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INDIGENOUS INTERPRETING ISSUES FOR COURTS

Dr Michael Cooke

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Foreword

The issue of interpreting services for indigenous people in Australian courts is one that has been considered by both the AIJA's Indigenous Cultural Awareness Committee and its Research and Project Advisory Committee in recent years.

Questions relating to the need for such services, their availability and their use have been discussed in these forums and at AIJA Council.

To assist an informed debate about these issues, the 2001 AIJA Annual Conference included a session on the topic which featured a presentation by Dr Michael Cooke. Dr Cooke has published his doctoral thesis on this topic and is recognized nationally as a leading expert in the field.

The quality of Dr. Cooke's paper presented at the Annual Conference was such that the AIJA believed there would be value in publishing it in its own right. It is hoped that in addition to its value as an information resource, this paper may provide useful background material for courts and tribunals who are considering running education programs for judicial officers or court staff on the issue of interpreters for indigenous languages.

Her Hon Judge Mary Ann Yeats
Convenor
AIJA Indigenous Cultural Awareness Committee

Introduction

This discussion of indigenous languages interpreting issues for courts is informed by my work in the Northern Territory (NT) as an interpreter, linguist and academic. The benefits of working in a 'small' place like the NT include opportunities to engage in a diverse range of professional activities and to interact with a broad range of people. Thus my own understandings of interpreting issues have been enriched by dialogue over the years with a range of stakeholders holding a range of viewpoints.

For example, there are police, lawyers and judges who see the need for interpreters as overstated, since most Aboriginal people speak at least basic English such that they can understand and respond to simply framed questions. There are some police who utilise an interpreter only to assist in satisfying the legal requirement that they properly explain the effect of the police caution and, once this is done, continue the interview in English. There are lawyers who see the interpreter as an impediment to the easy leading of an Aboriginal witness during cross-examination. There are magistrates and judges who are reluctant to permit interpreters to be used with witnesses who have some English because they feel the interpreter may interfere with the court's capacity to evaluate a witness directly, or may allow the witness the advantage of extra time to answer a question.¹

Equally, there are police who find that interviews conducted in the presence of a competent interpreter may promote more forthcoming responses from Aboriginal interviewees. There are lawyers who come to rely on interpreters in taking instructions or to enable their client to take the stand as a witness somewhat protected from easy linguistic manipulation and suggestibility under cross-examination. And there are members of the judiciary who will halt a trial until an interpreter can be found in a particular case, being of the opinion that the carriage of justice really does require a defendant to understand the proceedings.

It has been interesting over the last few years to see the debate about interpreting and communication issues being informed by contributions from linguists, whether their input has been by way of expert evidence in specific trials, by way of opportunities to address legal audiences, or by way of the increasing profile of relevant branches of linguistics (applied linguistics, sociolinguistics and forensic linguistics), which are providing more solid foundations to discussion about language and the law.

In offering some insights of a linguist to an audience of lawyers² my aim is to highlight several key observations about communication with indigenous litigants, defendants or witnesses, and to amply illustrate them. I should mention, however, that while most of my comments would apply to situations involving Torres Strait Islanders

¹ See generally Commonwealth Attorney-General's Department *Access to interpreters in the Australian Legal System*, (1991) s. 3.3 (p 44).

² I use the term lawyers in the more general sense so as to also include those holding judicial office.

of a non-English speaking background (NESB) as they do to NESB Aboriginal people (and, indeed, NESB migrants), my observations are overwhelmingly based on situations involving Aboriginal people and so will mainly be expressed as such.

These primary observations are that:

- Aboriginal evidence given in English is easily misconstrued through failure to identify how the semantic and grammatical differences between non-standard dialects of English used by witnesses, and Standard Australian English (SAE), can affect meaning;
- where an Aboriginal person speaks some English, lawyers often overestimate their capacity to be fairly interviewed in English; and
- courts commonly fail to account for the suggestibility and linguistic manipulability of NESB Aboriginal witnesses through regulating how they are questioned, particularly in reference to leading questions.

Arising from these observations is the concern that Aboriginal evidence is frequently denied its due weight.

The remainder of the paper is in three sections.

The first explores the principal English-based language varieties used by Aboriginal people. The relevance of this section is to explain how easily Aboriginal evidence is misunderstood when courts interpret utterances composed of English words according to the grammatical, semantic and conversational rules of SAE.

The second section³ looks more directly at interpreting issues in the context of the dynamics of evidentiary discourse.⁴ These include: the influence of tactical considerations on the part of counsel; communicative disadvantages accruing to partial speakers of English when giving evidence in English; and a tendency by lawyers to overestimate a witness's capacity to give evidence without an interpreter on the basis that the witness has a conversational command of the English language.

Then the final section looks at alternative ways in which the need for interpreting assistance for NESB Aboriginal witnesses can be appropriately assessed for courtroom purposes.

³ Material in this section is mainly drawn from: Cooke, M. 'Anglo/Yolngu communication in the criminal justice system', (1998) unpublished PhD thesis, University of New England.

⁴ A convenient term for the verbal interaction between counsel, witness, magistrate/judge and interpreter (where present) during the giving of evidence.

1. English based languages and dialects used by Aboriginal people

“It’s a function for Your Worship to interpret what the witness has said and what they meant.”

(Barrister arguing in 1990 against a linguist giving evidence concerning possible miscommunication and misinterpretation in previous evidence heard from Aboriginal witnesses without the benefit of interpreting assistance: *Elcho Island Coronial Inquest*.⁵)

The above quotation was part of submission that it is the function of the court (ie. the coroner) to evaluate witness evidence with the English language being a matter of common knowledge and experience not requiring expert assistance for its interpretation. This argument overlooks the presence of rule governed varieties of non-standard English spoken by Aboriginal people that are sufficiently distinct so as to prevent the speaker of SAE from reliably and accurately interpreting the meaning of utterances in these non-standard forms. These forms include *Aboriginal English* (usually spoken among urban Aboriginal communities) and other English based language varieties such as *Pidgin English*, *Northern Territory Kriol*, and *Learner’s English*.

1.1 Aboriginal English

Aboriginal English is a term generally used to denote the dialects of English used among Aboriginal people of urban and rural backgrounds. It is, in other words, their home language variety. That is not to say that many do not use SAE — they may well do in their dealings with non-Aboriginal people. But equally there are those who cannot use SAE effectively.

The leader in the field of Aboriginal English and the law is Dr Diana Eades (now of the University of Hawaii). Her 1992 handbook for lawyers, *Aboriginal English and the Law*,⁶ has helped promote understanding within the legal profession about miscommunication which arises when Aboriginal English utterances are interpreted according to the grammar and semantics of SAE and, of course, the converse — where an Aboriginal witness may misinterpret the effect of a question put to them in SAE.

As Eades points out, Aboriginal English is not a fixed dialect but a range of dialects, some being lighter (closer to SAE) and others being heavier (closer to Kriol). For example, in heavy forms *he* (or *e*) is used for both ‘he’ and ‘she’, or *la* is used for ‘at’ or ‘to’. There are sufficient differences in grammar, pronunciation and vocabulary so as to force the SAE speaker to sometimes conjecture as to meaning.

⁵ NT Coroners Court Inquest, before A. McGregor SM, into the death of Ganamu Garrawurra, May 1990 – June 1991 (unreported).

⁶ Eades, D. *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners*, (1992) Brisbane: Queensland Law Society.

These are two examples:

Aboriginal English	Standard Australian English
<i>He never bin la court</i> <i>E Alan cousin-sister</i>	He/She didn't go to court She is Alan's mother's sister's daughter

Sometimes these differences in meaning can become an issue at law. A now notorious pitfall for the inexperienced police officer or criminal lawyer is to accept the use of the word 'kill' at face value, since in many Aboriginal English varieties (as with Kriol) kill means to 'hit', 'strike' or 'injure' and not necessarily 'kill dead'.

There are other examples of the danger in assuming that ordinary English words used by speakers of Aboriginal English (AE) have the same meaning as in SAE. For instance, I was recently asked to analyse a Police Record of Interview where a man had confessed to having sex with a woman who he said was "*asleep*" at the time — thus giving support to the woman's complaint of sexual assault. However, the man's lawyer maintained that his client had used 'sleep' in the AE sense, where it means 'lie down', rather than the SAE sense where it refers to a particular state of (un)consciousness. This argument that the man had meant that the woman was in fact awake could be supported if it could be shown that he had been speaking in AE when he was responding to police. However, while it was apparent that he was indeed using a mixture of SAE and AE in the interview (eg: "*Oh, I just went I started walking home told her I was gunna go K... and then half way down I see her running and only she came for me which was when I throw...*"), he also exhibited his familiarity with the SAE meaning of 'sleep' by offering a series of synonyms in his clarification of the woman's somnolent state ("*sleep, drunk, asleep, passed out ... call it whatever*"). Thus, while linguistic analysis revealed that the argument for misinterpretation could not be sustained in this instance, the case is nevertheless indicative of how easily the sense of everyday words can be misinterpreted when the effect of dialect is not considered.

1.2 Pidgins

Pidgin is a technical term referring to a contact language: a language form used for intercultural contact such as in trading ports, plantations or — in the case of Australia — stock camps, cattle stations, missions and the like. While pidgin languages are rule governed, they are not used by speakers as a first language and in fact are not fully developed languages. *Aboriginal Pidgin English* was used widely in Australia in the 1800s and during the first half of last century, but is rarely spoken today. In fact, to refer to a single Aboriginal Pidgin English is an over-simplification, as a study of the subject by Harris has shown.⁷ Harris points out (p 259) that:

⁷ Harris, John *Northern Territory Pidgins and the Origin of Kriol*, (1986) Pacific Linguistics, Series C – No. 89. Australian National University.

Pidgin Englishes arose at various times in various places but they had common features that facilitated their parallel convergence into one widely understood lingua franca, Northern Territory Pidgin English.

Harris noted influences, for example, from *Chinese Pidgin English*, *Southeastern Australian Pidgin English* and even *Macassan Pidgin*.⁸ Incidentally, Harris noted that reference to the use of 'kill' to mean 'hit' could be traced back to the 1880s.⁹

It appears that the prominence of Aboriginal Pidgin English as a language of European/Aboriginal communication was so great by the 1880s that it was used in Northern Territory courts, as can be seen from the following example from a 1913 Darwin murder trial where the judge is administering the oath to an Aboriginal witness, Ada:¹⁰

Judge: *Now, Ada, you savvy those blackfella there?* (pointing to the defendants)

Witness: *Yaas, me savvy.*

Judge: *You see those white gentlemen there?* (pointing to the Jury)

Witness: *Yaas, me see 'em.*

Judge: *All right, Ada. Now, you tell those gentlemen all you savvy about those blackfella. And you talk straight fella.*

Witness: *Yaas.*

Judge: *And loud fella.*

Witness: *Yaas.*

(Ada then proceeded to give her evidence.)

In the context of this paper, it is significant to note that Aboriginal Pidgin Englishes led to the development of a new language, *Northern Territory Kriol*, in the early 1900s, and have influenced Aboriginal English (such as, for example, the AE meaning of 'kill').

⁸ Macassan English was a contact language that developed among NT coastal Aboriginal communities for communication with visiting Macassan fishermen from Southern Sulawesi in Indonesia.

⁹ Op. cit. n7, p 271.

¹⁰ Op. cit. n7, p 347.

1.3 Creoles

A creole is a full language that develops when enough people use pidgin as a home language (rather than a contact language) such that it becomes the language of a community. A creole is more grammatically complex than a second language pidgin as it has to meet all the communicative requirements of native speakers. Thus, creoles are as complex as other full languages.

In the case of the NT, Kriol emerged out of NT Pidgin English at Roper River Mission in the early 1900s. As a sanctuary from massacre (by cattlemen and police), the mission attracted remnants of eight different language groups.¹¹ Harris explains:¹²

...the massacre of many of the Aboriginal people of the Roper River region, together with the drastic social disruption and geographical dislocation, led to a situation where a new peer group of children and young people at Roper River mission were suddenly thrust together under circumstances in which they had not yet acquired the multilingual competence by which the adult members of the speech community were able to communicate. The obvious lingua franca was Northern Territory Pidgin English, a pidgin which was already the lingua franca of European and Aboriginal communication.

... it did not take long for the pressing need for a primary language to prompt its creolisation.

Kriol expanded during the 1900s and continues to do so. It is now the main language of many Aboriginal communities with over 20,000 speakers across the northern half of the NT and is spreading into Western Australia. In Far North Queensland, another creole language, *Torres Strait Creole* (also known as *Cape York Creole*), independently developed from *Melanesian Pidgin*, which had become established in coastal Queensland via the sugar industry.¹³

The following comparative table¹⁴ of pronouns in SAE, NT Pidgin English and Kriol illustrates both the process of grammatical simplification that occurred with the pidginisation of English, and the development of grammatical complexity that occurs with creolisation, to yield a situation where the pronominal system for Kriol is actually more complex than for English (Kriol follows other Aboriginal languages in this respect).

¹¹ Op. cit. n7, p 305.

¹² Op. cit. n7, pp 310-11.

¹³ Op. cit. n7, p 292-3.

¹⁴ Op. cit. n7, p 304.

PRONOUN	ENGLISH	NT PIDGIN	KRIOL
1 st person singular	I	<i>me (I)</i>	<i>mi</i>
1 st person dual inclusive	we	<i>we</i>	<i>yunmi</i>
1 st person dual exclusive	we	<i>we</i>	<i>mindubala</i>
1 st person plural inclusive	we	<i>we</i>	<i>wi</i>
1 st person plural exclusive	we	<i>we</i>	<i>mibala</i>
2 nd person singular	you	<i>you</i>	<i>yu</i>
2 nd person dual	you	<i>you</i>	<i>yundubala</i>
2 nd person plural	you	<i>you</i>	<i>yubala</i>
3 rd person singular masculine	he	<i>him</i>	<i>im</i>
3 rd person singular feminine	she	<i>him</i>	<i>im</i>
3 rd person singular neuter	it	<i>him</i>	<i>im</i>
3 rd person dual	they	<i>all about (they)</i>	<i>dubala</i>
3 rd person plural	they	<i>all about</i>	<i>olabat</i>
Number of distinctions:	7	5	11

Another semantic domain where Kriol reveals itself as an Aboriginal language, lies in the organisation of its kinship terms within a paradigm reflecting traditional Aboriginal kinship structure where, for example, one refers to one's mother in the same way as one refers to her sisters. Thus the Kriol term, *mami* (from 'Mummy') means both 'mother' and 'maternal aunt'. Similarly, *dedi* (from 'Daddy') means both 'father' and 'paternal uncle'. Thus the Kriol word *anti* (from 'Aunty') is restricted to mean 'paternal aunt' ('maternal aunt' being *mami*); and the Kriol word *anggurl* (from 'uncle') is restricted to mean 'maternal uncle' ('paternal uncle' being *dedi*). These examples highlight the danger of attempting to interpret what a person is saying by assuming that recognisably English words mean the same as they do in English.

A sample of Kriol text (below) taken from the translated New Testament, illustrates both the connection with English and Kriol's integrity as a language:

Matthew 26:14

Then one of the twelve, the man called Judas Iscariot, went to the chief priests and said, "What will you give me to betray him to you?" They weighed him out 30 silver pieces.

Brom deya det wekinmen blanga Jisas neim Judas Askeriyat bin go langa detlot haibala serramonimen, en imbin tok, "Wanim yumob garra gibit mi if ai hendimoba Jisas langa yumob?"

Wal detlot serramonimen bin gudbinji wen deibin irrim im tok lagijat, en deibin kaundimup 30 bigwan silbawan mani, en deibin gibit im det mani.

1.4 Learner's English (an interlanguage)

Interlanguage refers to utterances of those learning a second language who, while attempting to achieve native speaker norms, fail to (consistently) do so. The errors of language learners occur as patterns, which vary according to the learner's first language, their stage of development in the second language, and the context of the conversation. It is an appreciation of these patterns that allows the linguist to understand how the error is generated and to correctly interpret the intended meaning.

Learners of English tend to make similar errors and pass through similar successive stages of competence in their journey of acquisition. Of relevance to those who interview second language speakers (eg. barristers), is that a suitably qualified linguist or language teacher is able to use these patterns or errors to determine the proficiency of an interviewee's English, how much they can understand and express, and whether or not they require an interpreter.

There is also variability in language used by learners at any given stage of development — just as the language of native speakers is variable. This variability appears to be systematic in several senses. These are that learners alternate their use of forms according to linguistic context, situational context and stylistic context (learners are much more likely to use correct target language forms in situations that warrant a *careful style* as opposed to informal *vernacular style*).¹⁵

Language interference refers to the transfer of features from the learner's previously acquired language(s) into the interlanguage. Transfer may be variably manifest as errors, as the overuse or avoidance of certain forms or structures, and as *code mixing* (changing from one language variety to another, even in the middle of a sentence). Transfer may also have other effects such as on the rate or course of acquisition.

The problem of language interference in creating communication difficulties in courtrooms is raised by Lester (1973), an Aboriginal interpreter with long experience in Alice Springs courts. He observed the effect in the case of Central Australian Aboriginal languages and English.¹⁶

The people have no understanding of connecting or qualifying words like 'if', 'but', 'because' and 'or'. In our languages these are part of another word or they don't exist. We have no word for 'because'. The same with words like 'in', 'at', 'on', 'by', 'with', 'over', 'under' and so on. For these there is one ending that goes on other words. Most of the people when they speak English leave out these words. When they hear them they do not understand their meaning.

¹⁵ Ellis, R. *The Study of Second Language Acquisition*, (1994) Oxford University Press, Oxford, p 22.

¹⁶ Lester, J. *Aborigines and the Courts and Interpreting in the Courts*, (1973) Institute of Aboriginal Development, Alice Springs, p 3.

The following excerpt provides examples of language interference and in particular highlights a potential problem where police tell Aboriginal suspects that they “don’t have to” answer questions. It is from a voir dire held during an NT Supreme Court trial of a Yolngu man (ie from North East Arnhem Land) charged with aggravated sexual assault. Police had questioned him in the presence of his younger brother who acted as Prisoner’s Friend¹⁷ but who was also asked by police to act as interpreter (despite having no qualification). Here, Defence Counsel (DC) is questioning the younger brother about his apparent reticence at being involved in the police interview (apparently because according to his society’s law, it is not appropriate for a younger sibling to participate in a discussion of explicit and unseemly sexual matters concerning an older sibling).¹⁸

DC: *James, you said you weren’t feeling comfortable being there. Remember you said that? Is that right?*

Witness: *Yes.*

DC: *Is it the fact that you weren’t comfortable, because Harry is your older brother?*

Witness: *Yes.*

DC: *Why would that make you uncomfortable?*

Witness: *I - I - I **don’t have to talk** about my brother - older brother.*

DC: *You don’t have to?*

Witness: *Yeah.*

DC: *I’m not sure I understand.*

Witness: *I’m an **Dhudi-nha** in Yulngu system, we **don’t have to talk** about older brother, ‘cause he’s our old - older brother.*

DC: *Well that means you don’t have to. Can you if you want to?*

Witness: *No.*

DC: *Why do you say that?*

Witness: ***Skinship** system. Have to respect older brother.*

(later:)

DC: *... You said that you were uncomfortable because you are his younger brother; is that right?*

Witness: *Yes.*

DC: *Perhaps you could just explain to His Honour why that makes you feel uncomfortable?*

¹⁷ Under the Anunga Guidelines set out by Foster J in *Anunga* (1976, 11 ALR 412) and incorporated into NT Police Standing Orders, an Aboriginal suspect is permitted to have a person of their choice present to assist and advise during the police interview.

¹⁸ *R v Gurruwiwi* (NT Supreme Court, Kearney J, September 1996, unreported), transcript p 41.

Witness: *Well, look, he's my brother and he's my - my - a leader in a more or less way, that's back home. And like, we respect our older brother. We **don't have to talk** about - I mean, all that bad things about our brother - like my brother or we **don't have to swear** our brother - like older brother.*

A number of points arise from this:

- The witness has used “don't have to” to mean ‘must not’. I have found this misinterpretation of the meaning of ‘don't have to’ to be a predominant pattern with NESB Aboriginal people across the NT, including Kriol speakers. This is of particular concern in the context of the police caution, which is usually administered by police using expressions such as “you don't have to answer my questions”.
- A common occurrence among language learners is to revert to their first language when having difficulty finding the right English word. Here the witness has used “dhudi-nha” for ‘last born’.
- ‘Skinship’ is quite a common term in Aboriginal Learner’s English from Arnhem Land and is derived from the English words ‘skin’ (Aboriginal people may speak of a skin name or wrong skin in reference to what anthropologists call a subsection system — utilised by many Aboriginal groups in classifying relatives), and ‘kinship’ (because Yolngu also follow blood and marriage lines in determining kin identity). It was used unselfconsciously here with the witness not realising that skinship is not an English word.

1.5 Discussion

The presence and interplay of a number of English based dialects, even within the one community, is illustrated by two Aboriginal writers from Oenpelli (Gunbalanya) who recorded and described language use in their small community (of a few hundred people) where the community language is *Kunwinjku* (a traditional language) but where various English related languages/dialects are used as well:¹⁹

... the people who use Aboriginal English use it as a second dialect of English to communicate with other Aboriginal people from other communities who are not Kunwinjku speakers. It feels more natural for Aboriginal people to use Aboriginal English with each other, and it is quickly learnt. We feel its use does not threaten either Kunwinjku or our knowledge of Standard English because we know we can move easily between all of these languages and dialects according to the social situation.

¹⁹ Walton, C. & Christie, M. ‘Aboriginal Literature and Critical Pedagogies’, *Ngoonjook: Journal of Australian Indigenous Issues*, (1994) no. 10, pp 65-88.

Other Aboriginal people at Gunbalanya do not use Aboriginal English amongst themselves but always use Kunwinjku. However, some of the old people who cannot speak English use a form of Pidgin when speaking to European people. Other older people use a form of English closer to Standard English when speaking to Europeans. They learnt this from the missionaries.

These language varieties share different grammars and even sound different. What they have in common are conversational rules which tend to be based very strongly in Aboriginal styles of social interaction often quite different from the Anglo-Australian pattern. Eades has discussed several characteristics of Aboriginal communicative style relevant to legal interviews.²⁰ These characteristics include: resistance to direct questions; the expression of specific information in non-numerical terms (in respect of time, location and quantity); periods of silence (which can be misinterpreted by non-Aboriginal lawyers); avoidance of eye contact; confusion with English *either/or* questions; and, *gratuitous concurrence* (see further below).

In respect of Aboriginal communicative style, Eades reports that ‘the most important element of socio-cultural context is the indirectness which is central to much of the social interaction’.²¹ This indirectness is reflected in the use of ‘multifunctional linguistic forms’ and ‘structurally ambiguous’ or ‘communicatively ambiguous’ question forms. Conversely, communicative norms permit answers to likewise be indirect, particularly in response to requests. When asked to express opinions, Aboriginal people adhere to ‘a fundamental cultural view that Aboriginal persons can only speak for themselves’ and tend ‘not to express a firm or biased opinion, even if they hold one’. The result is that the ‘style of gradually and indirectly expressing an opinion is a significant factor in cross-cultural miscommunication’. Although an indirect style is by no means alien to Anglo-Australian discourse, it is not a feature of courtroom questioning where, particularly in cross-examination, lawyers are often both aggressive and direct in their questioning and usually demand direct and unequivocal answers.

A factor that bears greatly upon the capacity of NESB Aboriginal people to participate effectively in an interview is its style: the *question/answer* (Q/A) interview style is not generally familiar — information and explanation is generally communicated more effectively in narrative style. Communicative empowerment afforded by the opportunity to testify in this culturally appropriate genre and with appropriate linguistic support was highlighted in a 1995 murder trial of an NESB Aboriginal woman with the prosecution relying on an incriminating record of interview conducted in Q/A style without interpreting assistance.²² In contrast, trial evidence was elicited from her through a guided narrative with occasional linguistic support from an interpreter. The narrative

²⁰ Eades, D. ‘Communicative Strategies in Aboriginal English’, ed. S. Romaine, *Language in Australia*, (1991) Cambridge University Press, Cambridge, pp 84-93.

²¹ Op. cit. n20, p 52.

²² *R v M* (Supreme Court of WA, Owen J, February 1995, unreported). This case was described in: Cooke, M., ‘A different story: narrative versus ‘question and answer’ in Aboriginal evidence’, *Forensic Linguistics*, (1996) Vol. 3, no. 2, pp 273-288.

served to place the killing (which she admitted to) in perspective as a reaction to extreme and continuing violence. Following her evidence, the charge of wilful murder was withdrawn in favour of manslaughter.

It is noteworthy that the Australian Government's *Commonwealth Evidence Act 1995* provides for narrative evidence in federal courts following application by counsel and direction from the court (section 29.2). While this Commonwealth legislation is not binding in other jurisdictions, the Queensland Criminal Justice Commission reports that:²³

...skilful counsel are able to elicit narrative from their witness in a natural and compelling way, but at the same time steer the witness away from inadmissible material (such as hearsay or prejudicial material). This controlled form of questioning is referred to as "guided narrative".

2. Interpreting issues in the context of evidentiary discourse

"He's shown no sign of ... needing the assistance of an interpreter to interpret the English language."

(Barrister objecting to a witness request for an interpreter: *Elcho Island Coronial Inquest*.)

Australia is bound by a number of international agreements and conventions implying rights to an interpreter for NESB people facing criminal charges where they are unable to participate effectively in proceedings due to language difficulties.²⁴ Requirements also extend from common law where '(d)efendants in criminal cases have the strongest claims to interpreters, while the need for interpreters for witnesses in civil and criminal matters is less compelling'.²⁵ The situation is clarified by Mildren J:²⁶

An accused person who does not understand the language of the court is entitled to an interpreter and this right cannot be waived unless the person is represented by counsel. In civil cases a party — and, it is submitted, in both civil and criminal cases, a witness — may have the services of an interpreter only with the leave of the court.

²³ Criminal Justice Commission, *Aboriginal Witnesses in Queensland's Criminal Courts*, (1996) Criminal Justice Commission, Brisbane, p 49.

²⁴ Laster, K. & Taylor, V. *Interpreters and the Legal System*, (1994) Federation Press, Sydney, Chapter 4.

²⁵ *Ibid*, p 78.

²⁶ Mildren, Hon Justice D. 'Redressing the imbalance against Aboriginals in the criminal justice system', *Criminal Law Journal*, (1997) Vol. 21, no. 1, pp 17-18.

The situation of witnesses who speak some English is problematic. First, judges do not generally have the expertise required to determine a person's level of English proficiency and may easily overestimate it. Second, there is a preference by many judges and magistrates to hear evidence in English from NESB witnesses, reflected in judicial statements such as: 'Experience has shown that the tribunal of fact can make a better assessment of a witness if there is no interpreter transposed between it and the witness'.²⁷ The variability in judicial attitudes towards interpreters was highlighted in *Access to Interpreters in the Australian Legal System*:²⁸

... there is substantial evidence to suggest that, in cases where a witness has limited understanding of English, there has been a reluctance by some judges to allow an interpreter to be used in circumstances where one would seem appropriate.

This reflects the primary consideration ... that a witness with some understanding of English should not obtain an unfair advantage. ... Less attention has been given to the real risk that a witness with insufficient knowledge of English may not be able to adequately understand the questions put and convey the meanings he or she wishes to express.

The practitioner's perspective was made explicit (para 3.3.4) in submissions from 'a number of experienced lawyers [who] suggested that the decision whether to use an interpreter was a tactical issue'.

Where there is any contention, the decision as to whether a witness who is a partial speaker of English requires an interpreter often results from assessing the person's responses to a series of introductory questions or from considering the witness's performance during a prior interview, such as an interview with police. Unfortunately, the process of second language acquisition entails certain features which easily cause overestimation of a learner's skills.

One is that listening skills generally progress faster than speaking skills. In other words, the learner is usually able to understand more complex utterances than they could produce themselves. Furthermore, a learner may understand a question more from recognition of a key word and tone of voice than from cognisance of a question's structure. Thus, one should not assess the learner's overall language proficiency based on the complexity of questions responded to (of far more use is the complexity of any answer).

27 *R v Johnson* quoted p 89 in Earle, J. 1991, 'Access to interpreters in the Australian legal system', *Reform*, (1986) Vol. 62, pp 88-93.

28 *Op. cit.* n1, p ii.

A second feature is that in conversation with a native speaker, a learner often utilises the native speaker's contributions in the construction of their own responses. Linguists call this *scaffolding*.²⁹ While this contributes to the semblance of English conversational skills on the part of the learner, reliance upon scaffolding may easily mask insufficiency.

A third feature is that at the lower-intermediate levels of proficiency a learner may be able to participate effectively in basic and predictable general conversations (greetings, providing basic personal information, talk about the weather or about a sporting event) by utilising often heard or used expressions and by previous experience of how these conversations typically proceed. It is only when the topic of conversation proceeds to the unfamiliar, and where the predictability of conversation fails, that the learner may reveal their difficulty.

In combination, these features often conspire to produce a false assessment such that the witness must take the stand unassisted and open to questioning tactics which exploit the linguistic vulnerability of a partial speaker.

In the case of the *Elcho Coronial*, there was indeed frequent contention concerning the provision of interpreting assistance to those Yolngu witnesses who spoke some English. It was a high profile case investigating the circumstances surrounding the death of a middle-aged knife-wielding mentally-ill Yolngu man (Ganamu Garrawurra) shot by paramilitary style NT 'Task Force Police' as he attempted to evade their ambush on a remote island beach. The shooting was witnessed by three Yolngu men, one of whom was a local police aid. While evidence was taken from a total of 16 Yolngu witnesses, most attention was reserved for this witness who had already been interviewed by police at length. The police aid (henceforth, PA) testified on a number of occasions during the inquest and his evidence occupies almost 300 pages of the official transcript. He was given a great deal of attention by several counsel using various communicative approaches, and the provision of interpreting assistance to him was highly contentious. He was under particular pressure from counsel representing police interests. Following the shooting, PA had spoken to detectives about his earlier advice to the police that the family should have helped bring Ganamu in, as they had done three times before. Furthermore, the police had denied him any opportunity to approach Ganamu on the beach and, when Ganamu died, he was not allowed near the body. Finally, his account of the events of the shooting was at significant variance to those of the police.

The quotation given at the beginning of this section is part of an exchange between barristers on the issue of whether PA required an interpreter. The issue arose when, after having given evidence-in-chief on the previous day without an interpreter, he requested an interpreter immediately upon resumption of questioning the next day. Three barristers contributed to this exchange: Counsel Assisting the Coroner (CAC), Counsel for the police (CPol) and Queen's Counsel representing the family of the deceased (QCF).³⁰

²⁹ Ellis, R. *The Study of Second Language Acquisition*, (1994) Oxford University Press, Oxford, pp 284-5.

³⁰ *Elcho Coronial* transcript, p 650.

CAC: *In the course of one of your interviews with police ... you drew a plan; is that correct?*

PA: *Yes. First of all, can I have my - my interpreter please.*

Coroner: *Is there a problem?*

CAC: *I'm not aware of there being a problem, Your Worship. On the other hand, I'm also conscious of the fact that sometimes one isn't aware that there's a problem.*

Coroner: *Yes*

CAC: *It's not my application, but the witness has indicated that he would like the assistance of Mr Cooke and Mr Cooke is present.*

Coroner: *I know. Mr Cooke is available. I'm going to allow it.*

CPol: *Can I just be heard on that your worship?*

Coroner: *I'll allow you to be heard, yes.*

CPol: *Your Worship, we, on other occasions when witnesses have endeavoured to - wanted to use interpreters, we've made submissions. This witness has given three statements to Police without the aid of an interpreter. He, in one of his statements, sets out his background, education and training, and if it's necessary I'll ask him what his level of education is. I believe he attended school at Elcho and went to a later stage of that education.*

... in my submission, unless the witness can establish to Your Worship that he actually needs an interpreter to assist in interpreting the language, as distinct from using him as some sort of prop, then Your Worship should not allow him to use an interpreter. He's shown no sign to date, in this court or in any of the statements that have been taken from him, of needing the assistance of an interpreter to interpret the English language.

Coroner: *All right.*

QCF: *Does Your Worship want to hear me on that?*

Coroner: *I'd much rather hear the witness, to find out why he wants an interpreter.*

Why do you want to use an interpreter just now?

PA: *It's in connection that I - the subject - the subject changes and I get confused. Give a good explanation. There's different varieties of questions.*

Coroner: *Yes, Mr Ross?*

QCF: *Yes. I just wanted to say this, just to echo what Mr Tiffin said, that we're not necessarily the best judges and probably he is. While it's pretty clear that, in general terms, his command of oral English has been demonstrated, one would have thought that what the witness probably wants is to make sure that the nuance of the question and the nuance of the answer is made clear.*

... there is not only a matter of explanation to the nuance of the words but that in various communities words that seem clear and unambiguous to us have different meanings in those communities.

This exchange between counsel, coroner and witness encapsulates some of the principal communication issues underscoring the dynamics of evidentiary discourse involving NESB Aboriginal witnesses. They include:

- the failure to recognise the need for interpreting assistance (“*sometimes one isn't aware that there's a problem*”);
- the utilisation of interpreters as a tactical matter (“when witnesses have ... wanted to use interpreters, we've made submissions”);
- the perceived effect of an interpreter as “*some kind of prop*”;
- susceptibility to confusion by Yolngu witnesses from the *question and answer* interview style (“*the subject changes and I get confused*”);
- misunderstandings where Yolngu use English expressions with non-standard meanings (“*words that seem clear and unambiguous to us have different meanings*”).

These issues are now considered in turn.

2.1 “sometimes one isn't aware that there's a problem”

In fact, this witness (PA) *had* shown signs of communication difficulty prior to this point. During police interviews his insufficiency had been masked by his being able to scaffold his replies around the police questions and by the police prompting and leading in order to salvage his sometimes absurd replies.

There were numerous instances in these interviews where PA was asked to state how far individuals were from one another at various stages of the unfolding tragedy at the isolated beach. In common with many Aboriginal people who ‘often tend not to use expressions of quantifiable specification, or to use them vaguely, inaccurately, or inconsistently’,³¹ PA exhibited great difficulty in supplying such information in the terms in which it was requested.

³¹ Op. cit. n6, p 29.

- (pp 9-10):³² The detective and PA were conferring over a map of the beach where Ganamu was shot.

PA: *... so we had a little bit from here, but there, was about 50, 50 miles.*

Detective: *Fifty miles?*

PA: *Not miles - - -*

Detective: *Yards.*

PA: *Yards, um yeah that's, that's 50 that half.*

Detective: *Metres, meaning one big pace.*

PA: *Yeah.*

Detective: *Yeah, I mean like this. (Detective presumably takes a step.)*

PA: *No, no, no, no not not - - -*

Detective: *That would be about a metre.*

PA: *Yeah metre, about 50 metre.*

Detective: *Yeah.*

PA: *Yeah.*

While PA's initial proposition of 50 miles in the above extract was absurd the detective was able to renegotiate the units and thus render the answer feasible. However, PA was led to this outcome so that the concern that he may be inaccurate and unreliable in his quantified specification of distance remains. A few minutes later in the interview the detective asked for another interval to be specified whereupon PA did so in the common Aboriginal way of comparing visible reference points in the immediate environment (PA indicated a mound of earth visible from the interviewing room). The detective then asked for the distance to be quantified and, perhaps in view of PA's previously demonstrated unreliability in respect of units of measurement, dispensed with standard units in favour of car lengths (or possibly widths — he was not clear).

- (pp16-17)

Detective: *How far away from the Constable was the dead man when he fired them (shots) in the air?*

PA: *Um, see he was, um er see that hill over there - - -*

Detective: *Yeah.*

³² Page numbers relate to reference NT CIB 1/000035.

PA: - - - *hill over there.*

...

Detective: *All right. Now, how many cars would fit between here and that hill do you think?*

(PA responded to an earlier issue and did not answer the question.)

Detective: *But how, how many cars away, how many cars could fit between here and there if they were up against each other, connected.*

PA: *Oh I'd say about, about 40.*

Detective: *Forty cars? Is it 40 cars or 40 metres you're talking about?*

PA: *Well 40 cars parked, metres you know.*

Detective: *Forty metres?*

PA: *Yeah 40 metres.*

Detective: *... for the purpose of the tape I would estimate ... the hill would be about oh 30 metres.*

2nd Det: *Yes, I, I confirm that as well.*

It is apparent that the detective found PA's answer of 40 cars to be excessive given that both detectives estimated the distance as 30 metres. He again renegotiated the units to accommodate the numeral. This demonstrated difficulty in communicating in this domain could only have adversely affected PA's reliability as an eyewitness and thus the credibility and value of his evidence. An interpreter could have made clear to the detective that the difficulty did not necessarily relate to perception but to both enumeration and the use of standard units. Questions could then have been reformulated enabling PA to confine his answers to comparisons with features in his physical environment and the resulting distances could be measured as necessary. That CAC was "*not aware of there being a problem*" in respect of these interviews may have been because he had not appreciated the extent of 'scaffolding' in rendering PA's responses sensible.

In fact, this witness had also displayed communication difficulties while giving evidence-in-chief, but these had gone unrecognised. Of particular concern was that the court understood him to have affirmed reading statements he made to police whereas he had only been asked if he had "*seen*" them (he took this literally). When he was asked if the transcript was accurate he replied "*Yes, if I can think of it*" and this was taken as an affirmation. The fact that he had not had an opportunity to read the transcripts of his statements was only revealed after a full day in the witness box.

2.2 "when witnesses have ... wanted to use interpreters, we've made submissions"

In this inquiry, the challenge facing counsel for the police (CPol) was potentially damaging evidence from Yolngu witnesses that would undermine the police position that the shooting was in self-defence against an armed, dangerous and terrifying man. The fact that he had been calmed down by family members on other occasions when he

displayed aggression, and numerous other indications that the police might have been needlessly heavy handed, meant that CPol's efforts in cross-examination were directed at undermining the evidence of the Yolngu witnesses and any confusion or disorientation on the part of witnesses generally aided his cause. And it follows that the presence of an interpreter undermined it. Thus, the extracts that follow emphasise how much the use of interpreters can be a tactical issue in cases where witnesses have some English.

The illocutionary power of counsel who confront NESB Aboriginal witnesses unimpeded by interpreting 'assistance' is illustrated in an excerpt from the cross-examination of a witness who had been earlier described to the court as a person whose "*English is quite excellent in fact*", and so the question of interpreting assistance did not arise. Nevertheless, a significant language handicap emerged under questioning by CPol who forced the witness's concurrence on the point that Ganamu (the deceased) had once thrown a spear at his own brother. The reality — which happened to be confirmed in court some months later — was that it was a spear *shaft* which had been thrown; that is, a length of light wood that had yet to be fashioned into a spear. In what appears as a case of first language interference, the witness was confounded by the fact that the English word 'spear' translates into Djambarrpuynu as *gara*, a generic term for spear which also means 'spear wood'. After twice trying unsuccessfully to explain that Ganamu had only thrown a stick at his brother, the witness misinformed the court under pressure of insistence to accept the confinement imposed by a declarative *yes/no* question:

- (pp 558-9)³³

CPol: *You knew that he'd thrown a spear at [his brother], didn't you?*

Witness: *It wasn't a real spear - it was blunt in the nose.*

Coroner: *It was what?*

Witness: *It wasn't a real spear with a sharp edge on it.*

CPol: *When I asked you whether you know about these things ...?*

Witness: *I've heard it, yes, I've heard about that.*

CPol: *Please tell me that you have?*

Witness: *Yes.*

(Objection)

CPol: *You'd heard about him throwing a spear at [his brother], hadn't you?*

Witness: *Yes.*

³³ Page numbers refer to the *Elcho Coronial* transcript.

The next extract illustrates the ease with which cross-examination proceeds when counsel asks a series of *yes/no* questions of a partial speaker of English who exhibits (in common with most Aboriginal witnesses) a propensity towards *gratuitous concurrence*, which can be described as an agreement or confirmation ‘which does not necessarily signify the speaker’s actual agreement with a proposition’.³⁴

The phenomenon has long been recognised by courts as can be seen from the following comment by Kriewaldt J, a judge of the NT Supreme Court in the 1950s. Here, His Honour was speaking in general terms about Aboriginal witnesses:³⁵

... the very process of question and answer which is the basis of the extraction of evidence, might not fully extract what he [an Aboriginal witness] knows, what he tried to say, nor what his intent was. An answer in the affirmative could indicate that the Aboriginal witness is trying to understand the question, that he has understood it, that he has understood part of it, that he may not have understood it at all, or that he does not want the question to go unanswered, or that he thinks that an affirmative answer is more likely to be acceptable to the questioner than a negative answer.

CPol was able to establish under cross-examination that Ganamu had given fear to local inhabitants, through a series of *yes/no* questions (all answered with “*yes*”). Although an interpreter was with this witness, CPol had successfully appealed to elicit this evidence without the interpreter’s assistance:

- (p 35)

CPol: *When Stacey was speared, did you run away?*

Witness: *Yes.*

CPol: *Did you run back to the Toyota?*

Witness: *Yes.*

CPol: *Were those other Aboriginal men there with you?*

Witness: *Yes.*

CPol: *Did they run away?*

Witness: *Yes.*

CPol: *Were you frightened?*

Witness: *Yes.*

³⁴ Op. cit. n21, p 91.

³⁵ *R v Aboriginal Dulcie Dumala* (1959) NT 274, quoted p 33 in McCorquodale, D. ‘Judicial racism in Australia? Aborigines in civil and criminal cases’ in ed. K. Hazlehurst, NSW University Press, Sydney, *Ivory Scales: Black Australians and the Law*, (1987) pp 30-59.

CPol: *Frightened of the dead man?*

Witness: *Yes.*

(This series of agreements raised the spectre that the witness might be agreeable with anything — a case of gratuitous concurrence. The last question of this witness was an attempt by His Worship to eliminate this as a possibility:)

Coroner: *Was there anything in those questions that you had trouble understanding?*

(no reply)

Did you understand all that Mr Reeves just asked you?

Witness: *Yes.*

Coroner: *I was hoping to phrase that so I wouldn't get a simple yes.*

The easy verbal control over linguistically vulnerable witnesses reflected in the previous two extracts is easily upset by interpreting assistance. It is predictable, then, that counsel would try to minimise or exclude the interpreter's input as is seen in the next extract where counsel's frustration is evident:

- (p 1103)

CPol: *... And you said this morning that each of those warning shots came from your right, didn't you?*

Why are you now saying that they came from your left?

(The witness turns to speak through the interpreter.)

You don't need to ask Mr Cooke with you there. Why are you now saying - - -

Interpreter: *He's not asking.*

PA: *Well I didn't know - I didn't know ...*

(Another barrister raises an objection to CPol's interjection, which His Worship sustains:)

Coroner: *I know. ... Thank you for butting in. ... I think he can ask Mr Cooke.*

CPol: *Your Worship, in cross-examination, particularly on a point where a witness has been demonstrably contradictory and unreliable, as he has here, particularly when he's been answering all the questions up to that stage by himself, in my submission he should be required to answer the final question ... by himself, unaided with the support of an interpreter to try and dream up some explanation for it. ...*

Coroner: *It's utterly impertinent to suggest that the interpreter is going to help him dream up an explanation.*

CPol: *... well, I'll withdraw that Your Worship. ...*

2.3 “some sort of prop”: the interpreter as a shield

An interpreter inevitably provides some degree of shielding from aggressive cross-examination — if only through impeding the pace of questioning or through relaying the questions in a more civil, and therefore less threatening, tone of voice. Here, the police aid is being questioned about his observation of a wound to the hand of a searcher speared by Ganamu. CPol appeared to be trying to pressure the witness to agree that it was a serious injury so that he could then establish a contradiction with an earlier statement the witness had made to Aboriginal Legal Aid that it was a small cut. By turning to the interpreter in answering this question, PA was able to develop a full *yes and no* answer to a *yes or no* question, and so avoided the trap that had been set for him (p 811):

CPol: *And it was a serious injury wasn't it, from what you could see?*

(Witness begins to speak to the interpreter. Counsel interrupts.)

Mr Gumbula, it was a serious injury - - -

QCF: *Well wait on, please, the interpreter and the witness are speaking.*

CPol: *Well, Your Worship, I will – we're going to be here for weeks unless I'm able to interfere and insist upon an answer to a simple question.*

Coroner: *Well, can we have an answer to that one.*

Interpreter: *Well, the answer has come but it's a double answer. It was serious in one respect because it was one person injuring another, but in terms of anatomical damage, it seemed to be quite a small injury ...*

2.4 “the subject changes and I get confused”

Even with an interpreter, PA answered many questions without assistance — only occasionally turning to the interpreter to have the meaning of a question explained or an answer translated. Under cross-examination the tactic of rapid-fire questioning sometimes had the effect of cutting out any interaction with the interpreter. On one of these occasions the concerns PA had earlier expressed (“*the subject changes and I get confused ... There's different varieties of questions*”) were clearly manifest. The questions addressed a conversation between PA and a constable who had just called for back-up from the Task Force police following the wounding to the hand of a volunteer searcher:

- (pp 818-9)

CPol: *And is that the only time that you spoke to Constable Hutchinson about the task force coming?*

PA: *Yes.*

CPol: *And so are you saying that you knew on Thursday night that the task force was coming to the island?*

PA: *Yes.*

- CPol: *I thought you'd told us before that you first knew on Friday morning? Are you confused about that?*
- PA: *Yeah I was confused.*
- CPol: *Are you confused about that?*
- PA: *No, you question me 3 different and I didn't concentrate on one question.*
- CPol: *Well which is correct: you first knew about the task force coming on Thursday night or Friday morning? Do you understand the question, Mr Gumbula?*
- PA: *Yes, just give me time to think.*
- CPol: *Well, which is correct, that you first knew on Thursday night or - -*
-
- QCF: *Please, Your Worship, please intervene.*
- Coroner: *He said he wanted time to think about it, let him have a think about it.*

2.5 “words that seem clear and unambiguous to us have different meanings”

One of the risks implicit in hearing a NESB witness without an interpreter, is the misinterpretation of meaning resulting from differences between SAE and Learner's English. Even more concerning is that such miscommunication can go unrecognised by one or other party or, indeed, by the court. Three categories of miscommunication are exemplified. The first relates to a semantic distinction in the meaning of 'half'. The second relates to negative questions where the Learner's English reply "Yes" actually means "No" in SAE. The third concerns miscommunication at the conversational level, where implied accusations by counsel are not recognised by the witness (and are therefore unable to be addressed).

2.5.1 Same word, different meaning

The following excerpt from the *Elcho Coronial* shows how the word 'half' was used by a Yolngu witness in a Yolngu Learner's English sense to mean a 'small part' rather than its meaning in SAE as the product of an equal bisection. The failure of the court to appreciate this usage led to the witness' credibility being challenged. He had been giving evidence as to the phase of the moon on a particular Thursday night when Ganamu, whose condition was said to worsen at the time of the new moon, had speared another person apparently without provocation. The miscommunication was identified by the interpreter who, while not available to this witness (whose English had been deemed sufficient to give evidence unaided), nevertheless interjected to resolve the confusion.

- (pp 499-500)
Counsel: *So that was Thursday night?*
Witness: *Thursday night.*

Counsel: *And you say it was a half moon that night?*
 Witness: *Half moon.*
 Coroner: *Perhaps my diary is wrong.*
 Counsel: *You are sure you're not making this up now?*
 Witness: *No.*
 Counsel: *So you definitely went out - you went outside particularly to have a look at the moon, did you?*
 Witness: *Yes, I did.*
 ...
 Interpreter: *Could I make a suggestion here? When people use 'half' here ... that doesn't necessarily correspond to our terms ... So if you are asking what the moon was like could I suggest that an easy way for him would be to draw the shape of the moon on that night or something like that.*
 Coroner: *The answer seems too simple.*
 Counsel: *Well perhaps you would be able to draw what the moon looked like on that night?*
 Coroner: *Witness draws a thin crescent moon.*

2.5.2 Negative questions

Questions put negatively to Aboriginal witnesses commonly result in confusion as they did throughout the *Elcho Coronial* where Yolngu witnesses would frequently say “Yes” to confirm the veracity of a negatively framed proposition in a situation where the native English speaker would say “No”. In doing so, they were carrying over a convention typical in Aboriginal languages of answering negative questions by affirming or denying the negative proposition. The following excerpts illustrate the difficulties inherent in these questions.

- (p 435)
 CPol: *And when he started running you couldn't see any of the task force men at that stage, could you?*
 Witness: *When he was running?*
 CPol: *No, when he started to run?*
 Witness: *Yes.*
 CPol: *When he started to run you couldn't see the task force?*
 Witness: *Yes.*

The witness may either be meaning *Yes, you are right, I couldn't see them*, or *Yes, I could see them*. At different times this witness followed the Yolngu and English conventions for answering negative propositions put as questions:

- Yolngu convention (p 373):
CAC: *You didn't see who fired the five shots?*
Witness: *Right - yes.*
- English convention (p 433):
CPol: *But it wasn't part of the plan that young Kenny would try and catch the dead man, was it?*
Witness: *No.*

In spite of the inherent ambiguity of *yes/no* replies to negative questions by Yolngu witnesses, they continued to be put throughout the inquest. The reason for this is quite simple: *yes/no* questions are highly controlling, especially when accompanied by a tag (eg. "isn't it?", "was it?", etc.). They allow only agreement or denial and, according to tone of voice or the question's phrasing, counsel usually indicates which response is desired. In cross-examination of 'unfriendly' witnesses, *yes/no* questions tend to comprise the vast majority of all questions asked.³⁶

During the course of PA's evidence (much later in the proceedings — p 745) the Coroner was finally moved to demand of CPol that he refrain from putting negative questions. The exchange which followed is indicative of the tension between the need for clear communication (as a matter of justice) and the separate tactical concerns of counsel.

CPol: *... you haven't told the police or anyone else about that before you told us today about it, have you? This is the first time that you've said that isn't it?*

PA: *It is - could you - could you - - -*

CAC: *Your Worship, I simply note that it's a negative question. We've had this issue arise previously and it caused some confusion with the previous question my learned friend put in the negative form. Simply, so there's no misunderstanding, he may wish to rephrase the question.*

³⁶ In the *Elcho Coronial* four out of five questions put by counsel to 'unfriendly' witnesses, whether they were Aboriginal or not, were framed as *yes/no* questions.

- Coroner: *Can you please put all questions positively so that we don't have a reply which produces what you might call the false negative?*
- CPol: *If Your Worship pleases.*
You haven't told anyone else - - -
- Coroner: *If he says yes to that, it means he hasn't told anyone else; if he says no to that, it means - - -*
- CPol: *With respect, Your Worship, this witness doesn't fall into the category of other witnesses that are confused by that form of question - - -*
- Coroner: *I'm glad to hear it.*
- CPol: *- - - because the witnesses concerned, Your Worship might recall, were old men who were in each case - in every case, requiring the assistance of an interpreter to interpret all of their evidence. It's not the case with this particular witness.*

(CPol had overlooked a series of previous Yolngu witnesses who gave some or all of their evidence without interpreting assistance and who nevertheless exhibited the Yolngu style of answering of negative questions.)

- Coroner: *He's still not a person who habitually uses English - well I suppose he habitually uses it, but English is clearly a second language to him, and I don't want to run the risk unnecessarily of confusing him or getting a confused answer.*

(CPol then rephrased his question as an interrogative.)

CPol's argument that this witness was immune from the effects of Yolngu conversational conventions in respect of negative questions is not sustained by the transcript, which reveals a number of examples of him following the Yolngu pattern.

- (p 760)

CPol: *You can't answer that?*

PA: *Yeah, I can't answer that.*
- (p 764)

CPol: *You had never seen a person speared before in your life before you saw the spear in Ian Wurrawul, had you?*

PA: *Yes. I haven't seen. Sorry.*
- (p764)

CPol: *And you wouldn't go by yourself to get the vehicle, would you?*

PA: *Yes.*

CPol: *Because you were afraid that ...*

The reluctance of counsel to avoid use of negative questions is indicative of their tactical value as a highly controlling question type, placed ahead of the burden of confusion placed on the witness and the burden upon the court of interpreting inherently ambiguous replies. As an aside, it is interesting to note that the presence of an interpreter does not resolve the problematic nature of the negative question. The dilemma is thus: is the interpreter to translate an affirmative answer to a negative question as “Yes” (because this is what the witness said in language) or “No” (because, in English, this is what the witness meant)?

2.5.3 Implied meaning

This final extract provides an example of someone whose level of competence in English is sufficient to understand the surface meaning of English questions, but insufficient to capture their nuance — in this case, an accusation by counsel that Ganamu’s family bore some responsibility for his misfortune because they did not fulfil their own responsibility in ensuring that he took his medicine. In substance, CPol challenges the family’s behaviour on the basis of Anglo-Australian attitudes and values:

- (p 562)
 - CPol: *So the only time when you’ve seen him take the medication is once in the last year?*
 - Witness: *Yes, that’s right.*
 - CPol: *And surely the family would have been concerned - must have been concerned to make sure that he take his tablets to prevent him getting ill?*
 - Witness: *Well for that question I would say the family knew he was sick in the head and from my experience living in the one house, know him very well, the way he get sick in the head, we could wait for the right time and just cool ourself and just go politely to ask him if he wants a tablet or not.*
 - CPol: *And if he didn’t take them, you just let him get sick in the head?*
 - Witness: *Yes. If he didn’t want to take it he could just walk away.*
 - CPol: *And he’d just get sick in the head?*
 - Witness: *Yes.*

There are cultural assumptions operating here on each side that are not understood by the other. Hidden from the witness was the accusation by counsel that the family showed a lack of concern for their relative by not ensuring (forcing?) his taking of medicine, so that they themselves were responsible for the onset of illness. Hidden from counsel was that family members, in approaching the man tentatively with the offer of medicine, were demonstrating both respect and concern for him. By not pressing the medicine upon him

they were acknowledging his status as an individual, a male and an elder, and they were also respecting his right to make decisions himself about his own being. His mental illness was acknowledged but this did not nullify his status nor these rights. (Personal independence is among the strongest of Yolngu values.) Had the witness understood counsel's implied accusation he would have had the opportunity to address it instead of leaving it unchallenged.

Incidentally, this point also raises an important question for courts about the role of an interpreter in exchanges such as this: how is an interpreter expected to handle implied meaning which, because of cultural factors, cannot be inferred by the witness from the interpreter's straight surface translation of the utterance which carries it? Is the interpreter expected to explicate implied messages so that the witness has the benefit of hearing the question in the way that the court hears it? In other words, is the interpreter responsible for relaying meaning or obliged to simply translate words?

2.6 Discussion

The tendency to overestimate the English language proficiency of Aboriginal witnesses who speak some English results in their struggling to cope with the demands of courtroom questioning. Even when such witnesses do understand sentence meaning, it cannot automatically be assumed that they understand a question's intent or that they are aware of nuance, idiom and cultural values which colour meaning. Conversely it cannot be assumed that counsel are hearing a witness's message when they themselves have minimal familiarity with indigenous culture or are unaware of the distinctive features of Aboriginal Learner's English.

The temptation for counsel to capitalise on the linguistic vulnerability of NESB Aboriginal witnesses who testify in English is obviously strong. Coercive leading questions, principally in declarative form, are highly valued by lawyers in conducting cross-examination, and are also particularly effective with these witnesses. Thus a strong argument can be made against their unfettered application. Mildren J has pointed out that a trial judge has the power to 'disallow questions, or forms of questioning, which are unfair' and expresses the opinion that leading questions put to NESB Aboriginal witnesses frequently fall into this category.³⁷ His Honour cites *Mooney v James* as the basis for a trial judge's discretion to disallow leading questions — even during cross-examination — in situations where the witness is not protected from suggestibility:³⁸

The basis of the rule that leading questions may be put in cross-examination is the assumption that the witness's partisanship, conscious or unconscious, in combination that he is being questioned by an adversary will produce a state of mind that will protect him against suggestibility. But if the judge is satisfied that there is no

³⁷ Op. cit. n26, pp 14-16.

³⁸ *Mooney v James* [1949] VLR 22.

ground for the assumption, the rule has no application, and the judge may forbid cross-examination by questions which go to the length of putting into the witness's mouth the very words he is to echo back again.

Mildren suggests that linguistic and cultural factors serve to activate this power where NESB Aboriginal people are giving evidence in English:

Apart from gratuitous concurrence, 'scaffolding' (where the witness adopts a word or phrase not familiar to him put by the questioner) is not uncommon particularly among language learners. As a general rule it is submitted that the cross-examiner of a witness who is plainly Aboriginal by culture should not put leading questions to such a witness without the leave of the trial judge.

An obvious solution to this problem is to provide an interpreter. Yet, this may not be a complete solution, particularly if the interpreter is constrained to a narrow role of just translating words. If the interpreter were so constrained then problems with negative questions would simply be carried over in the translation. Similarly, if a witness is presented with implied accusations (such as in the last excerpt where the witness was virtually accused of neglecting his mentally-ill relative, and therefore contributing to his death), where intercultural differences prevent implied meaning from being carried in the translation, then it is essential that the interpreter explicates the accusation if the witness is to have the opportunity of answering it. Then there is the issue of gratuitous concurrence. If the only reason for this phenomenon were the misunderstanding of a question, then a competent interpreter would obviously remove that cause. However, given that there are meta-linguistic (ie. cultural) factors which contribute to gratuitous concurrence, how is the linguistic re-rendering of a question going to prevent it?

A further reason to be wary of viewing interpreting assistance as a panacea is raised in the next section. While the main focus is consideration of how to establish whether a NESB witness needs an interpreter, the English language proficiency of interpreters themselves becomes an issue.

3. Determining the need for interpreting assistance

Determining the need for interpreting assistance requires consideration of two main factors: one is the person's level of competence in the English language and the other is the communicative context in which the person is required to participate. Of course, these two factors are interrelated in that the level of English required by a person to be interviewed without an interpreter — and without disadvantage — must take into account the communicative demands of the interview.

With regard to the courtroom context, a distinction needs to be made between witness and defendant, in that the witness' role is restricted to giving evidence — while the defendant needs to understand the proceedings, may also give evidence (or a police interview may be used as evidence), and needs to instruct their lawyer and to understand explanations or advice that the lawyer gives. Thus, the English language demands placed upon the defendant will tend to be greater than for a witness. As a matter of convenience in the following discussion, I will focus primarily on the question of determining the need for interpreting assistance in the case of a witness and, if a witness' level of English means that interpreting assistance is required, then the defendant at the same level should require it also.

Assessing the communicative demands of any particular courtroom interview can be complicated in itself. While the interlocutors and the nature of the interview would be known to the court, there are many other factors which come into play and which can significantly affect the linguistic demands placed on the NESB witness. The following are pertinent questions: Are the participating barristers themselves speakers of SAE or are they also speakers of other varieties of English with which the indigenous witness may not be familiar (eg. Scottish English)? How fast do the barristers speak (rates above 200 w.p.m. significantly reduce comprehension for lower-intermediate level English speakers³⁹)? Will the witness be confronted with linguistically challenging questioning (eg. rapid-fire questioning, trick questions, convoluted question forms, syntactically complex questions)? Will the questions be straightforward or conceptually complex (will they be culturally alien or familiar)? And, will the witness need to speak about conceptually complex matters or matters that may be culturally alien to the court?

It would be apparent that few lawyers have the expertise to anticipate and analyse the range of factors which combine to determine the English proficiency required for an impending courtroom examination such that the NESB indigenous witness would not be handicapped relative to an Anglo-Australian witness in the same circumstance. And few lawyers would then have the skill to assess the witness' own level of English proficiency. There is a danger that some level of conversational command of English on the part of the witness may mislead the lawyer into assuming that the person can then conduct themselves without disadvantage in a courtroom interview.

In its report, *Aboriginal Witnesses and Queensland's Criminal Courts*, the Criminal Justice Commission has identified warnings coming from several directions about this potential for overestimation of the level of understanding in cases where the person speaks some English: ⁴⁰

³⁹ Ellis, R. *The Study of Second Language Acquisition*, (1994) Oxford University Press, Oxford, p 274.

⁴⁰ *Aboriginal Witnesses in Queensland's Criminal Courts*, p 70.

- Muirhead J warned (in *Jabarula v Svikart* (1984) 11 A Crim R 131) of ‘a tendency in all of us to assume that as we may understand a person who is talking in his second language in a simple conversation in English, his understanding of our conversation is reciprocal’.
- Gibbons had submitted to the *Access Report* (1991, para 3.3.27) that ‘it is most unlikely that a person not trained in language assessment could determine whether the English of a non-native speaker is adequate for legal uses’.
- NAATI expressed concern in its submission to the CJC that ‘[t]his risk [of lack of full understanding] is often greatest when the witness can speak some English. The tendency, inevitably, is to assume a greater degree of understanding than actually exists.’

How then is the decision to be made as to whether a particular witness’ handicap in English is sufficient so as to warrant an interpreter? Given that judges do not generally have the expertise in this area, how can a court be appropriately and practically assisted? In the NT there are three quite different approaches concerning assessment for the need for an interpreter in legal contexts that have a direct bearing on this question:

- One is for the NESB interviewee to decide for him/herself after listening to recorded advice in their own language about interpreting assistance. This assessment is performed by the interviewee.
- A second is for a lawyer to administer a short test (developed by linguists) to a prospective witness which mimics some of the linguistic challenges they would expect to face in a courtroom interview (if the person ‘fails’ the test then an interpreter is required). This assessment is performed by a lawyer.
- The third is for an appropriately qualified linguist or language teacher to conduct an analysis of the witness’ skills and advise the court accordingly. This assessment is performed by an expert.

An example of these approaches is described below. While each has validity, no attempt is made to persuade the reader as to the superiority of one over another. Indeed, it may be appropriate to consider a combination of approaches rather than a single one. Having said this, I cannot see why the witness’ opinion as to his or her own need should not be elicited and considered as a matter of course in any situation where the need is questioned.

3.1 Self-assessment by interviewee

This approach is exemplified in an NT strategy to provide recorded advice to NESB Aboriginal suspects prior to their being formally interviewed by police. The advice relates to: (1) the right for the suspect to let others know of his/her detention; (2) the right to nominate a ‘prisoner’s friend’ who can assist the suspect during the interview; (3) the right to request an interpreter; and, (4) the right to remain silent in the face of police questioning.

This *Preamble to the administration of the Police Caution* was an initiative instigated in 1996 by the NT Government through its Office of Aboriginal Development and Attorney-General's Department. The English text, from which translations into 15 Aboriginal languages were generated, was prepared by myself and lawyer, Ms Jenny Hardy (then of the North Australian Aboriginal Legal Aid Service, NAALAS), and then refined during meetings of an 'Aboriginal Interpreters Working Party' conducted by the Attorney-General's Department. Translations were complete by 1999 and the tapes were trialed by police on Groote Eylandt and in Alice Springs in 2000/1 (the results of the trial are not yet known).

The following is an excerpt taken from the Kriol version (which is translated here back into English). It is a portion of the explanation regarding interpreting assistance. The full text includes an explanation of the interpreter's role. This portion explains to the suspect their responsibility for determining their own need:

What does this law say for you?

This law says that if you understand English and talk English properly, well you yourself can talk English to the police.

But sometimes the police can use hard English words. Sometimes when the police ask you questions, maybe you cannot understand what he is talking about. Maybe you do not understand the meaning of what they are saying. But maybe, if you do not understand English properly, or maybe you only talk a little bit of English, well that's OK. Just ask the police to find someone who can talk English and your language properly.

If you do not know how to talk English properly, you can ask the police to find an interpreter for you.

When this tape is finished maybe you will say, "No. I do not want an interpreter." But later when the police talk to you, maybe you do not understand what they are saying. Well, at that time, you can ask them to get an interpreter and they must wait until the interpreter comes to help you.

3.2 Assessment by lawyer

This approach is constituted by a test entitled: *Is an Interpreter Necessary? A Test of English to assess the need for an interpreter for people involved in legal proceedings from a non-English speaking background.* The test was commissioned by National Legal Aid and NAALAS and developed by myself and Ms Elaine Wylie⁴¹ in 1998, and released in 1999. It is designed to help legal counsel in court proceedings to decide

⁴¹ Ms Wylie is an expert in English proficiency testing and Deputy Director of the National Languages and Literacy Institute of Australia – Language Testing and Curriculum Centre, Griffith University.

whether a NESB client or witness needs an interpreter to communicate with counsel and in court proceedings. It is meant to be administered by lawyers, paralegals and field officers and is constructed with six sections of progressively increasing difficulty. The test should be recorded (taped) so that the results are available for legal purposes if required.

The first section is a brief explanation by the tester concerning the purpose of the interview (“... I’m going to ask you some questions and I’m recording your answers. When I listen to the tape this will help me decide if you need an interpreter or not. ...”).

The second is constituted by a series of questions seeking biodata (eg. *Where is your home?; Have you attended school?*).

The third is a series of questions challenging the information just provided and is designed to simulate question structures and types common in cross-examination (eg. *Elizabeth Regina comes from your community too, doesn’t she?; These are lies that I’m hearing from you now. That’s right isn’t it?*). If the client/witness fails to respond to all of the questions despite prompting, or gives a response which is unintelligible or inconsistent with a response given in the previous section or with a reasonable view of the world, then an interpreter can be considered necessary for any court appearance.

The fourth and fifth sections are administered to determine if the client could cope without an interpreter during briefing sessions with sympathetic counsel or other professionals such as social workers. Using plain language, the tester presents information and explanation about a topic of gradually increasing conceptual complexity (but stopping short of being complicated). The example used in the test concerns interpreters: what they do and rules they must observe.

The fourth section is restricted to an explanation that the tester is going to be explaining about rules for interpreters (ie. ethical rules relating to confidentiality, impartiality, etc.) and that the client/witness will be asked to restate in their own words information which is given. The client/witness is then asked to restate what the tester has said is going to be happening. Then in section 5 these rules are explained and the client/witness is regularly asked to repeat back in their own words the substance or effect of what the tester has just said. If the person is unable to demonstrate understanding then the test is halted and an interpreter is considered necessary even for briefing sessions with sympathetic counsel. If they are able to give coherent and correct feedback then the final section is administered.

The final section is a ‘cross-examination’ on rules for interpreters where the client/witness is challenged with questions such as:

- I said that an interpreter is not allowed to give special help to either party, is that right?
- And I said that a good interpreter assists people without much English by telling them what to say and how to answer questions that are really hard or complicated, didn't I?

The value of this type of test is that it can be easily and quickly administered without any special training needed; that it is based on the type of communication that the client/witness would normally be exposed to; and that the results become immediately apparent. However, I am not aware that it is widely used or promoted.

3.3 Assessment by an expert

This approach to assessing the need of an interpreter for a witness/defendant is to seek the opinion of an appropriately qualified linguist or teacher of English as a second language. Either working from a pre-recorded interview (police interview), or by conducting an interview for the purpose of assessment, the assessor is able to ascertain the level of English proficiency exhibited, and give advice as to whether the subject requires an interpreter for the purpose in question.

I am aware of a number of linguists who have provided such advice to courts, as I have myself in *Thardim*⁴² where I gave *voir-dire* evidence of my assessment of the defendant's English language proficiency in terms of the Australian Second Language Proficiency Framework (ASLPR) and of my opinion that the defendant needed an interpreter for any formal interview. Interestingly, I was also asked in evidence to provide an expert interpretation, at several points, of what the defendant may have understood by a question or may have meant by an answer, in relation to his interview by police. This preparedness by a higher court to admit expert evidence by a linguist on these matters is a relatively recent development.

The ASLPR provides a convenient standardised measure of proficiency for legal purposes. It is a scale — or more precisely, a set of subscales for Speaking, Listening, Reading and Writing — tracing the development of proficiency in a second language. Since its initial development by Ingram and Wylie in 1978, it has achieved widespread prominence and utility as a means for assessing second language proficiency. The function and status of the ASLPR are described by Ingram (pp2-3):⁴³

The ASLPR is a scale that essentially describes how a second or foreign language develops from zero to native-like proficiency. It provides performance descriptions couched in terms of the practical tasks that learners can carry out and how they carry them out at ... along the continuum from zero to native-like proficiency ...

⁴² *R v Thardim* (NT Supreme Court, Martin CJ, November 1998, unreported).

⁴³ Ingram, D. 'The ASLPR: its origins and current developments', paper presented to the NLLIA Language Expo '96, Brisbane, (1996), July, pp 2-3.

The ASLPR has become the standard means for the statement of proficiency in Australia. It is used in many different contexts ranging from educational contexts and the interpretation of test results to immigrant regulations, law courts, libraries, vocational requirements for teaching and many other vocations, and so on.

ASLPR is used in Australian educational contexts as a means of defining entry standards for English language certificates, interpreting courses and post-graduate study. It has been cited by the Commonwealth Attorney-General's Department⁴⁴ and Queensland's Criminal Justice Commission⁴⁵ as providing comparatively objective criteria that can assist monolingual lawyers and judges to assess the English language competence of NESB individuals in determining any need for interpreting assistance.

The ASLPR levels are given by Wylie and Ingram⁴⁶ in 12 increasing levels of proficiency:

- (0) Zero Proficiency
- (0+) Formulaic Proficiency
- (1-) Minimum 'Creative' Proficiency
- (1) Basic Transactional Proficiency
- (1+) Transactional Proficiency
- (2) Basic Social Proficiency
- (2+) Social Proficiency
- (3)⁴⁷ Basic 'Vocational' Proficiency
- (3+) Basic 'Vocational' Proficiency Plus
- (4) 'Vocational' Proficiency
- (4+) Advanced 'Vocational' Proficiency
- (5) Native-like Proficiency

To put this scale in some perspective it is useful to note that entry into the Diploma of Interpreting Paraprofessional at the International Language Centre in Adelaide, requires

44 Op. cit. n1, para 3.3.28.

45 *Aboriginal Witnesses in Queensland's Criminal Courts*, p 70-1.

46 Wylie, E. & Ingram, D. 1995, *Australian Second Language Proficiency Ratings (ASLPR) General Proficiency Version for English*, Griffith University, Brisbane. Note that the authors now refer to ASLPR as ISLPR (ie. *International Second Language Proficiency Ratings*).

47 The Faculty of Asian and International Studies at Griffith University provides equivalents for ASLPR Level 3 (which is also its entry requirement for PhD studies) as a score of 580 on TOEFL (Test of English as a Foreign Language) or a 6.5 overall IELTS (International English Language Test Score). (Source: internet <<http://www.gu.edu.au/gwis/ais/pg/PhD-Eng-lang.html>>.)

an ASLPR at Level 3 in both languages.⁴⁸ NAATI defines the level of communicative proficiency that must be demonstrated at the paraprofessional interpreter level:⁴⁹

Interpreters at this level must be capable of understanding most of what native speakers say when speaking in a normal manner and without any great deviation from the norms of pronunciation, vocabulary and usage.

A straightforward police interview might represent this type of communication. Given that ASLPR Level 3 is required for paraprofessional interpreter training, it seems reasonable then to posit ASLPR Level 3 as the lower limit of English proficiency that would enable NESB people to cope linguistically with a straightforward police interview about events and circumstances pertaining to criminal offences. Significantly, it is also at this level that learners can be expected to cope with native speakers speaking at normal rates of speech. Descriptions of NESB speakers operating at each of the ASLPR levels are given in Wylie and Ingram. A description of proficiency at ASLPR 3 is given below.

ASLPR Level 3: Basic ‘Vocational’ Proficiency

Speaking Able to perform effectively in most informal and formal situations pertinent to social and community life and everyday commerce [ie. obtaining goods and services] and recreation, and in situations which are not linguistically demanding in ‘own’ vocational fields. In most conversations in such situations, the learner conveys fairly precise meanings, and has sufficient control of discourse to be able to sustain to some extent the juxtaposition of different ‘planes of meaning’.⁵⁰ ... Gives relatively long narrative or descriptive monologues fairly effectively. ... In some complicated persuasive (and similarly demanding) situations, there may be difference between what the speaker wants or intends to convey and the total message ... that is actually conveyed. ... Errors are made ... but they rarely interfere with understanding ... Vocabulary range is such that ... the learner can readily overcome most gaps by circumlocution, and rarely has to grope for a word.

⁴⁸ Source: internet <<http://www.aief.edu.au/study/institutions/all/10.htm>>.

⁴⁹ NAATI, *Levels of Accreditation for Translators and Interpreters*, (1980) AGPS, Canberra, p 2. Note that the paraprofessional level was previously categorised by NAATI as Level II Interpreting.

⁵⁰ “‘Planes of meaning’ refers to propositions (or sets of propositions) whose distinctiveness is the main focus of discussion in a text. Examples of different planes of meaning are: the opinion of one person as opposed to that of another; what might have been as opposed to what actually is; what is perceived to be as opposed to what actually was; a particular instance of behaviour as opposed to a general pattern.” (Op. cit. n45 1995, p vii).

Can elaborate own emotional and intellectual attitudes. Can provide and request specific information about relatively abstract topics ... Can generally handle the linguistic aspects of fairly tricky persuasive situations (eg. a personal misunderstanding or an undeserved traffic ticket). ...

In some uncomplicated straightforward situations in everyday life ... can convey meaning with reasonable accuracy in informal consecutive interpreting from L1. ...

It is often not obvious to others that learners have not conveyed exactly what they wanted to or intended to.

Listening :... Provided utterance rates are normal, the learner understands sufficiently well to participate with ease in most straightforward conversations with native speakers about everyday topics. ... May have problems with any particularly complex grammatical structures. ... May have problems with highly colloquial speech ... Fails to perceive subtle nuances of meaning. ...

Can get the gist of straightforward radio and TV interviews on [relatively abstract] topics provided the speakers do not significantly and/or continually exceed 180 w.p.m. and the speech is coherent ...

May fail to perceive the illocutionary force or personal relevance of instructions, warnings, or suggestions ... which are delivered in other than the most straightforward forms.

... they can understand the propositional content of most everyday texts which have an uncomplicated structure, provided the information is presented in a straightforward manner. ... Learners at this level have serious problems, however, when information is presented fast and without discipline [as when participants in a meeting interrupt each other] ...

They also have serious problems when there is significant allusion to more 'peripheral' cultural institutions and phenomena ... or when assumptions are made about knowledge of esoteric aspects of the culture ...

ASLPR 3 does not, however, entail the competency required to understand police jargon (words such as *offence, charge, bail, unlawful wounding, wilful murder*) without these terms being first explained in ordinary language. And it does not imply sufficient competence for dealing with the more complex language of the courtroom as a witness

— let alone as interpreter.⁵¹ Indeed, the significant linguistic demands placed on witnesses giving evidence in judicial proceedings are recognised by the expectation that court interpreters be accredited as *professional* interpreters rather than at the paraprofessional level.⁵² An ASLPR level 4 or above would be required to operate as witness or legal interpreter yet, in my experience, there are exceedingly few Aboriginal people of a non-English speaking background who are at this level (reasons for this include the absence of schooling beyond primary level standards in most indigenous communities and poor levels of participation in urban secondary schooling).

3.4 Discussion

At present there are no interpreters accredited in any indigenous language above the Paraprofessional level.⁵³ So the question as to whether an indigenous witness requires an interpreter should also take account of the level of linguistic assistance on offer. In other words, it is possible to imagine a situation where a witness may be properly deemed to require interpreting assistance given the linguistic demands of courtroom examination, and yet an interpreter may be offered whose own English language skills might not be superior to the witness'.

This is obviously a highly unsatisfactory situation given the high number of NESB indigenous witnesses and defendants in many jurisdictions. More disturbing is that NESB indigenous people exhibiting the range of capabilities associated with Levels 2 and 1+ are commonly considered able to cope without interpreting assistance within criminal justice proceedings.

Thus, until there is a greater effort to provide interpreter training and accreditation for indigenous interpreters at a higher level than presently offered, there is, to be sure, a significant handicap being faced by NESB indigenous defendants and witnesses compared to other groups. While it is true that interpreters of an English speaking background exist for some indigenous languages (and thus not subject to the English language handicap which most NESB indigenous interpreters face), such people are rare indeed.

Until the situation is turned around, the judiciary retains a crucial role (and responsibility) to offset the linguistic disadvantage faced by NESB witnesses and many of their paraprofessional interpreters by exerting more control over counsel in the way in which they frame their questions, and to be particularly alert to those instances where counsel knowingly capitalise on a witness' linguistic handicap.

51 Paraprofessional interpreters are not considered sufficiently competent to operate in the courtroom environment. NAATI's recommendation to the 1991 Commonwealth Attorney-General's Department *Inquiry into Access to Interpreters in the Australian Legal System* was that the first professional level be the minimum level for court interpreting. This recommendation was adopted by the Inquiry (Op. cit. n1 1991, para 5.4.10) — but does not necessarily reflect current practice.

52 Op. cit. n1.

53 This fact does not necessarily mean that no indigenous language interpreters operate at the professional level (there are some who do) since no NAATI test for professional accreditation in an indigenous language is offered.

