inadequate. It would also be inadequate to answer this question in terms of fractional descent, or the extent of a person's experience with police officers, following some of the sentencing decisions mentioned above. And it would not be relevant to consider the relevance of the witness's Aboriginality in terms of whether or not he or she had suffered from violence and alcohol abuse (central issues in the *Fernando* sentencing principles). Of greatest relevance is the extent to which the person has had socialisation opportunities (whether as a child or adult) in social groups in which English is used in typical mainstream ways. To overgeneralise, it can be expected that an Aboriginal person would have a fair degree of bicultural ability if they have had prolonged successful participation in mainstream education and employment, and probably also in residential, social and leisure environments.

Leading questions and jury directions: questions of specific relevance

The relevance of Aboriginal ways of using English was the subject of considerable deliberation in *Stack v WA*.[65] The specific focus of this deliberation comprised the two areas, discussed above, in which Mildren J has provided judicial leadership in relation to communication issues in court. In *Stack*, the Aboriginal applicant appealed his conviction, on manslaughter and unlawful wounding charges, because of the trial judge's Mildren-style directions to the jury (both at the commencement and the end of the trial) and his decision to stop leading questions being asked in the cross-examination of one of the prosecution witnesses, an 18-year-old Perth Aboriginal man. Thus, the communication issues were raised not in relation to the applicant, but to one of the witnesses. The appeal was successful (with a two-to-one majority) on the grounds that leading questions in cross-examination should not have been stopped, and that it was "not possible to be satisfied that no substantial miscarriage of justice resulted from the trial judge's ruling"[66] on leading questions.

64 (1995) 79 A Crim R 100.

65 (2004) 29 WAR 526.

66 ibid at 556.

In relation to the relevance of the Mildren directions about sociolinguistic features such as gratuitous concurrence, the judges considered several biographical factors, namely the witness's area of residence, his education and the fact that he spoke no Aboriginal languages. For example, Steytler J said that the witness:

> was an Aboriginal man who lived with his father in a Perth suburb and that he studied art and photography at TAFE in Kwinana [a Perth suburb] ... subsequent evidence established that he attended Kwinana Senior High School up to halfway through year 10, that he did well at school and that he did not speak any Aboriginal languages. There is nothing in any of this evidence which would indicate that any generalised phenomenon, such as that of gratuitous concurrence, or any other failure to give appropriately responsive answers, was applicable to him.[67]

The dissenting judge (Murray J) drew on similar biographical details of the witness, also highlighting the fact that the witness "spoke no Aboriginal languages".[68] The factors of area of residence, education to midway through Year 10, followed by a TAFE course, and not speaking an Aboriginal language may often correlate with considerable ability to use English in a mainstream Australian way, but this correlation is not a necessary one. It would have been relevant to also consider the witness's social networks. For example, was a considerable part of his social life as a child and a young adult spent in predominantly Aboriginal social interactions? The fact that speaking "no Aboriginal languages" was a criterion for all three appeal judges highlights the way that judicial officers (like many lawyers) still tend to look to clear markers of traditionally oriented practice to evaluate the relevance of a person's Aboriginality. However, sociolinguistic research on Aboriginal ways of using English, which is at the heart of the Mildren directions, do not appeal to use of an Aboriginal language to help provide guidance on a person's likely bicultural communication ability.[69]

Murray J also observed that "there was no evidence that [the witness] lived a lifestyle different from any young person within the socioeconomic group of which his family and relatives appeared to be members".[70] However,

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67 ibid at 553.

68 ibid at 535.

69 Further, it is unlikely that many judicial officers in criminal jurisdictions would be aware of the complex relationships between self-reports about whether a person speaks an Aboriginal language, and actual linguistic and sociolinguistic practice. See P McConvell and N Thieberger, *State of Indigenous languages in Australia—2001*, Australia State of the Environment Second Technical Paper Series (Natural and Cultural Heritage), Department of the Environment and Heritage, Canberra, 2001 at 22–23.

70 *Stack v WA*, above n 65, at 535.

it should be noted that this apparent similarity of lifestyle with non-Aboriginal people could well mask subtle distinctively Aboriginal features of communicative practice, which still characterise Aboriginal family interactions in southern towns and cities, including Perth.[71]

In their careful consideration of the relevance of Aboriginal ways of using English to the witness in question, the appeal judges discussed not just the witness's biographical information, but they also gave evaluations of the witness's actual communication while giving evidence during the trial. Murray J commented that from his reading of the transcript of trial evidence, the witness "appears to speak ordinary English and to display no signs of difficulty in expressing himself".[72] However, focusing on whether an Aboriginal speaker of English appears to have problems in expressing themselves, could well miss the subtle communication differences that arise from Aboriginal use of gratuitous concurrence, or silence, or different ways of giving specific information.[73] Using English in an Aboriginal way may not sound like difficulty in communication, and indeed it may not comprise difficulty in communication. But it can contribute to miscommunication, where interlocutors are unaware of differences in the use and interpretation of English. While all three judges indicated general acceptance of the idea of gratuitous concurrence, two of them cited passages from the cross-examination which seemed to show the witness in question was able to disagree, sometimes "vigorously",[74] with propositions put to him.

But there was a difference between the two majority judges (Steytler J and Templeman J) and the dissenting judge (Murray J) which pointed to the latter's recognition that reading a transcript of interaction is not the same as listening to it.[75] Murray J found that the trial judge's decision to stop leading questions and to give jury directions was made on the basis of information not accessible to the appeal court, which had "not had the benefit of seeing and hearing [the witness] give evidence".[76] Thus, his acceptance of the trial

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71 I Malcolm et al, *Umob deadly: recognized and unrecognized literacy skills of Aboriginal youth*, Curtin University, 2002.

72 *Stack v WA* (2004) 29 WAR 526, at 535.

73 D Eades, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners,* above n 1.

74 *Stack v WA* at 554.

75 D Eades, "Verbatim courtroom transcripts and discourse analysis" in H Kniffka (ed), *Recent Developments in Forensic Linguistics*, Peter Lang, Frankfurt, 1996, pp 241–54; D Eades, "Telling and retelling your story in court: questions, assumptions, and intercultural implications", above n 26.

76 *Stack v WA* at 535.

judge's decision concerning Aboriginal ways of using English was based on the fact that the trial judge's "view of the way in which the witness was handling the process of questioning and giving evidence depended, not only upon the nature of his responses but upon the demeanour of the witness while giving evidence".[77]

The *Stack* case provides evidence of three judges addressing communication issues for Aboriginal speakers of English, and navigating the question of deciding the relevance of these issues for a particular witness, who may, or may not, have been socialised with these norms of language use, and who may, or may not, have bicultural communication abilities.

A problem-centred approach to Aboriginal ways of using English

In contrast, these communication issues appear to have been dismissed with little consideration, and seemingly little understanding, in a NSW trial less than two years later. *R v Hart*[78] was the Supreme Court trial of a (non-Aboriginal) man for the murder of one of three local Aboriginal children in the small town of Bowraville.[79] The prosecution was intending to call 50 Aboriginal witnesses from that town or with links to that community, where Aboriginal people make up 13% of the population, and where Aboriginal ways of interacting, including ways of using English, are strong.

The investigating police officer had commissioned me to write a sociolinguistic report on communication issues which might have caused difficulties for the Aboriginal witnesses in communicating with police over the early years of the investigation, and which might have also made it difficult for them to tell the court what they had seen and what they knew was relevant to this case, and for their evidence to be understood. This report included information about several ways in which Aboriginal ways of using English differ from mainstream Australian ways, such as gratuitous concurrence and the use and interpretation of silence, discussed above. The report also included a

77 ibid at 537.

78 (unrep, 1/07/06, NSWSC).

79 This case is an important one for Aboriginal people's participation in the criminal justice system for many reasons, as exposed by a Parliamentary inquiry. NSW Parliament Legislative Council Standing Committee on Law and Justice, *The Family Response to the Murders in Bowraville*, NSW Parliament Legislative Council, Sydney, 2014; see also "Bowraville: unfinished business" *Four Corners*, ABC Television, 4 April 2011; M Knox, "The mission", *The Monthly*, October 2010, pp 40–47.

recommendation about directions to the jury similar to those prepared for the Queensland Criminal Justice Commission report,[80] discussed above.

Before the jury came into court, there was a brief courtroom discussion between lawyers and the judge about the substance of the sociolinguistic report. Defence Counsel said that he "did not dispute the general thrust of Dr Eades's 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 sociolinguistic features described in an expert report in terms of "communication eccentricities", and can attribute "neutrality" to such a derogatory reference to linguistic features, shows just how little recognition and understanding there is among some members of the legal profession about cultural and dialectal differences in ways of using English. Further, this lawyer's erasure of Aboriginal identity with the euphemistic reference to "people from the background of a large number of witnesses in this case" was consistent with the wider complaints from the Bowraville Aboriginal community that they were ignored by the criminal justice process.[81]

Having expressed lack of disagreement with the content of the sociolinguistic report, the Defence Counsel then argued against the use of such jury directions as recommended in my report, saying that it "will introduce into an evaluation of [the Aboriginal] witnesses, an assessment of them, a whole range of assumptions which may or may not be appropriate".[82] This is despite the qualifications and caveats made explicit in the recommended directions, discussed above.

The Crown did not argue in favour of the relevance of the sociolinguistic report when he tendered it to the court, and he did not disagree with the defence argument about it.[83] Nor did he take up the report's recommendation about directions to the jury.

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80 Queensland Criminal Justice Commission, above n 47.

81 NSW Parliament Legislative Council Standing Committee on Law and Justice, above n 79; "Bowraville: unfinished business" *Four Corners*, above n 79.

82 *R v Hart* (unrep, 1/07/06, NSWSC).

83 An experienced lawyer has pointed out that the issue is complicated by legal complexities regarding the admissibility of expert evidence about language use and understanding. An examination of these complexities, while beyond the scope of this paper, would in my view be valuable in providing further impetus for the recognition of the role of jury directions in many cases involving Aboriginal witnesses.

This short general discussion between Defence Counsel, Crown and judge, resulted in agreement not to present anything specific to the jury about Aboriginal use of English. However, seemingly prompted by this discussion, RS Hulme J made the following general comment 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.[84]

Unlike the *Stack* appeal, in this case there was no discussion about the applicability of sociolinguistic differences to any particular witness. Thus, there was no assessment of the relevance of Aboriginality. While the judge's stance is not overtly demeaning or deficit-based, his comments are arguably more problematic than Defence Counsel's comment, revealing several issues which appear to prevent the understanding of Aboriginal identity, culture and social practice and its relevance to cases such as this.

Ignoring the two-way nature of communication, the judge's comment implies 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. Thus, 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. This is somewhat ironic, given Defence Counsel's concerns about jurors bringing into their evaluation of Aboriginal witnesses "a whole range of assumptions which may or may not be appropriate". These comments by the judge to the jury also reveal apparent ignorance of the nature of the cultural and dialectal differences discussed in the expert report. It also revealed ignorance of the fact that Aboriginal people in Bowraville specifically, as throughout the State of NSW generally, are not second-language speakers of English.

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84 *R v Hart* (unrep, 1/07/06, NSWSC), author's notes.

In contrast to Defence Counsel's concerns in *Hart* about possible Mildren-style jury directions bringing into jurors' evaluation of (Aboriginal) witnesses "assumptions which may or may not be appropriate"; in the 2011 *Bowles v WA*[85] case, Hall J supported a trial judge's use of Mildren directions (for example about gratuitous concurrence), explaining 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 … it may be necessary for a judge to suggest to a jury that they may need to use care in respect of a particular witness in applying these assumptions.[86]

While this danger highlighted in the Western Australian case of *Bowles*[87] can also be relevant in cases in NSW, it must be acknowledged that the court's weighing of an Aboriginal witness's bicultural communication ability would often be more complex in NSW.

Conclusion

Perhaps the judge's focus in the *Hart* case on Aboriginal *problems* in communication should not be surprising when we consider that so much judicial energy has focused on Aboriginal sentencing, in which individual histories of troubled Aboriginal people figure so prominently.

But this article has argued that understanding Aboriginality is relevant not only to sentencing, but that it is also crucial to the way that Aboriginal witnesses are heard and how their stories are evaluated. In considering the relevance of Aboriginality to issues of communication, sentencing is not the goal, but rather a fair hearing of witnesses' stories, in interviews with lawyers and police officers, and in courtroom questioning. Thus, it is not people's individual problems stemming from alcohol abuse and violence which are at issue, but their linguistic socialisation and sociolinguistic experiences and abilities, as well as differences in ways of using language.

It is true that many Aboriginal people who have suffered greatly in the colonisation and decolonisation process (and who thus would presumably meet the *Fernando* test) have, as a result, had limited opportunities to develop bicultural communication abilities. Thus, for example, many have not been successful participants in mainstream education and employment, two of

85 (2011) WASCA 191.

86 ibid at [52].

87 ibid.

the major social contexts where socialisation in the norms and practices of mainstream use of English occur. But there is not necessarily a neat overlap between factors relevant to the application of the *Fernando* principles and those which call for the use of Mildren directions for the jury for example. Further, issues of alcohol abuse and violence, which often figure prominently in Aboriginal sentencing cases, are irrelevant to the sociolinguistic issues involved in Aboriginal ways of using English, and connected questions of intercultural communication. (For example, there are many teetotaller speakers of Aboriginal English who have not had much opportunity to develop bicultural communication abilities.) It is issues of socialisation and language variety usage which need to be considered.

Thus, in cases where communication rather than sentencing is at issue, attention to the *Fernando* principles can provide a framework—whether consciously or unconsciously — for thinking about Aboriginality in terms of problems. Such an approach runs the risk of erasing Aboriginal identity, ignoring the two-way process of communication, and obscuring cultural and dialectal differences in ways of speaking English. Effective intercultural communication and fair interpretation of the character and credibility of witnesses and their evidence requires abandoning a deficit view of Aboriginal identity and social practice, and developing understandings of culturally different ways of using the same language.

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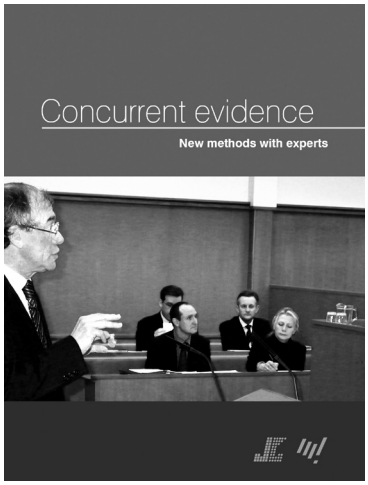
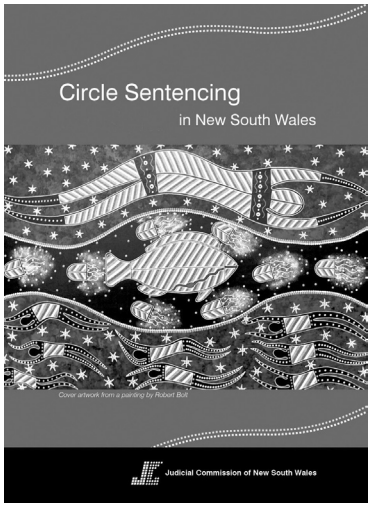


"Concurrent Evidence: New methods with experts", Educational DVD, Judicial Commission of NSW and Australasian Institute of Judicial Administration, 2006.

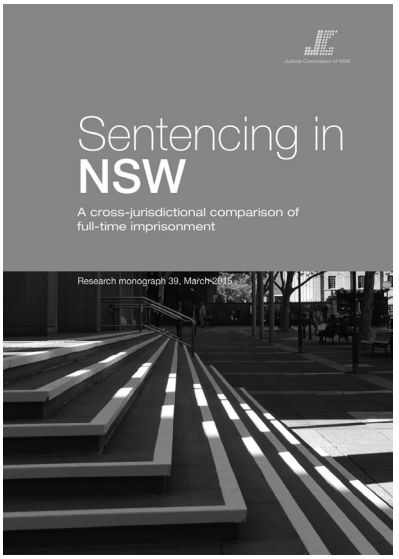
This DVD has been designed for judges, advocates and experts to show how concurrent evidence works in trials. It illustrates the process of concurrent evidence by looking at the reception of expert evidence in a resumption case in the Land and Environment Court.



"Circle Sentencing in NSW", Educational DVD, Judicial Commission of NSW, 2009.

Circle sentencing is an alternative sentencing program which involves members of Aboriginal communities in the sentencing of Aboriginal offenders. This DVD looks at the program from the perspective of key players in the process. In particular, Aboriginal offenders discuss their first-hand experience of circle sentencing and its positive effects. The DVD is primarily designed as an educational tool for judicial officers and will also benefit other participants in circle sentencing, including police prosecutors, defence lawyers, project officers and Aboriginal elders.

Research monograph



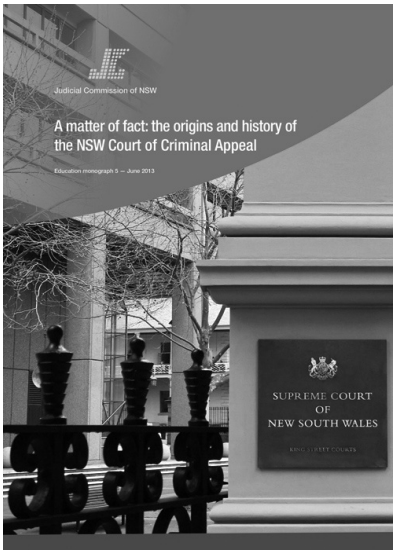
G Brignell and H Donnelly, *Sentencing in NSW: A cross-jurisdictional comparison of full-time imprisonment*, Research Monograph No 39, Judicial Commission of NSW, 2015

This study compares sentencing levels in NSW with those in other jurisdictions in Australia (particularly Victoria and Queensland) and overseas. It focuses on five specific offence categories that permitted robust comparison: sexual assault; child sexual assault; dangerous/culpable driving causing death; robbery; and break and enter/burglary. To further refine the comparison process, this study focuses primarily on the penalty option of full-time imprisonment.

The findings in this study show that sentences for a range of serious offences in NSW are among the most severe across the eastern seaboard states of Australia. Despite some small differences in statutory maximum penalties (and putting to one side partially suspended sentences), NSW had:

- higher full-time imprisonment rates than Queensland and Victoria for all five offence categories examined, and
- longer median head sentences than both Queensland and Victoria for the offences of child sexual assault, robbery, and break, enter/burglary.

Education monograph



P McClellan and C Beshara, *A matter of fact: the origins and history of the NSW Court of Criminal Appeal*, Education Monograph No 5, Judicial Commission of NSW, 2013

This monograph explores the origins and history of the Court of Criminal Appeal (CCA) for NSW. It begins with a discussion of the events that led up to the passage of the *Criminal Appeal Act* 1907 (UK), which created a CCA for England and Wales and served as the model for the *Criminal Appeal Act* 1912 (NSW). The monograph then explains the criminal appeal structure that predated the *Criminal Appeal Act*, recounts the little-known legal troubles of the Attorney General who pioneered the Act, and canvasses the parliamentary and public debates on the Criminal Appeal Bill.