

**Submission
No 14**

**INQUIRY INTO FAMILY RESPONSE TO THE MURDERS IN
BOWRAVILLE**

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Inquiry: Family response to the murders in Bowraville

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Summary

Aboriginal people in NSW speak some form of English as their main and first language (and typically their only language). But this English (often referred to as “Aboriginal English”) has developed over the past 200 years or so, with influences from traditional Aboriginal languages and cultures, and it is not always the same as English spoken by other Australians.

Subtle differences between Aboriginal and non-Aboriginal ways of speaking English can result in miscommunication, especially where people are unaware of the differences. The report provides examples of such differences in accent, grammar, meaning, non-verbal communication, silence and language functions. Of particular relevance are differences in the way that information is sought: a fundamental assumption about communication in mainstream Australian society is that asking questions is essential for finding out information. But this is a cultural assumption, which is not shared with many Aboriginal societies, where important information is often sought in less direct ways. The submission outlines some of the resulting problems for intercultural communication, particularly in the legal system, and indicates sources of more detailed information.

The three appendices point to the relevance of research on Aboriginal ways of using English to the Bowraville families specifically, in their more than two decades of engagement with the legal system. Appendix A is the expert report I prepared on these matters for the 2006 Supreme Court trial for the murder of one of the children. Appendix B comprises the draft jury directions about Aboriginal ways of speaking English which I recommended for the trial. Appendix C provides some comments about

evidence I observed during that trial which illustrate concerns about the need for jurors to be informed about Aboriginal ways of speaking English.

The submission recommends that committee members be provided with the opportunity to become informed about important aspects of Aboriginal English and communication relevant to its inquiry work with the Bowraville community members. It also recommends that the committee investigate language and communication issues involved in the community's engagement in the legal process since 1991, with a view to making recommendations about improved communication between the law and Aboriginal people in future.

1. Introduction

This submission concerns language and communication issues which I believe are relevant to the inquiry by the Standing Committee on Law and Justice into the family response to the murders in Bowraville. In my view, an understanding of research on Aboriginal ways of speaking English is relevant for two reasons:

- (1) it will help the committee to make the most of the opportunities to fully hear what the Bowraville families want to tell the inquiry,
- (2) it will shed some light on factors which have led the families to be so frustrated with their attempts to tell their stories within the legal process over more than two decades.

2. Author's expertise relevant to the inquiry

I am a consultant sociolinguist, Adjunct Professor in the School of Behavioural, Cognitive and Social Sciences at the University of New England, and Fellow of the Australian Academy of the Humanities. For more than three decades, I have specialised in Aboriginal ways of speaking English, focusing particularly on the legal process since 1986. I am the sole author of three books about language in the legal process: the lawyers' handbook titled *Aboriginal English and the Law* (1992, Queensland Law Society), the research book titled *Courtroom Talk and Neocolonial Control* (2008, Mouton de Gruyter) and the university textbook titled *Sociolinguistics and the Legal Process* (2010, Multilingual Matters). In addition, I am the sole author of *Aboriginal Ways of Using English* (2013, Aboriginal Studies Press), the editor of two other linguistics books, and the sole author of more than 65 scholarly book chapters, journal articles and encyclopaedia entries. Since 2006 I have been co-editor of the *International Journal of Speech Language and the Law*. Further information about my expertise can be found on <http://www.une.edu.au/staff-profiles/deades>

3. Intercultural communication: Aboriginal and non-Aboriginal people in NSW

Aboriginal people in NSW speak some form of English as their main and first language (and typically their only language). But this English (often referred to as “Aboriginal English”) has developed over the past 200 years or so with influences from traditional Aboriginal languages and cultures, and it is not always the same as English spoken by other Australians.

Although many of the differences between Aboriginal and non-Aboriginal ways of speaking English are subtle, they can result in miscommunication, especially where people are unaware of the differences. These differences can happen at every level of language, as the following brief examples illustrate:

accent: For example, non-Aboriginal people can get confused when an Aboriginal person says what sounds like “air shairt” – this is “her shirt” with an Aboriginal accent.

grammar: For example, many Aboriginal speakers of English use a grammatical pattern from the traditional languages in which two noun phrases are put together to make a descriptive sentence (such as “She a little girl”) or a locational sentence (such as “My Uncle Jim back there”). Other Australian speakers of English use the verb “to be” in such sentences, such as “is” or “was”.

semantics: For example, many English words don’t have quite the same meaning in Aboriginal societies, because of the way that words are embedded in cultural experiences. Thus, for many Aboriginal speakers of English, the word “mother” can refer to the woman who gave birth to someone, and that woman’s sisters.

non-verbal communication: For example, many Aboriginal people communicate direction with head or lip movement rather than words.

silence: There is a fundamental difference between Aboriginal and non-Aboriginal societies in the way that silence is used and interpreted. Research shows that the “standard maximum tolerance for silence” in many western interactions is about one second. After about one second or less, in many conversations or interviews, people feel uncomfortable with silence and someone will say something to fill it in. In an interview, a person who doesn’t answer a question within about one second is often taken to be evasive or dishonest. In many Aboriginal societies, on the other hand, people are brought up to feel comfortable with much longer silences in conversations and in more formal situations. Aboriginal people do not use silence in every interaction, but when they do use silence, it is typically seen as positive, indicating that people are taking time to think about important matters, for example.

language use: There are several differences in language function (in addition to structure, word meaning and accent). For many Aboriginal people, information seeking relies less on questions than in western societies. A fundamental assumption about communication in mainstream Australian society is that asking questions is essential for finding out information. But this is a cultural assumption, which is not shared with many Aboriginal societies, where important information is often sought in indirect ways, for example by sharing some knowledge on a topic, and waiting for the other person to contribute their own knowledge. A widespread assumption in Aboriginal societies is that information is shared with people in relationships where there have been opportunities to build up trust. In many situations where Aboriginal people are interviewed by non-Aboriginal people, repeated questions are at the basis of intercultural miscommunication. However, this

miscommunication is often unrecognised by non-Aboriginal people. A particularly problematic aspect of this miscommunication can result from the Aboriginal use of gratuitous concurrence in interviews – that is, the interviewee answering ‘yes’ to a question (or ‘no’ to a negative question), regardless of whether or not they actually agree with the question, or even understand it. The interviewer might assume that ‘yes’ answers indicate the interviewee is agreeing with the question. But such answers might instead reflect the interviewee answering in the way in which the interviewer appears to want them to respond (often in the hope of bringing the interview to an end).

This section has provided a few summary examples of Aboriginal ways of using English which I believe are relevant to the Committee’s communication with the Bowraville families, and understanding of their communication with the legal system over more than two decades. More detailed information can be provided, in writing or in person, and I refer the committee to my 2013 book *Aboriginal Ways of Using English* (published by Aboriginal Studies Press), and see also Appendix A.

4. Being bicultural

Many Aboriginal people in NSW have considerable bicultural skills, and can use English in an Aboriginal way when they are in Aboriginal contexts, and switch to using English in a mainstream Anglo way when they are in mainstream contexts (a similar ability to being bilingual).

Learning to become bicultural comes after prolonged and successful interactions in the second culture. This is often achieved through education or employment, as well as participation in groups such as leisure, sporting, and religious groups. Many Aboriginal people in Bowraville, as in other towns, cities and rural areas of the state, have not had opportunities to develop much bicultural ability.

5. Relevance of research on Aboriginal ways of using English to the legal system generally

The legal process relies on interviews: from police investigations, to consultations with lawyers, to testimony in court. Research over more than two decades has highlighted ways in which Aboriginal people's participation in the legal process is impacted by communication differences, such as those briefly outlined in Section 3; see also Appendix A. (For more detailed information, see my 1992 lawyers' handbook *Aboriginal English and the Law* and my 2013 book *Aboriginal Ways of Using English*).

Aboriginal witnesses are often disadvantaged in their participation in the legal process. A person's story and how they tell it and answer questions about it is central to how they are evaluated throughout the legal process. For example, if police officers, lawyers, magistrates, judges or jurors think that waiting for more than a second indicates that a person is not willing or able to answer the question and/or tell the truth, then an Aboriginal person for whom silence has a positive meaning is clearly at a disadvantage.

6. Relevance of research on Aboriginal ways of using English to the Bowraville families specifically

In 2006, the author was asked to prepare an expert report for the court in which a defendant was on trial for the murder of Evelyn Greenup. This report is attached as Appendix A. In brief summary, this report:

- outlines the research methods and theoretical principles and terms used in the research on which the report is based;
- outlines some features of Aboriginal English and culture in Bowraville;

- provides an overview of features of Aboriginal English relevant to legal contexts;
- summarises some key communication features of Aboriginal English which are of particular importance in how people give and seek information;
- provides suggestions about ways in which the communication differences outlined in the report can be addressed in police interviews and courtroom hearings; and
- provides specific information about possible jury directions concerning Aboriginal English speaking witnesses.

In order to avoid an overlong submission, I would like to direct the committee to this report in Appendix A for its explanations of language and communication issues relevant to the Bowraville families, in relation to both the Committee's engagement with them in this Inquiry, and the legal system's various engagements with them over more than two decades.

7. Recommendations about the process of this inquiry

In my respectful submission, it will be important for the committee members to have an understanding of the language and communication issues raised in this document before visiting the community and beginning the process of taking oral submissions with the families. Even with the best intentions, it can be difficult for non-Aboriginal people seeking information to facilitate a communicative environment in which Aboriginal people feel that they can talk freely and that their stories are being properly heard.

A number of practical issues will impact the quality of the evidence provided to the committee, including

- the kinds of questions that are asked,
- the way that questions are asked,
- the way that answers are received,
- the alternative ways that information is sought (ie not through questions)
- arrangements for hearings and informal information gathering

I would be happy to provide more detailed comments about issues such as these.

8. Recommendations about the broader issues relevant to this inquiry

Public statements from the families over a number of years have made it clear that they are disappointed and frustrated with many of their dealings with the legal process. At the same time they have felt listened to and respected in other dealings (particularly with detectives from NSW Homicide). In my view, many Bowraville family members are in a good position to bring to light some very important issues related to what works and what doesn't work when Aboriginal people in NSW participate in the criminal justice process. (Several of these issues were discussed clearly in the public meeting in Bowraville on 11 December 2010).

I suggest that the committee's investigation of the experience of the Bowraville families with the criminal justice process could lead to recommendations in areas such as:

- (i) Improvements in communication between investigating police officers and Aboriginal people, including specific training needs
- (ii) Compulsory training for lawyers and judicial officers about communication with Aboriginal people

(iii) Attention, and where necessary amendments to, guidelines, regulations and legislation which would enable Aboriginal people to more freely and fully tell what they know in the investigation of crimes. This is particularly relevant to police interviewing practice, and courtroom evidence.

For example, there would be considerable advantages in many Aboriginal witnesses communicating their evidence-in-chief in narrative form. Section 29 (2) of the Evidence Act makes provision for witnesses to do this, but my understanding is that this is rarely used. It would also be useful for the committee to consider whether Section 41 which gives the court the power to disallow “improper questions” is sufficiently understood and used in relation to Aboriginal witnesses.

(iv) Ways in which jurors can be alerted to possible areas of miscommunication with some Aboriginal speakers of English. In Section 6 of my expert report in the 2006 Bowraville murder trial (see Appendix A), I recommended the use of jury directions about Aboriginal ways of speaking English. (I attach to this submission as Appendix B a draft for possible jury directions prepared just before the trial). After brief discussion with the defence and the prosecution, the court decided not to use such directions. Appendix C provides some comments about evidence I observed during that trial which shows why jurors need to be informed about Aboriginal ways of speaking English.

I understand that the legal issues involved in such jury directions are considerable. Nevertheless, in my respectful submission, the fact they are used in Northern Territory and Western Australia suggests that there is scope for considering their use in New South Wales. I believe that the major obstacle preventing serious consideration in this state is the mistaken view that Aboriginal

people here are somehow not sufficiently distinct from other Australians. This view misunderstands the extent to which Aboriginal culture continues in this state, and how it influences communication.

In its 2013 report on jury directions, the NSW Law Reform Commission (NSWLRC) was reluctant to make any decision about directions concerning communication with Aboriginal witnesses. On this issue it took the position that “the content of directions that may be required in the NSW context should be the subject of further consideration by the Judicial Commission, involving consultation with NSW Indigenous and other communities and experts in the fields of culture and linguistics of relevance to those individual communities” (#5.133). I hope that this inquiry will take up this issue, given its relevance to the participation of Bowraville community members and many other Aboriginal people in the legal process.

9. Conclusion

In my view, the families of the murdered Bowraville children can provide the government’s Law and Justice Committee with detailed information and examples about ways in which the legal process has failed Aboriginal people in NSW. In order to properly hear this evidence it will be important for the Committee to have an understanding of language and communication issues raised in this report, including the Appendices. I hope the inquiry’s investigation of language and communication issues involved in the Bowraville community’s engagement with the law since 1990 leads to recommendations which can result in substantially improved communication between the legal system and Aboriginal people.