Aboriginalised English: implications in legal contexts in the Northern Territory

Diana Eades University of New England Diana.Eades@une.edu.au
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Language varieties spoken by Aboriginal people in the Northern Territory today

Aboriginal societies have always been multilingual, and the language situation in NT today is probably even more vibrant and complex than it’s ever been. Let’s start with a quick overview of the language varieties spoken by Aboriginal people in NT today (the term “language varieties” refers to languages or dialects).

- About 20 traditional Aboriginal languages are still strong, but many more are still spoken: the flyer for this conference says there are interpreters in NT for 100 Aboriginal language varieties. So this includes languages spoken as first languages, or as additional languages by people also speak another traditional language, and/or one of the language varieties related to English. Much of the conference this weekend will be about important issues for speakers of these traditional Aboriginal languages and speakers of immigrant languages.

My brief today is to address issues for Aboriginal people who speak non-standard English in the courts. Most of what I say will be relevant also to communication in other legal contexts – to any Aboriginal people who speak some kind of non-standard English in their dealings with the law – which I believe covers most NT Aboriginal people. So let’s look at these language varieties related to English which are spoken by Aboriginal people in the Territory. And let’s not forget that Standard English is also spoken by some Aboriginal people, particularly in their interactions with non-Aboriginal people.

- Many people speak a dialect of English known as Aboriginal English – it’s definitely English, but it differs in systematic ways from other varieties of Australian English. Actually it’s complicated because there are similarities and overlaps between some varieties of Aboriginal English and standard (Australian) English, and between some varieties of Aboriginal English and non-standard (Australian) English, and between some varieties of Aboriginal English and Kriol.

- Kriol is the fastest growing Aboriginal language in the country, and there are several main related Kriol varieties; known as Westside Kriol, Eastside Kriol (aka Roper River Kriol). These varieties are related to Kimberley Kriol in WA. While it is historically related to English, as well as to traditional languages, Kriol is a separate language. It sounds like English, but that doesn’t mean that English speakers can understand it, or that all speakers of Kriol have a good understanding of English. However, many people, including some Kriol speakers, mistakenly think it is a form of English. Because of the similarities and overlaps between some varieties of Aboriginal English and Kriol, I will include Kriol in some of my

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1 This text for a talk presented on 28 August at the Northern Territory Supreme Court Language and Law II conference draws on work by myself and others whose work is referred to at the end of the paper.
discussion. But I have to make it clear that Kriol speakers need interpreters unless they also speak English very well, probably Aboriginal English. I’m sure this issue will come up during the conference.

• There are also several new languages that linguistically speaking are mixed languages\(^2\), which result from speakers bringing together their traditional language and English/Kriol, and developing a new language. e.g. Light Warlpiri, Gurindji Kriol, Modern Tiwi, and Wumpurrarni English. We’ll be hearing about these mixed languages on Sunday afternoon.

My focus today will mostly be on Aboriginal English – in fact I’m increasingly using two terms interchangeably: Aboriginal English and Aboriginal ways of speaking English. (This is for linguistic reasons that I won’t go into today, see Eades 2013, 2014).

When we think about Aboriginal people speaking any English in their dealings with the law, one of the most important issues in remote Australia is how much English people speak, or as linguists put it, their English proficiency. It can be misleading to assume that just because an Aboriginal person is speaking some English, that they have the proficiency required to participate in a police interview, or a lawyer interview, or to answer questions in court. It is common for people to have the ability to speak about some topics in some contexts in a second or additional language, while lacking sufficient proficiency to communicate in this language on more complex issues: the term “partial speakers of English” refers to people whose main language is a traditional Indigenous language or Kriol, but whose English proficiency is not the same as, or similar to, that of a native speaker. (The term Aboriginal Learner’s English is sometimes given to their use of English, see Cooke 2002).

Many Aboriginal partial speakers of English have what the experts term “basic transactional proficiency”\(^3\). This is the level of language proficiency at which people can use English for basic transactions (this is using English to get things done), for example in familiar shops, or in very basic social interactions. People at this level are: “able to understand enough to participate in very simple face-to-face conversations with a sympathetic or experienced member of the public. Such conversations are usually directly related to the person’s basic transactional needs or on very familiar topics”. Others have a higher level of English proficiency: “Social proficiency”. This means they are “Able to satisfy basic social needs, and the requirements of routine situations pertinent to their own everyday commerce and recreation and to linguistically undemanding ‘vocational’ fields. This is the entry level for some TAFE courses. But a higher level of proficiency in English would be required to understand abstract concepts such as in the full right to silence caution.

\(^2\) Kriol developed from speakers bringing together their traditional languages and English because they needed a common language for everyday life. The new mixed languages are developing “in situations where a common language already exists, and communication is not an issue”. So the new mixed languages are about new and modern identities (Meakins 2014: 396).

\(^3\) Information in this paragraph is based on the International Second Language Proficiency Rating Scale ®, see http://islpr.org/
The Northern Territory is leading the way in making the caution accessible to speakers of Aboriginal languages and partial speakers of English, and we will be hearing about this today, and tomorrow morning and Sunday morning.

I think any Australian who has started to learn a second language will be aware of what it’s like to be a partial speaker of this language. Some of us know what it’s like to speak a bit or even quite a bit, of a second language on the one hand, and yet on the other hand not to be able to understand lots of things people say to us. This can happen especially if the conversation involves anything abstract or not immediate, or when the other person is speaking fast. Yet, there is a very strong assumption that English is the norm, particularly in the way that institutions like law and education operate. And it seems that often an assumption is made that because a particular non-native speaker of English can have an informal conversation in English then this person can understand more complex language usage – for example in a police interview, a lawyer interview or in giving evidence in court.

In an important WA case last year Judge Hall ruled as inadmissible a police interview with a Pintupi suspect from Kiwirrkurra – because “it was plain that an interpreter was required”. He did not accept the police view that the suspect “had a good understanding of English and an interpreter would not be required” (#47). And he was critical of the fact that the police based this decision on

- interactions police had with him with him “almost entirely within an interview context” (#74)
- as well as a few “brief” and “casual” conversations” (#52), and
- their assumption that the answers given always reflect an understanding of the questions asked (#74).

In fact, many Aboriginal people say very little in interview contexts, something I’ll come back to shortly, and also they say very little in brief and causal conversations with non-Aboriginal people they don’t know well.

The argument and evidence in this Gibson judgment challenges an assumption that brief casual conversations and interviews enable a police officer to decide that a person doesn’t need an interpreter. And we can add lawyer and judicial officer too.

Several speakers this weekend will talk about better ways of making this decision, and I have to say that the NT Law Society’s Indigenous Protocol for Lawyers is a groundbreaking document in this regard (which draws on work by the Aboriginal Interpreter Service, see “How to decide if you should work with an interpreter – Legal” and “Do I need an interpreter? 4 step process – Legal” on http://dlgcs.nt.gov.au/interpreting/aboriginal_interpreter_service/when_to_use_an_interpreter )

The Aboriginalisation of English

Let’s turn now to some of the results of the Aboriginalisation of English over the generations: and how English is used by people who speak Aboriginal English as their main language, as well as by those who speak it as an additional language. The important thing about Aboriginal English and Kriol varieties is that all of them – to varying degrees and in varying ways – can be seen as Aboriginalisations of English. That is, over the

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4 Western Australia v Gibson 2014 WASC 240; paragraph numbers are from this judgment.
generations that speakers of traditional languages have learnt some English they have adapted it and changed it under the influence of their existing culture and ways of communication. To understand how Aboriginal people use English we have to recognise the central role of culture in communication: that is ways of thinking, believing and acting (including talking), that you share with others in your group, and are mostly passed on from one generation to next. We can think of the actual language as a tool for communication, for interaction, for relating, getting things done – the tool can change (e.g. from traditional language to English) but much of the culture remains. Whether people are speaking Yolngu Matha or English, for example, the way they talk to certain relatives is something that is an essential part of being Yolngu, and just changing the tool doesn’t change the ways of thinking, believing and acting about how to talk to those relatives.

English has been Aboriginalised in lots of ways: like accent, grammar and meaning. But maybe the most important aspect for intercultural communication is what linguists call pragmatics. In constrast to semantics which is about the meaning of words and phrases, linguistic pragmatics is about what the speaker means here, and about how do people use words to do things, such as elicit a story, or to give specific information.

**Interviews**

We have to start with how language works in interviews: interviews are at the heart of the way the law operates, and more widely in other mainstream Australian institutions and contexts: job interviews, media interviews, police interviews, lawyer interviews, and witnesses in court give their evidence through interviews.

The basic assumption underlying any interview is that a person requiring information asks questions from a person who is expected to provide the information. Interviews are mostly one-sided in this way, and the expectation is of a smooth Question-Answer iterative pattern. Interviews are not a speech event typically found in Aboriginal societies, where information is often provided in a much less direct way, and it’s not one-sided. People ask questions – lots of questions sometimes – about who is related to who, where someone has been, or is going – about the social and spatial aspects of people’s lives. But when Aboriginal people want to find out more substantial or complicated information, such as the details of an event, or why someone has done something, they typically talk around a topic, engaging in conversation (or *yarning*) rather than a Question-Answer session. So, interviews are culturally specific events, with no equivalent in traditional Aboriginal societies, just as Aboriginal ceremonies are culturally specific events with no real equivalent in mainstream Anglo society.

Of course some Aboriginal people have little trouble participating in interviews: they have had the opportunity to develop bicultural skills in communication, that is they can communicate in an Aboriginal way in Aboriginal interactions and they can switch to a mainstream way of communicating in other contexts. Aboriginal people typically develop such bicultural skills through prolonged and successful participation in mainstream education and employment. But many Aboriginal people have not had these opportunities, and are not comfortable or experienced in the interview format as a way of providing information. So, although the law often requires witnesses to give an account (or tell their story) through the interview format, this can be difficult for Aboriginal witnesses who do not have considerable bicultural abilities. Of course this is true whether
a person speaks a traditional language variety or Kriol and there is an interpreter, or whether they are speaking an English variety. It’s important to remember that just because an Aboriginal person is speaking English, even as their first language, it doesn’t mean that they are using English in the same way – in short, culture impacts the way people use English.

Let’s look now at three specific problems that can arise for many Aboriginal people in interviews:

(i) Gratuitous concurrence

In the 1940s the anthropologist Elkin (1947:176) observed that for Aboriginal people in court, “their fundamental aim is to satisfy the questioner, to tell him what they think he wants to be told.” And in 1959 in this court Justice Kriewaldt talked about it in *R v Aboriginal Dulcie Dumaia* (NTJ: 697). In 1974 Justice Forster (also in this court) said in *R v Anunga* (1976 Australian Law Reports 11: 417): “most Aboriginal people … will answer questions by white people in the way in which they think the questioner wants”. This observation has been made by many other people around Australia.

Following Ken Liberman’s anthropological and sociolinguistic work in Central Australia a few decades ago (e.g. 1981, 1985), we use the term “gratuitous concurrence” to refer to a speaker saying *yes* (or *yeah* or *mm* or nodding their head) in answer to a question, or *no*, *nuh* or shaking their head to a negative question, regardless of whether or not they agree with what they are being asked, and sometimes regardless of whether they even understand the question. This is not the *uh-huh* we use when another person is talking and we give minimal feedback: I’m talking here about a clear answer to a direct question.

Of course, gratuitous concurrence doesn’t only happen in Australia, and not only with Aboriginal people. It can be a strategy used when people do not fully understand the language they are being questioned in, or when people are in an oppressive situation. But in Australia its use goes beyond these two situations. It is very widely used by Aboriginal people: not only those who speak a traditional language as their first or main language, but also by those who speak English as their first and often their only language. While some writers have talked about Aboriginal use of gratuitous concurrence as a form of politeness, Liberman’s work shows the importance of cultural issues for Aboriginal people, including ways of reaching consensus. There is often a preference for avoiding contradiction over serious matters, and instead dealing with areas of disagreement over time, and where possible with some indirectness. So, when we put this cultural approach about not needing to nail everything down immediately, with the fact that questions are not the main tool for finding out complicated or sensitive issues in Aboriginal societies – then it’s not surprising that there is widespread use of gratuitous concurrence by many Aboriginal people in interviews.

But an important question is how can we know when *yes* is intended to signal agreement, and when it might be gratuitous concurrence. The short answer is we can’t be in someone else’s mind, so we can never know for sure. But here are some important considerations: Does the person understand the question? Should they have an interpreter? But even if they do understand the question, and even if English is their first language: Is this a situation where the Aboriginal person is being asked many questions, where there is a power imbalance between interviewer and interviewee? where there is
limited opportunity for the interviewee to initiate or control talk, where the interviewee is feeling tired, or afraid, or pressured, or it’s a difficult topic, or there are unfamiliar concepts or words. And how bicultural is the interviewee? All of these factors can be relevant, so that it can often be dangerous to attribute a literal interpretation to Aboriginal answers of yes in an interview.

You can see that gratuitous concurrence can be a problem in police interviews, especially with the do you agree? or do you understand? questions. Two of Justice Forster rules for police interviews in his 1974 judgment in the Anunga case are particularly relevant here:

3. Care should be taken in administering the caution.
4. Care should be taken in formulating questions, so that as far as possible, the answer which is wanted or expected is not suggested in any way.

We now know these as part of the Anunga Guidelines for police interviews with Aboriginal suspects.

But what about leading questions in cross-examination? Justice Mildren – of this court – is undoubtedly the judicial leader on the participation of Aboriginal people in the legal process has said for many years that “more use should be made of [the] power to prevent questions being put unfairly to Aboriginal witnesses in leading form in cross-examination whenever it appears or it is made to appear to the trial judge that the witness is likely not to be protected from suggestibility … (Mildren 1997: 15-16, referring to Barry J in Mooney v James 1949).

(ii) Silence

Now let’s move on to an important difference between Aboriginal and mainstream Anglo use and interpretation of silence (or pausing) in conversations, including interviews. In Aboriginal interactions, silences are often used productively and positively (but of course I’m not saying that all Aboriginal conversation include silence). That is, it is not unusual for Aboriginal conversations to include quite considerable silences. There is no obligation to fill silences, and when serious matters are being discussed, people often like to think for some time before talking. This is quite a contrast to the widespread western norm that silence in a conversation means that something has gone wrong. Research has demonstrated that in many English-speaking western societies, the ‘standard average maximum tolerance for silence’ in a wide range of conversational contexts (formal and informal) is about one second. This means that by the time that there has been silence for almost one second, someone will fill the silence. This has particularly been found to be the case in many studies of interviews: if the interviewee pauses before providing an answer, it is common for the interviewer to repeat or rephrase the question, or ask a new question, to avoid an ‘uncomfortable silence’.

But many Aboriginal people respond to some direct questions from non-Aboriginal people, especially those on important personal topics, with a period of silence, often lasting more than one second. When the questioner allows for some silence, it is often followed by an answer. But many non-Aboriginal people feel (unconsciously, but understandably) uncomfortable with a silence of more than about one second. Thus the situation in many interviews of Aboriginal people in legal contexts can amount to the interviewer (e.g. police officer or lawyer) effectively interrupting the first part of the answer, that is the silence that often begins an Aboriginal answer.
(iii) Specific information
Another difference concerns the way that people provide specific information. It is common for interviewers to ask such questions as *how many? what time?* These questions often expect an answer with some quantifiable specification, such as *seven people, or about 10.30 in the morning.* But many Aboriginal people give specific details in relational rather than quantifiable terms: that is relating the question to social, geographical or similar situations or events, rather than using numbers. It is not that such Aboriginal people are not able to give specific detail, but that their ways of being specific may not involve numbers. Asking Aboriginal people questions that expect a quantifiable specification (such as “what time was it?”) can be an invitation for less accurate information than inviting people to provide other details about the event. So instead of asking *how many?* you can invite a more accurate answer by asking *who was there?*, instead of *What time?* you can ask *When? after the kids left for school?* instead of *What year?* try *When? -- before So-n-So was born/died?*

I’ve talked about gratuitous concurrence, silence and how people give specific information: knowing about these three aspects of how Aboriginal people communicate even when using English is important when we think about evaluating a witness’s credibility and reliability.

**Accent, word meaning and grammar**
Let’s turn now to briefly look at some other features of Aboriginal English that impact the way that Aboriginal people participate in the law, and how they are understood and evaluated: I’ll just give a few examples of accent, word meaning and grammar. (As I mentioned earlier some of these features of language are shared with Kriol.)

(i) Accent
The sound systems of Aboriginal traditional languages have influenced Aboriginal English and Kriol varieties in several ways. So, for speakers of Heavy Aboriginal English (and Kriol too) the “f” and “v” sounds in SAE words may sound like something between “p” and “b”, eg the word that sounds like *bite* in AE might be the SAE word “fight”. And many Aboriginal people don’t distinguish between “p” and “b”, or between “t” and “d”, or between “k” and “g”. So for example, in Kriol the word for ‘tea’ is *dilib* (cf English ‘tea leaf’).

Also the English “s” may sound more like “j” in Kriol or Heavy AE. e.g. *jidan* means “live”, cf SAE “sit down.”

And the sound pattern of the traditional languages can influence the structure of syllables, so that words that begin with CC in SAE may have a vowel inserted, thus: *jilip* means “sleep”.

(ii) Same word: different meaning
One of the characteristics of Aboriginal English is that some English words are used with a slightly different meaning: You are probably aware of some of these:
to camp: to stay/live;
fine: fire, firewood, matches;
cheeky: dangerous, poisonous, unpredictable;
deadly: fantastic (spreading to SAE)
promise wife: girl promised to future husband. So, asking some Aboriginal speakers of English ‘do you promise to tell me the truth?’ may be confusing.
sorry: grieving, sorrowful

And some of the talks this weekend will give other examples.

In many varieties of AE silly can mean wild or violent as a result of being drunk. This meaning was important in a NSW case I worked on a few years ago, with an Aboriginal man telling police that he assaulted his brother because his brother was carrying on silly after he came home drunk, and started harrassing their sister. Although he gave examples of the violent conduct typical of his brother when he carried on silly, the police summarised all of this part of the interview saying “he was sick of his brother’s antics”. They didn’t realise that carrying on silly might have an Aboriginal English meaning, and they ignored everything the suspect said about the violence that was involved. They just focused on the word silly and wrongly substituted the word “antics”.

(iii) Grammar

The grammar of traditional Aboriginal languages have also influenced the way that many Aboriginal people in the NT speak English. Here is just one example:

If you ask me the question “You didn’t see him, did you?”; and I reply “Yes”, does that mean I did see him or I didn’t? In most English varieties around the world, it would mean “Yes, I did see him”. But if you translate the question into many other languages, a “Yes” answer would mean “Yes, I agree with your statement that I didn’t see him” – or in SAE “No, I didn’t see him”. This is the pattern in many traditional Aboriginal languages. So, speakers of these languages who speak English as a second language often carry over this pattern of answering questions into their Aboriginal English. Michael Cooke (2002: 26) gives a good example from a courtroom questioning of a Yolngu Matha speaker, who is answering questions in English. When the lawyer asked him “You can’t answer that?” the witness replied Yeah, I can’t answer that.

This is a great witness because he did not stop at Yeah, but expanded his answer in a way that made his meaning clear. But if he had just given the one-word answer Yeah, speakers of Standard Australian English may well have mistakenly taken him to mean Yeah, I can answer that. So you can see how tricky it can be understanding answers from second language speakers of English who speak traditional languages as their first language.

One example brings together accent, grammar, semantics and culture

A Central Australian Aboriginal speaker of English, was giving evidence in a land claim about the relationship between two people. The witness said Charcoal Jack – properly his father. This was understood by the court as the witness being unsure of the family relationship in question, a meaning consistent with it being recorded in the official transcription as Charcoal Jack – probably his father. But this was a misunderstanding, in which several features of heavy Aboriginal English were involved, including the interchangeability of the b and p sounds, and the use of the adverb properly to mean
“real” or maybe “biological” (it would be an adjective in SAE). So, a subtle but important misunderstanding arose because of accent, semantic and grammatical differences. But there’s also an important cultural difference here: the word father in Aboriginal English around the country often can be used to refer to a person’s biological father as well as any of this biological father’s brothers (and thus the qualification properly to specify a person’s “real” or biological father). The witness was not expressing lack of certainty about the relationship. On the contrary, he was being specific about what kind of father-relationship was involved. (This example comes from Koch 1985: 180).

Some concluding comments

There are clearly some important differences between Aboriginal English and other varieties of Australian English. And there are clearly some important differences between Aboriginal cultures and ways of communicating on the one hand, and the communication processes and assumptions which operate in the law, on the other hand. These differences in culture and communication impact most Aboriginal people in the NT in their dealings with the law, even if they speak a variety of English.

The importance of these differences for the law have been recognised by some key people in the legal system in the NT, and the conference program promises some great presentations relevant to specific aspects of these issues. An important initiative has been the jury directions used for some years now that were developed by Justice Mildren of this court, to provide jury members with information about Aboriginal ways of communicating, such as the things I’ve talked about today. Some courts in WA have also started using Mildren directions in recent years, and I’m aware of them being used also in a NSW case a few years ago. In the 2011 Western Australian case of Bowles, the appeal court supported the trial judge’s use of Mildren directions (for example about gratuitous concurrence), because – the appeal court said – “There may be a danger that a jury drawn from the dominant culture will unthinkingly assess a witness based upon their own unconscious assumptions … it may be necessary for a judge to suggest to a jury that they may need to use care in respect of a particular witness in applying these assumptions” (Bowles v WA [2011] WASCA 191; #52).

I’d like to generalise this statement a bit further and say that “There may be a danger that anyone from the dominant culture will unthinkingly assess Aboriginal people speaking English in the legal process based upon their own unconscious assumptions …”.

The challenges for effective and fair intercultural communication are considerable and there are no easy formulae. In my view, particular problems in the understanding and evaluation of many Aboriginal witnesses arise when people say very little in interviews or evidence. We’ve seen that there are cultural and linguistic factors to do with the interview format itself, as well as specific kinds of questions and an interview pace that can result in Aboriginal people not having enough time to think about answers to serious questions. There is much to be gained from courts recognising and working with Aboriginal ways of communicating, even when people are speaking varieties of English. This is essential for Aboriginal witnesses to be properly heard and understood in the legal process, and for their credibility and reliability to be fairly evaluated.
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