

## **PART THREE**

# **The Police Record of Interview**

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## Introduction

Yolngu may be questioned by police in criminal justice contexts as victims, suspects (who may or may not have been arrested and charged) or witnesses. It is the *Police Record of Interview* (henceforth, PRI)—the formal police interview of arrested crime suspects—that is of principle interest to this analyst. The reason lies in its importance in the criminal justice process. PRIs are invariably tendered as evidence in any following court case where a defendant pleads *not guilty*, and they usually play a particularly prominent role in cases involving Aboriginal defendants, where ‘Aboriginal confessions frequently form virtually the entire prosecution case’ (Goldflam 1995:32). Any investigation of the nature and features of Anglo/Yolngu verbal interaction in criminal justice contexts must therefore include an assessment of communication in the PRI.

It will be seen from an analysis of the PRI used in the trial *R v M* (Chapter 5) that the Q/A interview style—characteristic of PFIs—may serve to obscure the evidence of a NESB Aboriginal suspect who is unaccustomed to that discourse style. Furthermore, the Q/A approach to conversation provides a means for the NESB suspect’s evidence to be skewed by a conversationally adept native-English speaking police officer.

The conduct by police of their communication with a Yolngu suspect during the course of a PRI was itself a judicial issue in *R v G* (Chapter 6), a case where linguistic expertise was called upon to help decide the question of whether or not the PRI could be admitted into evidence. Discussion in that case extended to matters such as *degrees* of need for interpreting assistance in PRIs involving NESB Aboriginal suspects and questioned the efficacy of police practices regarding communication with such people (a matter that will be explored in the NT context in Chapter 7).

Electronic audio-recording of police interviews with suspects who have been charged with substantial criminal offences is now common police practice across Australia<sup>42</sup>. In the NT police are required by sections 142-143 of the *Police Administration Act 1978* (NT) to electronically record admissions and confessions obtained during questioning in relation to an offence for which the maximum penalty is imprisonment in excess of two years. In the case of serious crimes interviews may be video-recorded.

Electronic recording confers a distinct methodological advantage in the sociolinguistic analysis of PRIs since the interactional dynamics of verbal communication are obviously more easily discerned in audio or video recordings than from written transcripts, thereby

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<sup>42</sup>As a result of the High Court decision of *McKinney v R* (1991) 171 CLR 468, a warning must be given by a judge to a jury on the dangers of convicting on an uncorroborated confession whenever a disputed confessional statement by the accused to police is the only evidence against the accused. However, an electronic recording of a confessional statement constitutes corroboration of the confession such that the warning will not be necessary: see *Cross on Evidence*, para 15157 (Heydon 1996). As a result, almost all confessions have been electronically recorded since 1991.

facilitating an interactional sociolinguistics approach. The quite detailed study of the PRI provided in Chapter 5 brings in features such as length of silence, rate of speech and tone of voice to expose some of the more subtle communicative dynamics of a situation where native English speaking police officers are working to obtain admissions from their NESB Aboriginal suspect.

Ethnographic background information pertinent to the analysis of Anglo/Yolngu communication in a PRI needs to incorporate various historical, legislative and judicial factors that impinge upon their conduct. Understanding the dynamics of Anglo/Yolngu communication in a PRI also proceeds out of an appreciation of the tension between a police officer's need to elicit a confession from the suspect—to ensure a successful prosecution—balanced against the requirement that questioning be conducted in accordance with procedures that ensure fairness to the suspect—but which may have the effect of inhibiting the elicitation of a confession. In the case of Aboriginal suspects, particularly those of a traditionally oriented background, there are a specific safeguards that apply and that vary from state to state.

The most comprehensive of these safeguards are the NT's *Anunga* guidelines (also known as the Anunga Rules). These were the result of *R v Anunga* (1976) 11 ALR 412 (*Anunga*), where Forster J, with the approval of Muirhead and Ward JJ (NT Supreme Court), laid down guidelines for the interrogation of Aboriginal suspects and established that a breach of the guidelines would lead to the probable exclusion of a confession that had been obtained (*Cross*<sup>43</sup>, para 33745).

While, strictly speaking, the Anunga Rules apply only to the NT, some other states (South Australia, Queensland, the Australian Capital Territory) have issued their police with guidelines based on *Anunga* (McRae, Nettheim & Beacroft 1997:372), and they 'remain a useful guide in all jurisdictions whenever an Aboriginal defendant who possesses any of the characteristics [pertaining to *Anunga*] ... is interviewed by the police' (*Laws of Australia*, para 24; *R v W* [1988] 2 Qd R 308, Dowsett J at 321). Furthermore, their relevance extends beyond cases involving Indigenous defendants affected by linguistic or cultural disadvantage, to cases involving migrants who may be similarly affected (Stewart & McArdle 1993:395; Laster & Taylor 1994:143-4). The *Anunga* guidelines therefore represent an important contextual aspect in the sociolinguistic description of PRIs involving NESB Aboriginal suspects. The general features of the PRI and an introduction to the Anunga Rules are given below as a foundation for the three chapters that follow.

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<sup>43</sup> Citations of *Cross on Evidence* (henceforth, *Cross*), the leading Australian text on evidence, are from the version by Heydon (1996).

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## **The Police Record of Interview and the Anunga Rules**

A characteristic feature of the PRI concerns the fact that the suspect (or 'detainee' or 'prisoner') is under arrest. A fundamental procedural difference between the PRI and a police interview with a *witness* (who may, incidentally, also be considered by police as a suspect) concerns the administration of the *police caution*. Before being questioned about a criminal offence a suspect must be formally cautioned<sup>44</sup> of the fact that anything that is said may be recorded and used in evidence in any subsequent trial; and must be informed of his or her right to remain silent in the face of police questioning without prejudice (this requirement that no adverse inference is to be drawn by a suspect's silence is the current situation in the NT and Western Australia which provide the cases under investigation here).

In cautioning the suspect prior to questioning, the police are observing an essential requirement under general law for a confession to be admissible as evidence. This is that a confession should have been made voluntarily; that is, the defendant must understand that he/she had a choice whether to speak or be silent. If the confession was not made voluntarily the confession *must* be excluded (*Cross*, para 33605). Even where a confession has been made voluntarily the court has discretion and may choose to reject a confession on the grounds that it would be unfair to use it against the accused (*Cross*, para 33685). The discretion to exclude for unfairness often depends on proof of some unfair conduct by police officers (*Cross*, para 33685).

Where the obtaining of a confession has involved unlawfulness by the police, the court has a further discretion that permits the rejection of a confession. The court will weigh the necessity to encourage adherence to the law against the public interest in securing the conviction of those who break the law (*Cross*, para 33760). In the NT both the requirement that police administer the caution prior to questioning a person held in custody, and a court's discretionary power to admit confessional material that is obtained in contravention of this regulation (where 'the court is satisfied that, in the circumstances of the case, admission of the evidence would not be contrary to the interests of justice'), are legislated within the *Police Administration Act 1978* (NT) (sections 140(a) and 143 respectively).

These safeguards for the suspect do not provide adequate protection for those Aboriginal people who for language or cultural reasons are not able to understand their legal rights. The Law Reform Commission (1986, paras 111-2) cited a number of problems that are well recognised in the case of Aboriginal people (see also Chapter 1 above), including: 'language;

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<sup>44</sup> This rule of police conduct derives from the so-called Judges' Rules (initially formulated in England in 1912 by the Judges of the King's Bench Division as a guide to police in the questioning of suspects and arrested persons) which, in a decision of the High Court in *R v Lee* (1950) 82 CLR, were held to provide 'a standard of propriety' where 'the spirit of the rules should be regarded' (quoted from Bates 1985:196-7). The point at which the caution should be applied was addressed in *R v Williams* (1976) 14 SASR 1, where Wells J was strongly of the view that a caution should be administered when the suspect 'makes an admission or otherwise shows a consciousness of guilt and (the police officer) makes up his mind to arrest him' (Bates 1985:197).

deference to authority; different concepts of time and distance; health problems (especially hearing problems ...); customary law inhibitions; and misunderstandings between Aborigines and police'. Furthermore, '(o)f all Aborigines in Australia, those who are traditionally oriented appear to be the most vulnerable'.

In respect of police interviews with Aboriginal prisoners in the NT, the incorporation of the Anunga Rules into the NT Police General Orders has instituted a requirement (under Rule 3) that Aboriginal detainees *demonstrate* their understanding of the police caution by repeating its meaning back to police in their own words<sup>45</sup>. It is this requirement that reveals how deeply miscommunication between police and NESB Aboriginal people commonly runs (i.e. by making the attempt the detainee reveals how much or how little he or she is understanding).

The state of Aboriginal/police relations—investigated in Australia by the Royal Commission into Aboriginal Deaths in Custody—is of particular concern in respect of police interviews. The RCADC found that the long history of 'continuous and hostile conflict with Aboriginal people' has seen the development of 'deep animosity and often hatred' between Aboriginal people and police (*RCADC National Report: Overview and Recommendations* 1991:10-11).

The fear of police that many Aboriginal people still appear to hold (NT Office of Aboriginal Development<sup>46</sup> 1994/5 Vol 2:73) is an important factor to bear in mind when analysing interviews by police of Aboriginal people—whether as witnesses, suspects or victims. In the NT the majority of people who are arrested and/or summonsed by police is Aboriginal while they represent only one quarter of the NT population (NT Interp. Rpt,<sup>47</sup> p36).

Over a period of time in the NT, mounting judicial recognition of particular difficulties that Aboriginal people were experiencing with police interrogation culminated in the *Anunga* guidelines. They were intended to make interrogation a fairer process for Aboriginal people and, in doing so, to reduce the incidence of PRIs with Aboriginal suspects being ruled inadmissible as evidence by courts.

Forster J prefaced his 'statement of guidelines' in *Anunga* with some general comments about Anglo/Aboriginal communication in legal contexts, pointing to the nature of the difficulties that he perceived Aboriginal people faced:

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<sup>45</sup> The consequence of the incorporation of the rules into general orders is that any breach of the rules triggers the occasion for the court to consider the exercise of the discretion to reject a confession that has involved unlawfulness by police. A breach of the requirement that understanding of the caution be demonstrated is made more significant in that it reduces the chance that the confession was voluntary (*Cross*, para 33745; *Laws of Australia*, paras 23, 24).

<sup>46</sup> The NT Office of Aboriginal Development (henceforth OAD) was established by the NT Government in 1992 'to enhance communication between Government and Aboriginal people' (OAD 1994/5 Vol 1:9).

<sup>47</sup> 'NT Interp. Rpt' is used as an abbreviation for the 'Northern Territory Aboriginal Languages Interpreter Services Trial (6 January - 30 June 1997) Evaluation Report'. This forthcoming report was prepared by OAD for the Evaluation Committee of the Aboriginal Languages Interpreter Service Trial, which was jointly sponsored by the Commonwealth Attorney-General's Department, NT Attorney-General's Department and OAD.

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Aboriginal people do not understand English very well and ... even if they understand the words, they may not understand the concepts which English phrases and sentences express. Even with the use of interpreters this problem is by no means solved. Police and legal English is sometimes not translatable into the Aboriginal language [sic] at all ... English concepts of time, number and distance are imperfectly understood ...

Another matter which needs to be understood is that most Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman. ... Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because if they do not have to answer questions, then why are the questions being asked?

Nine rules were given of which the first four are of principal interest here, concerning: (1) interpreters; (2) the prisoner's friend; (3) administration of the police caution; and, (4) leading questions.

(1) When an Aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding.

(2) When an Aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the Aboriginal has apparent confidence. He may be a mission or settlement superintendent or a member of the staff of one of these institutions who knows and is known by the Aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. The combinations of persons and situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the Aboriginal has confidence, by whom he will feel supported.

(3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, "Do you understand you do not have to answer questions?". Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.

(4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.

Rules 5 to 9 address other matters which are not of direct interest in this study. They are the need for police to: attempt to corroborate any confession (Rule 5); provide refreshment and toilet facilities (Rule 6); avoid questioning a suspect whose mental alertness is affected by fatigue, illness or drunkenness (Rule 7); attempt to provide legal assistance if requested (Rule 8); and, to replace any clothing that is removed for forensic examination (Rule 9). The full text of these rules is provided in Appendix 1.

While the incorporation of these rules into NT Police General Orders (Code Q2) places a definite obligation upon police to conduct their interrogations of Aboriginal suspects

accordingly, it should be emphasised that 'a confession obtained in breach of the Anunga Rules will not necessarily be excluded' (Stewart & McArdle 1993:30; see also Law Reform Commission 1986:55). Western Australia (WA) does not provide detailed guidelines concerning the interrogation of Aboriginal people. However, under section 49 of its *Aboriginal Affairs Planning Authority Act 1972*, a court must refuse to accept confessions from Aborigines where it is established that the defendant 'was not capable of understanding an admission of guilt or of the confession' (*Laws of Australia*, para 25).

Goldflam (1995:32) asserts that the Anunga Rules have not proven popular with police in the NT because they make it more difficult to obtain a confession. Venbrux states (1995:155) that there is considerable pressure from police to have them 'watered down'. It is common practice in the case of suspects with language difficulties to use the prisoner's friend as an (inadequate) interpreter or to press on without assistance at all, and the administration of the caution in the manner prescribed by 'Rule 3' remains problematic (Mildren 1997). In many instances a succession of silences or monosyllabic responses during the administration of the caution reveals only that the suspect has not the faintest conception of what the police officer is meaning, as is amply illustrated in the tortuous and farcical exchange from *R v Cedric Kennedy* (1978) (quoted in Hazlehurst 1987:84-5). Nevertheless, 'the decision as to whether the caution is understood by the Aboriginal suspect is still left to the discretion of the interrogating police officer' (Venbrux 1995:154).

Chapter 5 presents an analysis of the PRI of a Yolngu woman (to be known as 'M') who was subsequently put on trial for the wilful murder of her *de facto* partner. The trial took place in the jurisdiction of WA where the relevant events occurred, although M was from Northeast Arnhem Land in the NT. While police regulations in that jurisdiction do not incorporate the *Anunga* guidelines (as they do in the NT), two parallels will be clear: the detainee was given the opportunity to choose a companion (prisoner's friend) and the police followed the approach given in the third guideline in administering the police caution.

The initial focus of analysis is upon the communicative difficulties that both sides had experienced during administration of the police caution (undertaken without an interpreter). The focus then shifts to the body of the interview in examining the interplay between the discursive characteristics of M as a second language learner (and one who is also Aboriginal) and the questioning strategies of her interrogators.

Analytical commentary upon this dialogue will help define M's English language proficiency in terms of the Australian Second Language Proficiency Ratings (ASLPR) scale. This scale will be introduced as a framework for assessing the English language proficiency of those Yolngu whose interviews are the subject of analysis in this and subsequent parts of the thesis. It also useful as a framework in discussion of an appropriate minimum level of English

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proficiency that would permit a NESB Aboriginal person to participate in a PRI without requiring interpreting assistance.

In Chapter 6 a *voir dire*<sup>48</sup> held at the beginning of a trial (*R v G*) is examined. This was a legal contest over the admissibility into evidence of a PRI with the Yolngu defendant. Legal argument centred on conflicting roles of the defendant's brother who had been present at the interview to act as both interpreter and prisoner's friend. This man had spoken in Djambarrpuyngu encouraging his brother to 'tell' the police—immediately after having relayed to him the police officer's message that he should only talk of his own volition.

The main point at issue was the questions of from whom this encouragement/inducement to confess was understood by the prisoner to have emanated: did it come from his brother in an advisory role as prisoner's friend? or, from the police through his brother as interpreter? Attempts by both counsel to elicit evidence from the brother at the *voir dire* on this point were thwarted by his difficulties with communicating in the English language. This case highlights a number of deficiencies regarding the conduct of PRIs with NESB Aboriginal suspects, including a weakness in the Anunga Rules which permit the double role of prisoner's friend and interpreter.

These two case studies lay the groundwork for an evaluation in Chapter 7 of suggested strategies for improving communication between police and Aboriginal people in PRIs in the NT. There it is apparent that the first three of the Anunga Rules—those concerning interpreters, prisoner's friend and administering the caution—are the source of considerable difficulty (Mildren 1997).

Specific reforms and proposals relating to police procedures in their questioning of Aboriginal people are being tried and canvassed in the NT. They include: suggested revisions to the Anunga Rules; the preparation of audiotapes carrying information in Aboriginal languages, to be played to NESB Aboriginal suspects prior to interview; an accelerated system of interpreter accreditation organised from Batchelor College (a tertiary education college for Aboriginal students, located 100 km south of Darwin); and a trial Aboriginal languages interpreter service organised by the Office of Aboriginal Development.

In terms of the research questions posed in the introductory chapter to the thesis:

- the sociolinguistic analysis of a substantial text in the PRI with M in Chapter 5 establishes a familiarity with features that will be seen in subsequent chapters to be

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<sup>48</sup> *Voir dire* (to speak the truth) is a 'trial within a trial' where the admissibility of evidence or the competency of a witness is determined by a court (Marantelli & Tikotin 1985). This is distinct from the US context where the *voir dire* refers to the pre-trial interview of jurors to check any biases relevant to the case which then lead to their exclusion from the jury.



characteristic of verbal interaction between Yolngu and officials within the criminal justice context;

- the analysis in Chapter 6 of witness testimony and legal argument at the *voir dire* in *R v G* explores the problematic nature of Anglo/Yolngu communication in PRIs under current practices and assesses the effect on their reliability as evidence in court;
- Chapter 7 incorporates a discussion of the ways in which linguists have contributed in the development and implementation of strategies to improve the efficacy of Anglo/NESB Aboriginal communication in policing contexts in the NT.

## CHAPTER 5

### THE PRI IN *R v M* (WESTERN AUSTRALIA)

#### 5.1 A methodological note

An analysis of the communicative interaction in the interview between police and M was initially undertaken when I was approached in the context of the criminal proceedings themselves to assess M's competency as a speaker of English. Thus my analysis was not then, as it is now, a matter of academic research. The analysis here is much more extensive than was provided at the time of the criminal proceedings and it will be linked to other sections of this thesis in which M's testimony at her trial will be measured against her performance at the police interview. The interconnection between the two communicative events—the police interview and M's evidence as a witness in her own trial—requires that analysis here be informed by description of the case as a whole. This includes consideration of my own participation, first as linguistic consultant and then as the interpreter at the trial. This description is set against the background of the previous discussion of the broader legal issues relating to police interrogation of Aboriginal people. Consideration of the more fluid and interactive situational dynamics of the interview itself will be given during the course of its analysis.

Transcriptions given here have been prepared by the researcher directly from an audiotape of the police interview and also with reference to the video recording of the same. Transcript notation is given on p. xii.

#### 5.2 Background summary of the case

M, a Yolngu woman, was charged with *wilful murder* following the death of a Western Australian Aboriginal man, 'RB', whom she had stabbed four times with a knife. M and RB had met in Darwin and he had taken her to his 'country' (i.e. land to which he was linked in a traditional way) in WA. M's trial before Owen J and a jury of twelve in the Supreme Court of WA began in February 1995, seven months after the stabbing.

M had been arrested and charged with *unlawful wounding* on the night of the stabbing but was charged with *wilful murder* subsequent to RB's death the next day. The story of the killing as it unfolded during the police interview was this: the pair had been drinking with a group; he a lot and she a little. He challenged her for talking with one of the other men there. They then left and found an empty Housing Commission cabin to stay in. They argued, with him accusing her of infidelity. He kicked her and hit her with the handle of a knife and then insisted on sex. He countered her protestations of tiredness by kicking her again. She punched him in the groin, grabbed the knife from him and stabbed him. He took the knife back and attempted to stab her, cutting her hands as she protected herself. She kicked him in

the groin and again got the knife and again stabbed him. He ran outside and she followed, still holding the knife. He sat on the ground near a public telephone box and then lay down and continued swearing at her and threatening her. She stabbed him twice again, hid the knife and went to the pub. The police found her there.

M's answers to questions concerning the background to the relationship of several months standing revealed RB to have been a possessive and jealous boyfriend, prone to violence—a bit of a 'basher'. He was a man who would not give M freedom; who refused her permission to go back home to the NT to her young children.

It had also become apparent from the interview that M was not a fluent speaker of English as she had had trouble understanding some of the questions. I had been M's lecturer when she was studying at Batchelor College a year prior<sup>49</sup>. This led to my receiving a phone call (January 1995) from the Detective Sergeant who was preparing evidence for the impending trial where M would enter a plea of not guilty. He wanted to know how well she spoke and understood English. This was an important question since the strongest support for the charge of wilful murder apparently derived from her PRI. The police officer hoped I might be able to vouch for her competence as an English speaker, presumably so that the admissibility of the PRI as evidence in the trial would not be questioned on the basis that it had been unfairly conducted (e.g. through her not having adequately understood her position, her right to silence or the questions that were asked ).

I was sent a videotape of the PRI and prepared a statement based upon my analysis. I found that that while M could converse in English in informal contexts she did not exhibit the skills necessary for unambiguous communication in a formal interview and that the interview was indeed marred by miscommunication. The police informed me that my evidence would probably not be required by the prosecution and that they would send the statement on to the defence lawyer, who might well wish to use it.

It was thus that M's Legal Aid lawyer approached me to appear as an expert witness for the defence in order to help prevent the PRI from being admitted in evidence at the trial. He felt that, were it to be admitted, he could not afford to call M as a witness in an attempt to rebut its content. He was all too familiar with instances where Aboriginal clients take the stand only to clam up, concur with anything or contradict themselves; they are particularly prone to 'coming apart' under cross-examination (see section 1.3). I agreed and flew to WA a day or so before the trial. I accompanied the lawyer on a visit to see M at the prison where she was being held and acted as interpreter for them. From this he felt that M could give evidence with my assistance as an interpreter, and he decided to call her. He also decided not to contest the

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<sup>49</sup> Many of the college's courses, including the one M had been undertaking, are designed to cater for NESB students entering with only basic literacy skills, in order to accommodate those with little formal education.

admittance of the police interview in evidence since, while it was certainly damaging, it would nevertheless serve a vital function in corroborating her testimony.

At the trial M's testimony revealed RE to have been a brutal and vicious man and she to have been his prisoner. The murder charge was dropped and the lesser charge of manslaughter substituted, to which M pleaded guilty. She was sentenced to remain at her NT community for three years under the supervision of her community elders.

### 5.3 Administration of the Police Caution

How far can M be seen to have understood her common law right to silence through the administration of the police caution? It will be seen that the senior interviewing police officer attempted to establish that the prisoner understood the caution (and thus the significance of making a confession in accordance with the requirements given in section 49 of the *Western Australian Aboriginal Affairs Planning Authority Act 1972*) by asking her to paraphrase its meaning in her own words (in the spirit of the third *Anunga* guideline). Preliminary questions were directed towards: confirming that an interview was taking place and being video-recorded; clarifying who was present; clarifying that she knew where she was; and, eliciting basic details of identity for the record (her full name, address and date of birth).

M's answers to these preliminary questions cast immediate doubt as to her level of competency in the English language. M's background included a number of years employed as an assistant teacher of young Yolngu children and one-and-a-half years of tertiary training at Batchelor College. Neither of these contexts had placed demands upon M to exhibit advanced proficiency in English: the school was a bilingual school where the younger children are taught primarily in Yolngu Matha, and Batchelor College's curriculum is geared towards NESB Indigenous students who may have had little formal education. Furthermore, English plays a limited role in M's community where there are few European-Australians and where even commercial transactions (such as shopping and banking) are conducted by Yolngu in Yolngu Matha (see section 2.1).

In the transcription which follows, 'DS' refers to the Detective Sergeant, and 'PS' to the Police Sergeant. A considerable proportion of the interview has been quoted; brief summaries of the sections of the interview that have been omitted (for reasons of space) have been inserted at the points of omission so that the integrity of the interview is maintained.

- DS: All right [M] (uses M's Christian name) (cough), this interview is now being video-recorded. OK?
- M: (nods head)
- DS: On the video camera in there and those two squares down the bottom. That's where the two videotapes are. OK? Now, I'm Detective Sergeant S... B... from Broome C.I.B., OK?, and this is Sergeant P... B... —he's from Halls Creek Police Station. OK?

- M: Mm. (very faint)
- DS: Now the time by my watch is about two forty ah three, in the afternoon of Sunday the 31st of July 1994. OK?
- M: (nods head)
- DS: Ah, now, can you tell me what your full name is?
- M: ... .. (M gives her Christian name, Yolngu personal name, and Yolngu family name)
- DS: Right, now how do you spell your last name?
- M: ... (M spells the letters of her Yolngu *personal* name)

(M did not understand the meaning of *last name* and instead spelt her Yolngu personal name.)

- DS: Right and, and, the ... (DS attempts to pronounce M's Yolngu family name) —, ... (attempts again) — — —
- M: ... (M says her Yolngu family name), my family name.
- DS: Your family name, right, now how do you spell your family name?
- M: ... (M spells the letters of her Yolngu family name)
- DS: All right, and your date of birth, [M]?
- M: Four, four, (year of birth).
- DS: All right, and now you're living — where in Halls Creek?
- M: Yes.

(*Yes* is not an appropriate answer to a *wh-* question. M appears to have completely misunderstood the question as another for which a *yes/no* response is appropriate. It is possible that she had interpreted the question as if it had been said: *All right, and now you're living where — in Halls Creek?*, which is a *yes/no* question.)

- DS: Whereabouts in Halls Creek?
- M: Police station.

(This is an apparent case of first language (L1) interference in her E–YM interlanguage (see sections 2.8.2–3 above). In M's L1, Djambarrpuyngu, the word for *live* is *nhina*, the primary meaning of which is *sit* with the meaning extending to include *stay* and *live*. Since M was staying at the police station—having stayed there overnight—the answer was, for her, appropriate—especially given that DS's original question had been posed in the present tense.

The pragmatics of this answer are interesting. At one level her answer clearly violates the Gricean Maxim of Quantity in that it provided no new information—she knew that DS must already have known she was staying at the police station. Yet knowing-that-DS-knew did not lead M to seek another meaning for his question—one that could enable her to be informative in her response. It is evident then that M had allowed that the conventions of everyday conversation did not necessarily apply to this interview in that DS was asking questions for which answers were known and sometimes patently clear (e.g. her name, and that she was staying at the police station).)

- DS: No, what's the name of the place, ah, you've been living at?

(DS rephrased the question clearly in a past tense—and with emphasis—and so M was able to respond to the meaning that was intended:)

M: At [C].

DS: Right and where — whereabouts is that? — Do you know where that is?

M: — ahh — Not far from Halls Creek.

DS: All right. — Now, um, this interview, me talking to you, is being recorded because of — umm, what happened to [RB] last night — that he was stabbed in — as I told you before — he, um, he died last night, OK? Now what I'm going to do — remember what I said to you before — now I'll go through that again, OK? I'm gonna ask you some questions about what happened last night.

(DS's reference to *before* in '*remember what I said to you before*' is probably indicative of a prior explanation about the police caution given before this formal interview. This conclusion is warranted by '*now I'll go through that again, OK?*' uttered immediately before an introduction to the cautioning process )

M: Yes.

DS: Yeah, you understand that? And what — ah — I ask you now is going to be recorded through these microphones onto the camera. — OK? And onto these tapes. D'you understand that?

M: Yes.

(Although M replied in the affirmative there is the possibility that her answer was merely gratuitous concurrence (see section 1.3). In light of the relatively high levels of contact between Western Australian police and Aboriginal people<sup>50</sup>, it is quite surprising that an experienced Western Australian police officer was not more wary of framing *yes/no* questions.)

DS: Do you understand what I mean when I said it's actually — putting what we talk/ onto the tape?

M: Our voice./

DS: Yeah, our voices.

M: Yeah.

(M has made it clear that the administration of this first part of the caution—that the interview was being recorded—was successful. M's interjection of '*our voice*' when DS provided no pause also demonstrates active participation in the dialogue.)

DS: OK? Ummm — and if you don't want to answer any\* of my questions you just say 'I don't want to answer that\* question\*' and then you don't have to answer it\*. OK?

(\*A problem here is that DS expressed M's right to silence in terms of *individual* questions rather than the interrogation as a whole. If he had continued on from, '*if you don't want to answer any of my questions*', with: *you just say, 'I don't want to answer any questions*', then M could have made the inference that she was permitted to opt out of the interrogation. His use of the singular in '*that*', '*question*', and '*it*' implied otherwise.)

M: Yes.

<sup>50</sup> WA police have frequent contact with Aboriginal people: according to the Australian Institute of Criminology WA has the highest imprisonment rate for Indigenous people; they are gaoled there at 23 times the rate for non-Indigenous people (Lagan 1997:3).

(Again there is the possibility that this was mere gratuitous concurrence and again—in the next utterance—DS attempted to elicit a more reliable indication of comprehension by asking M to paraphrase his meaning.)

DS: Ummm — now what did I mean by that, y'know, if I ask you a question it's gonna be on there, and if you answer you answer it'll be on there but if you don't wanna answer you just say you don't wanna answer — what does all that mean?

M: — If I'm not sc— scare I'll — do my best / to answer every questions.

DS: / All right.

(After having allowed for M's obvious hesitation DS appears to have attempted to close off M's reply when it became apparent that she was not saying what was prompted. For M's part, in stating that unless scared she would answer, she has not shown understanding that she was under no obligation to answer, nor any understanding that there could be other reasons—apart from being scared—for not answering (such as the wish to avoid incriminating oneself!). It is noteworthy that DS has not suggested to M *why* she might not want to answer a question or what can constitute reasonable grounds for an otherwise cooperative person to refuse to answer.)

DS: All right. OK. Now an' if you don't want to answer any more questions.

M: — I'll try — answer it, answer it back.=

(Again there is clear evidence that M was under a misapprehension; she implied a distinct sense of obligation to answer to the best of her ability even when she might not want to answer.)

DS: =Yeah — but if you don't want to answer it, what do you say?

M: —No.

(This was an appropriate reply and the first indication that refusal to answer was a possible response. However, DS's wording of his question had not included that a refusal to answer was *acceptable* and so M has not shown an understanding that she was not *obliged* to answer. On the contrary, M's previous two replies suggested a strong sense of an obligation. )

DS: OK. — All right. — Now, ahh, afterwards — after we finish with this video tape — I can — I'll show a copy of this tape — I'll give a copy of this tape to the court, to the, ah, judge in court, OK? And he can have a look at that, at what — what we are talking about now. He can watch us talking. Do you understand that?

M: Yes.

DS: Yeah. Now if we show this to the court, and you say things in here about what happened last night, what, what can happen because of what you say? What could happen to you?

M: — After when I finish from my — — ?

(There was a rising tone in this utterance that indicated this was to be a question. DS interrupted midway so that it is not possible to know what she wanted clarified.)

DS: Yeah — once it goes to court. If I show this to the court — what could happen?

M: — The court will s-, say something to me, / maybe 'Go to gaol', / I don't know.

(M's response indicates that M had seen a link between showing the video to the court and potential consequences to herself. But there is not yet evidence to show that she saw her own utterances (or silences) as influencing her fate. DS tried to clarify this in his next turn.)

DS: /Yeah /Right.

But, by what we say here, it could mean maybe you go to gaol or maybe not. (This was an unfortunate choice of words. To a native English speaker the intended meaning may have been clear, but the sentence is definitely ambiguous because DS's use of *we* may have meant himself and the other police officer sitting next to him *or* it could have meant himself and M *or* it could refer to all three of them. Also, '*here*' can mean the police station where the interview was taking place or the interview itself. Thus this question can be paraphrased in at least two ways. One is: *But by what we police officers say to each other here at the police station, it could mean you go to gaol or maybe not.* Another way is: *But by what you and I say here in this interview, it could mean you go to gaol or maybe not.* M's reply does not reveal which way she interpreted the proposition.)

M: Depends with the court.=

(M has countered with a qualification to the proposition that words being spoken here decide her fate.)

DS: =Yeah. All right. So if you don't want to say anything to me or you want to keep it for yourself then you don't — have to talk, OK?

(This was the fifth time that DS raised the point that M did not have to answer his questions. This time he has not implied that the freedom applies only to individual questions: he has permitted the inference that the right to silence may extend to the whole conversation. However, her reply does not confirm that he has progressed any further.)

M: Mm.

DS: — Now while we're doing this, like I said to you before, do you want someone to come in here and sit with you?, while we talk to you?

(DS has offered M a 'prisoner's friend'.)

M: No, I'm right.

DS: OK. All right I just want to get it straight that, that you understand that if I ask you a question that you don't want to answer — then you don't have to answer it. — Are you happy with that?

M: Yes.

(This was DS's sixth and final attempt at having M confirm that she has understood her right to silence. Given M's previous replies to these questions, more than an agreeable affirmation was required to demonstrate understanding and to exclude the possibility of gratuitous concurrence. Furthermore, in E-YM interlanguage *you don't have to* is typically taken to mean the opposite of *you have to* — in other words, it means *you mustn't*<sup>51</sup>. If this is the case with M, then her affirmation becomes more problematic.)

Apparently having decided that the police caution had been satisfactorily administered, DC then moved on to the interview proper.

<sup>51</sup> Evidence for this interpretation in the case of E-YM interlanguage will be given in section 6.3.3.



### 5.3.1 Discussion

That M did not speak and understand English with advanced or native-like proficiency is already clear from the limited portion of the police interview considered thus far. There were many demonstrations of lack of comprehension in her replies to DS's questions concerning the right to silence and, for a person about to be charged with wilful murder (which in WA carries a mandatory life sentence if convicted), the consequences of such difficulties can be disastrous. Furthermore, the difficulty in communication that is now obvious from linguistic analysis was also apparent at the time. This is evident in DS's six attempts to have M explicate her understanding of her right to refuse to answer questions. This indicates that he was aware then that he was not 'getting through'.

Section 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) requires that courts refuse to accept admissions of guilt in the case of Aboriginal people until they are satisfied that the defendant (in respect to more serious offences) is capable of understanding admissions that they made to police. Yet courts have been restricting the application of this provision to the 'very unsophisticated tribal individual' (Ashforth 1990, Chapter 2), and M's urban lifestyle at the time of her offence may not have defined her in this category.

Unlike the NT, the Police Department of WA has no written guidelines on the use of interpreters, although their policy is to use interpreters when the person being questioned does not have adequate English language skills (*Access Report* 1991, para 4.3.23). However, notwithstanding common law provisions concerning voluntariness, unfairness and unlawfulness in the elicitation of confessions (see the introduction section above), there is no rule of law preventing the admission into evidence of statements made under interrogation without an interpreter by a person with an inadequate command of English (*Access Report* 1991, para 4.4.1).

At M's trial there was no objection to M being granted an interpreter and he was utilised by the trial judge and by both prosecution and defence counsel. However, in spite of the seriousness of the matter, an interpreter had not been provided at M's interrogation (where DS did not even inquire as to her first language background). DS's failure to seek an interpreter in circumstances such as these is perhaps not so surprising in view of an apparent general reluctance on the part of police to use interpreters in their questioning (ibid, para 4.4.5; Goldflam 1995). It may be more convenient for police to conduct questioning without the delay and effort that is required to obtain the services of an interpreter (Laster & Taylor 1995:140). Furthermore, M was able to communicate in English notwithstanding her difficulty, and at her trial the PRI was admitted into evidence<sup>52</sup>.

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<sup>52</sup> Reference was made at the beginning of the trial to the existence of my report advising of M's limited proficiency in English for the purposes of a PRI. This caused the judge to defer decision as to the PRI's admissibility under section 49 of the *Aboriginal Affairs Planning Authority Act* (WA), until he had heard the evidence of the police, a nursing sister who had attended to M's knife wounds to her hands, and M herself. Following this he

A clearer picture of M's proficiency in the English language, particularly in respect of her speaking skills, becomes apparent from an analysis of excerpts from the remainder of the interview. Her obvious limitations with respect to grammar and vocabulary leave her reliant as a second language learner on *collaborative discourse* with her native English speaking interlocutor who helps her construct her contribution to the conversation through prompting and *scaffolding* (Ellis 1994:284-5). This learner's discourse strategy is one of constructing contributions to conversation within a verbal framework ('scaffold') provided by the utterances of the native speaker.

Scaffolding in a police interview could encompass instances where a police officer begins a sentence for the suspect to complete or provides a phrase which the suspect repeats. Another mechanism for the collaborative construction of admissions in a police interrogation is provided by the gratuitous concurrence phenomenon to which Aboriginal people in situations such as this appear to be particularly susceptible. There are clear signs (as will be seen below) that M, as a learner of English, was constructing her input into the dialogue upon or around the words and expressions provided by DS and PS. Without implying any deliberate coercion on their part it becomes evident that they helped construct M's confession. It is after all their role in an interview such as this—which followed investigative activity that has led to the arrest of M as the obvious suspect—to elicit self-incriminating answers from her in response to their questions about the killing.

In spite of M's obvious communication difficulties in the interview she did display occasional glimpses of eloquence as she attempted to explain the untenable predicament she had found herself in with RB. She attempted on several occasions to relate events expressively in a narrative style but each time was quickly brought back to the Q/A interview style by her interrogator(s). On the other hand, her level of skill as a communicator became clearly manifest at her trial where her lawyer's focus was upon eliciting a narrative from M concerning her experiences, thoughts and emotions in the time leading up to, and then including, the stabbing of RB (this will be analysed in section 9.5 below). Notwithstanding the important assistance she obtained on occasion from the interpreter, she showed a capacity in that context to speak in English with a power that was not available to her at the police interview. The difference in M's performance between the two contexts highlights the need to be aware of the influence of context and discourse structure upon the quality and course of intercultural communication (as discussed in section 4.2.3). In particular, the length and informativeness of her responses during her testimony (examination-in-chief) at trial reflected the positive mediation and more equal power symmetry (Shea 1994, see section 4.3.1 above) that was afforded by M's lawyer.

Interposed in the following transcribed excerpts from the remainder of the police interview are comments upon features of M's communication and upon the interplay between DS's strategies for obtaining incriminating admissions and M's attempts to explain in her own way what had been happening. It is immediately obvious that the dynamics of the interaction have changed directly upon DS being no longer occupied with the problem of having M demonstrate her understanding of the caution. The removal of this requirement left him free to solicit her confession without the need for fully informed participation on her part. The change is evident in the first question.

#### 5.4 M's confession

After DS had dealt with the administration of the police caution he went on to question M about the events leading up to her stabbing of RB and to the issue of her reasons for doing so. This next question followed immediately after the administration of the caution:

DS: All right. —Now, do you agree earlier —that I asked you a lot of questions and I made — I wrote down all the questions and (M: mmm) everything that you said and I said and Sergeant [PS] said a few things too. All right, and you saw me write it all down? — (1.5 secs) Yeah?

M: Yeah.

(M's concurrence has been directed by DS's prompt, 'Yeah?', following her delay in replying.)

DS: OK— Do you agree —that when we —spoke before and I made all these notes — that you told us that ah you had an argument with [RB] last night — and that you stabbed him —on two different occasions, two times, —twice? —So you stabbed him a total of four times.

M: Yes.

(The change in interview style is already clear. DS has made no effort to check M's understanding of his meaning. Nor is there evidence of any attempt by DS to simplify or break down his proposition to facilitate understanding even though this was warranted given M's previously demonstrated difficulties with much less complex constructions than '*you stabbed him on two different occasions, two times, twice*'. M's concurrence thus provided no confirmation that DS's proposition had been understood.)

DS: Yeah? And did you also — say that you wanted to kill him?

M: — Yes.

DS: OK. — Now, — what we'll do is — is — ah if you want to you can tell us how —how you met [RB] ?

M: Umm — He went to Darwin.— I was in Darwin hospital. — I got out. — I went to Bagot (an Aboriginal reserve in Darwin). I stayed there — — —

(M has proceeded to answer with a quite concise recount of the sequence of relevant events leading to their meeting. She was interrupted by the following unrelated question which held her for some time from resuming her account of how they had met.)

DS: Ah, are you from Darwin?

M: Yeah.

(In SAE the construction *Are you from X* has different possible meanings; e.g. *Is X your former (or original) home?* or *Is X the place where you (normally) live?*. In E-YM interlanguage it usually means *Is X the place where you have travelled from?* and it is this question that M has answered. This is likely to be a case of L1 transfer<sup>53</sup>.)

- DS: That's where you normally live?=  
 M: =No.=  
 DS: =You've been living there before?=  
 M: =No, I went — to Darwin hospital.  
 DS: Right. — Whereabouts do you live in the Northern Territory?  
 M: ... (M says the name of her community)  
 DS: And that's off — out of Darwin somewhere is it?  
 M: Yeah.

(The presence of alternative interpretations for M's affirmation that she was '*from Darwin*' may have provided cause for DS to seek clarification by testing her with one of the alternatives: '*That's where you normally live?*'. M's rejection of this left him to try the other meaning which was also rejected. DS finally reframed the question enabling the miscommunication to be resolved. This exchange, incidentally, has provided an example of 'communicative leniency' (Meeuwis 1994, see section 4.3.1 above) where negotiation and renegotiation of meaning, led by a 'supportive' (in terms of the communication; not in terms of welfare) native English speaking interlocutor, resolves the miscommunication and averts communication breakdown.)

- DS: Mm Hm. So when you were in Darwin in hospital this is when you met — met [RB]?  
 M: I got out from hospital and I met [RB] at Bagot.

(M has not given a direct reply to DS's *yes/no* question but she has corrected his mistaken conclusion by separating the events of being in hospital and meeting RB. She does this by stating the events in the order that they occurred. M's tendency to provide answers in this way—by relating a series of events in the order of their occurrence—is a common feature of Yolngu discourse that is also manifest in E-YM interlanguage. The question had been how had she met RB. Instead of answering directly that they had met at Bagot she had concisely recounted (to the point where she was interrupted): '*He went to Darwin. I was in Darwin hospital. I got out. I went to Bagot. I stayed there — —*'.)

DS proceeded to question M about RB further. M explained that after meeting at Bagot Reserve (some four months before this interview) RB had asked her to accompany him back to his community in WA where she could find work as Aboriginal tour guide. Then DS directed M to the matter of her relationship with RB once they were away from the NT and living in RB's community in WA.

<sup>53</sup> The Djambarrpuyngu gloss for *Are you from X?* is: nhe X-nur (with rising intonation)  
 2sg X-ABLATIVE  
 you from X (i.e. *Have you come from X?*).

The transcription below resumes with a question by DS that presented an open invitation for M to describe her relationship with RB. M commenced a narrative and the first few responses by DS did not take control from her telling the story. However, DS soon intervened to resume control. M was clearly attempting to develop a theme concerning the habitual violence to which she had been subjected. DS's questions, on the other hand, promoted RB's refusal to allow M to return to Darwin and to her family as the explanation for M's actions in stabbing RB, ahead of his violence. It is relevant to note that any revelations in the police interview concerning RB's extreme violence could have given cause for concern to DS in that they would have weakened the case against M. In fact DS closed off M's elaboration of the violence she had experienced by providing a premature conclusion to M's recount: '*So, then he wouldn't let you go back to Darwin*', and then turning her towards the events of the day of the stabbing.

- DS: Now what was happening out there. How did — how did things go out there?
- M: First he was talk-, — telling me, he was going to be my — husband — —
- DS: Yep.
- M: — look after me properly.
- DS: And what happened?
- M: And every time I would go to [RB]'s family, talk to them, sit with them — come back — he wou' — he would — he give me a hiding.
- DS: Mm Hm.
- M: And I told him, — 'What's wrong? — Can't I talk to your family or sit with them?'—
- DS: Yeah, and what did he say?
- M: 'No! You didn't come here to see them. You came here — with me.'
- DS: Yeah.
- M: 'So if you want to see them, you should have go come here by yourself.'
- DS: Mm Hm. — Did ahm — did you want to leave, did you want to go back to Darwin — to your family?
- M: I — I telled [RB], 'If you want to do that, I'll go back.' — I tried to — run away from him — in [C], with some tourists.
- DS: Yeah.
- M: Because — the first time he hit me was in — Homestead— — (M's voice falters with emotion)
- DS: Ah Ha
- M: — and — too many times he hit me in [C] .
- DS: All right. So then um, he wouldn't let you go back to Darwin?
- M: No.
- DS: No. Then yesterday (i.e. the day of the stabbing) did you come into town from [C] into Halls Creek?
- M: Yeah.

DS then went on to ask M about the events of the previous day. She explained that she had come in to town with RB that morning and had sat with him as he joined a group of men to drink wine in a park adjacent to a liquor outlet. Her talking to one of the men there had provoked anger in RB.

Note in the following extract, M's difficulty as she attempted to say *Some other men who were sitting around me and RB* and then, *What are you two talking about?*:

- M: An' I was talking.  
 DS: Who were you talking to?  
 M: Some other men — who was sitting at — next to around — — —  
 DS: Mm Hm  
 M: around — with me and [RB].  
 DS: Yep.  
 M: I was talking to the man and he (i.e. RB) turned around and he said 'What you talking to — What are you — What two are you talking about?'.  
 DS: Who said this, [RB]?  
 M: Yeah.  
 M: All right.  
 M: And I said, 'Nothing. Just talking to each other — you heard me what I was s -, saying to him'. — An' he turned around and, 'Maybe he's your boyfriend'.

DS's questioning then turned to the matter of the argument and violence that ensued after RB and M had eventually left the group to seek shelter for the night in a Housing Commission cabin. There, RB had accused M of infidelity with the man she had been talking to. DS again introduced the subject of M wanting to go back to Darwin:

- DS: All right, and what happened when you got to that unit — into that flat?  
 M: He start saying that same thing — arguing me — about that man who was talking — I was talking to him.  
 DS: Yeah? And what were you trying to do when he was talking to you now?  
 M: I said, 'What's wrong? Why can't I speak to anyone? — or some people? — Get to know them? — — —  
 DS: Yeah, and what did he say?  
 M: 'Why do you have to know them?'  
 DS: Yeah. So he didn't like you talking to other people. He wanted you just for you — for him? — Did you tell him that you wanted to go back to Darwin?

M replied that she had told RB she wanted to return to her children. She was asked to describe subsequent events. She spoke about RB kicking her and then demanding sex whereupon her refusal was followed by him striking her head with the handle of his knife. It was at this point that M fought back:

- DS: So then what's happened then? He's holding the knife, and then what?  
 M: — I got a knife and he was sitting next to me, and I stabbed him.

- DS: Right, but did you try to take the knife off of him first?  
M: Yes, I punch him in the thing.  
DS: Yeah — in, in the groin?=  
M: =Yeah.=  
DS: =In his penis?=  
M: =Yeah.=  
DS: =Yeah.=  
M: I punch him hard — and I — got the knife.

DS interrupted the account to asked M to demonstrate how she had held the knife. M then explained that she had stabbed RB who then took the knife back and cut her hands as she protected herself. She again managed to take the knife and stabbed him again:

- DS: How did you get the knife off of him this time?  
M: I kicked him back.  
DS: Yeah? Where did you kick him?  
M: — Same one.  
DS: Which one?  
M: Right underneath the — the — — thing.  
DS: Where? You tell me.  
M: The prick.

These previous two extracts have shown evidence of gratuitous concurrence. M was explaining that she had taken the knife from RB by first kicking him in the groin. She referred to '*the thing*' in an effort to avoid explicitness. DS, however, required explicitness and prompted her with questions using the words *groin* and *penis* where M responded each time with '*Yeah*'. This exchange was conducted without any pauses at all, suggesting that M may have been passing over DS's interjections as interruptions to her recount (which continued with '*I punch him hard and I got the knife*').

Subsequently, when she was saying how she had taken the knife a second time she again referred to '*the thing*'. DS's request for explicitness failed to elicit either *penis* or *groin* notwithstanding DS's indication of their appropriate use through modelling them earlier. Rather, she attempted a further evasion ('*same one*') whereupon DS's insistence resulted in '*prick*', an inappropriate term in a formal interview.

These factors indicate that she did not know these words when DS used them, and that her concurrence with the questions that contained *penis* and *groin* was thus 'gratuitous'.

DS maintained the focus upon the unfolding physical struggle:

- DS: Right. All right — so— then you got the kni- — he dropped the knife or something did he then?

- M: Yeah  
 DS: All right. So then you got the knife a second time?  
 M: And I stabbed him.

(M has built her contribution upon that of DS, yielding a jointly constructed proposition.)

- DS: And this is still inside the little unit?  
 M: Yeah.  
 DS: Yeah? All right, so you stabbed him a second time — — —  
 M: He — — —  
 DS: Why did you stab him these two times?  
 M: — (M has taken a sip of water.)  
 DS: For/ for what reason.  
 M: /... (M makes a sound, beginning to say something.)  
 DS: No. When you stabbed him just once and then you got the knife stabbed him the second time — — —  
 M: He was forcing me, (becoming agitated) forcing me.  
 DS: All right. What did you want to do to him when you stabbed him those two times.  
 M: I didn't want him to killed just to make him — you know — (3 secs) just to make him — go ahh — unconscious, you know?

(M has been challenged to provide a direct answer to the question of her own aim in stabbing RB more than '*just once*'. M took some time to locate the word *unconscious*. DS apparently saw no strategic value in pursuing the point of what M had hoped to achieve by making RB unconscious.)

- DS: Mm Hm. All right. Then when you — when you stabbed him the second time, what did he do?

Following on from this, M explained that RB had run outside and sat on the ground. She followed him. He abused and threatened her verbally. He had by then lain down. She stabbed him twice more.

The next extract is significant in again demonstrating M's attempts at giving her information as a narrative but being prevented from doing by the effect of the questions. They are revealed here to be interruptive interjections that inhibited M's telling. If one takes away the police officer's words from the following interchange, M's attempt at narration emerges: '*I got wild at him. I wanted to get rid of him / because I never seen a man - taking a woman and being putting in the gaol / like to me it was I was in prison*'. DS prematurely completed the account by providing the closure, '*the way he was looking after you, the way he was keeping you*':

- DS: And why did you stab him this time — these two times?  
 M: — I got wild at him. I — I wanted to get rid of him.  
 DS: And what do you mean you wanted to get rid of him? What did you want to happen?  
 M: Because I never seen a man — taking a woman and being putting in the gaol — — —  
 DS: Mmm=



M: =Like to me it was I was in a prison.

DS: The way he was looking after you, the way he was keeping you.

M: Yes.

(DS's question as to M's aim ('*What did you want to happen?*') was answered with a powerful statement of her predicament as RB's prisoner. The impact of M's argument was dissipated by DS who had her accept a reframing of RB's violent abuse as his '*way of looking after*' her. )

DS: Yeah, so when he's lying on the ground outside near the telephone — and you say you stabbed him that two more times — with that same knife?

M: Same knife.

DS: Yeah? What did you want to happen to him?

M: — I want to get rid of him.

DS: Yeah, but how — how were you going to get rid of him?

M: Kill him.

DS: You wanted to kill him — when he was lying there?

(This is the climax of the interview: an opportunity to elicit an admission from M that she had *wanted to kill* RB while he posed no threat (i.e. he was just lying there). The probability of obtaining this confession to wilful murder was increased by DS having framed the admission for her in the form of a declarative *yes/no* question (see discussion of question form and function in section 8.2 below), where gratuitous concurrence on M's part would be sufficient to achieve the desired result. However, M did not address the question:)

M: — (5 secs) Also he was — he was threatening two of the tourists at [C-] (DS: Yeah) when they tried to help me those two touris-, — tourists were — threatened by him.

(M has, in effect, declined to answer the question. Again M attempted to return to the dominant theme within her narrative, of his extreme violence. Here she has revealed that it was not only directed towards herself but to others. DS did not show any interest, instead returning to the matter of her motive in stabbing RB. This time DS embedded the proposition that M wilfully murdered RB within the question as to why she had wanted to do so, and eventually achieved a favourable result.)

DS: Yes. So why did you want to kill him this — this time when he was lying there an' you stabbed him that two times — why did you want to kill him?

M: — (3 secs) I wanted to get — away from him — I want — I didn't want to see his face — I didn't want him to — stop me — I wanted to be free, to talk to people — make friends — — —

DS: So that was the only way you thought you could do it?

M: — That's the only way I can get to be free — to kill him.

Again, DS has scaffolded M's contribution to the dialogue ('*So that was the only way ...*'). DS then asked if RB had still been conscious after this. M said that he had continued swearing at her. M had then hidden the knife under a step (asked why, she explained that she had been frightened of RB's family finding out) and then went to a pub. DS then returned to

his theme that the explanation for M's actions in stabbing RB lay in her desire to get back to Darwin:

DS: What were you going to do when you hid the knife? — Where — what were your plans — what were you going to do? Now that you'd stabbed him to kill him and you'd hidden the knife, what did you want to do?

(DS has embedded the proposition that M had intended to kill RB and linked it with his theme.)

M: — Hitchhike to Darwin.

DS: — Did you ring the ambulance?

M: No.

DS: Why not?

M: — I was scared.

DS: All right. Before you said there was a reason why you didn't ring the ambulance.

M: — (5 secs) Beg you pardon?

DS: Before, when, when I was asking these questions, there was something in here you said about why you didn't want to ring the ambulance.

M: Because I wanted him to be dead. (crying)

DS: — So if he didn't get any help he could've died? — You were hoping.

(This is another clear case of scaffolding where DS has modelled and prompted, after a pause, an answer which is also clearly damaging to her.)

M: I was hoping.

DS: Yeah. — All right. Ahhh. — [PS] (addressing the other police officer), is there anything you want to ask ... (inaudible).

PS: When you stabbed him the second time — you were sitting along side him and he was laying on the ground?

M: Yes.

PS: All right. And when you got up — (PS now speaks quickly:) you said he was talking to you so you just wanted him to go away so you just stabbed him another two times — — (PS has paused)

(PS has increased his rate of speech here—taking just under 3.5 seconds to utter 23 words—giving a rate of speech of 400 words per minute! This rate of speech is challenging even for native speakers of English for whom rates above 320 w.p.m. impact upon the level of comprehension. For lower-intermediate level speakers of English, rates of speech above 200 w.p.m. significantly reduce comprehension (Ellis 1994:274). There is thus the significant possibility that M may not have even understood the incriminating proposition that has been presented to her for her confirmation, and that she may simply answer gratuitously.)

M: Yeah.

(M has affirmed a radically reframed explanation of the killing whereby RB has now been reduced from a terrorist to a talkative irritant and, with this, PS has managed to have her portray a quite gratuitous killing. Furthermore this revisionism was masked within a question which purports to address the manner in which the knife was held—a matter of far less significance:)

PS: — with two hands or one hand?

M: One hand.

PS: And when you got up then — did you think he was dead then? Was he making funny noises?

(PS has paired two questions here. He has not said what he means by '*funny noises*' but has left the implicature (derivable from applying the Gricean Maxim of Relation) that they are associated with death.)

M: Yeah, he was making funny noises.

(Does M's '*Yeah*' constitute an answer to the first question or the second? And if it is to the second, does it imply her agreement with the first? For a native English speaking jury listening to this interview as evidence, the fact that M has already admitted to not calling an ambulance and the affirmation of the '*funny noises*' would indicate that she believed he was at least mortally wounded. However, it is not clear that M appreciated what she was implying, particularly because (once again) her reply has been constructed with the aid of her interlocutor's verbal scaffolding.

PS proceeded with an attempt to lead M through the argument that she had observed at the time that RB was making *funny noises* and wasn't talking, and that therefore she had thought he was almost dead.)

PS: He wasn't talking any more?

M: Little bit of — sound.

PS: Little bit. — Do you think he — he was nearly dead then?

M: — Maybe.

PS: Maybe?

M: Yeah.

PS: An- — Did you run away to— when you hid the knife or you just got up, just walked away

M: Just got up and walked away.

(A clear example of scaffolding is provided here by M's almost verbatim adoption of one of the alternatives that PS proffered.)

PS: Was he calling out to you then or — — —

M: Yeah, little bit of — sound — — —

(M's '*Yeah*' posed a problem to the position that M had thought RB was perhaps dead. M's hesitancy in finding her words to express RB's state provided PS with the opportunity to renegotiate her response—by proposing the replacement of M's affirmation of RB '*calling out*' with '*just making funny noises*'. This would serve to re-establish the status quo; namely, that M had walked away at a time when she had reason to believe that RB was mortally wounded:)

PS: Was it talking or was he jus'(t) making funny noises?

M: Noises.

PS: Yeah.

PS then directed M to the time when he (PS) had approached her at the pub where she had gone after leaving the scene. There, M had at first denied knowing RB or having '*made him sick*' because she had been '*scared of going to gaol*'. PS's questions to M then turned to ascertaining that she had then *voluntarily* accompanied PS to the crime scene. He established this quite easily with a series of questions set out as reminiscences—achieved by prefacing each of his questions with the contextualisation cue, *(re)member*, as a contracted form of *Do you remember ...?*, promoting a conversation as between people on familiar terms. He also adopted a less authoritative higher pitched tone of voice.

- PS: (re-)Member after I spoke to you at the hotel? —you said ah you had an argument with [RB] — out at that block area?
- M: — Yeah.
- PS: (re-)Member that after a little while we started talking there? —and I said, did you want to come and show me? — where it happened?
- M: Yeah.
- PS: Remember me saying that to you? — And I said you didn't have to go out and show me if you didn't want to -- and if you wanted to show me where it all happened — do you remember me saying that to you?
- M: Yeah.
- PS: And you — you said to me that you wanted to go out and just show me.
- M: Yes.

PS continued with 'reminiscing', eventually leading her towards their activity at the crime scene:

- PS: And did you show us something else?
- M: —
- PS: What were you helping us to find?
- M: You was looking for that knife — I couldn't remember where I put it but I told you it was somewhere underneath the —

(For a moment or two M has entered into the spirit of this relatively intimate style of discourse. M's contribution here is much more substantial and forthcoming than was actually called for, indicating that PS's conversational style is yielding a result.)

- PS: Underneath the house.
- M: Yeah.
- PS: And the only — 'member we didn't find it straight away — was because there was three or four houses there, wasn't there?
- M: Yeah.
- PS: Well, we found him in the end. — And do you remember the — ahh — police taking some photos an' — an' you were — —

('Well we found him in the end' was, in terms of any probative value in a court case, an empty comment: it was a statement of the obvious and it called for no response from M. It functions as a closing device—given in a familiar, conversational style—to the dialogue about locating the knife. PS used an inclusive pronoun (thus including M) and he even personalised the knife with the personal pronoun '*him*' in the manner of an intimate conversational style.)

M: Pointing, yeah.

(A rare occasion when M found cause and confidence to prompt one of her interrogators.)

PS: You were just pointing — what were you pointing at?

M: That knife.

After dispensing with one or two other matters of detail PS finally closed the conversation about their recent excursion to the crime scene with: '*And then you just came back to the police station*', whereupon DS took over once more:

DS: All right. Now, [M], is there anything else you want to say about what happened last night? — that you mightn't have already said or that we mightn't have asked you — anything that you want to say about what happened last night?

M: (M lowers her voice and proceeds to directly quote RB:) — 'I wa-, — I want to send you — your head to your family — I want to kill you — the first thing I would do is — put your head on the coffin and send it back — to ... (name of M's community).

PS: That's what he said to you?

DS: — All right.

(DS has closed the invitation to M to speak her mind with '*All right*' after a brief pause of a little more than a second. PS then moves towards closing the interview.)

PS: Are you — you happy with the way that ahm — the detective and me have been speaking to you about this matter?

DS: Yeah.

PS: Have we — we haven't growled at you or done anything like that, have we or ...

(After beginning to phrase this question as an open *yes/no* question—that might, by way of gratuitous response, yield an embarrassing answer—PS quickly moved to rephrase the question as a declarative *yes/no* where the preferred response is encoded. The choice of *growled* is interesting. It is commonly used in Aboriginal English (and E-YM interlanguage) to refer to aggressive admonishment. In a strategic sense this question would have served to counter any subsequent suggestion that might have been made that M's admissions were not entirely voluntary or were made under pressure. PS's choice of this term, which indicates rough shouting more than anything else, posited an unlikely, overt and exaggerated type of pressure, thus promoting the likelihood that M would answer in the negative—as she did:)

M: — No. It's making me more leaving(?) it — little bit — ah — —

(M has given the desired answer in '*No*', and is not given time to find the words to express feelings that she *has* experienced.)

PS: Have you been scared while we've been asking you all this qu-, — have we made you scared or not?

M: No. I was scared myself, not from you — when you was asking me question — Myself was scared.

DS: And how do you feel now about it?

M: Little bit much better now.

DS: Yeah? Good.

(Neither DS nor PS made any attempt to identify the source of M's fear which, since it did not originate from them, may have had its origin in the trauma she had experienced. An exploration of these feelings of fear could have carried the risk of undermining the solidity of confession of wilful murder that had just been constructed.)

PS: And you — you've told us the truth, you've told us your story and you've told us the truth?

M: Yeah.

PS: You don't want to say any more or — —

(By having already signalled closure of the segment of the interview concerning M's testimony (i.e. with '*you've told us your story and you've told us the truth?*') PS's invitation for M to say more is further weakened by being negatively couched.)

M: —No.

DS: All right OK Well, [M], —what'll happen is that ahm —[RB]'s body is gotta be taken down to Perth and a doctor down there has to look at it — all right? And then, ahm, at the moment you've been charged with, ahm, unlawful wounding which means you've stabbed him —OK —ahh —and depending on what the doctors say when they look at him --there's, ahh —a likelihood —it's possible that a more serious charge is going to be laid against you in a few days time.

(DS has elected to fully inform M of the gravity of her situation at the end of the interview.)

M: Mm Hm.

DS: OK? Do you understand what I mean? — Can you just tell me — what I mean so that I know that you understand what I'm saying?

M: It's like — maybe something — maybe — I'll go to gaol.

(Right at the beginning of the interview M had indicated in the context of the administration of the police caution that she might '*go to gaol*'. There is no advance here upon this limited level of understanding concerning her predicament. DS's facile explanation of unlawful wounding as simply the fact of M stabbing RB fails to provide a reference point that would assist M in appreciating the meaning of '*a more serious charge*'. Furthermore she had been informed at the beginning of the interview that RB had already died. She could not be expected to intuit from '*depending on what the doctors say ... a more serious charge is going to be laid ...*' that it is for the doctors to determine whether RB had died from stab wounds inflicted by M rather than, say, from alcohol poisoning—and that this kind of assessment was the link between '*the doctors*' and the possibility of a '*more serious charge*'.)

DS: All right. — OK.— All right now — you'll have to see a — a solicitor at some stage — a lawyer, OK, —about this. An' if you tell him that you had this video interview with us an then he can have a copy of it later — OK? =

M: =Where can I get my solic-, solcitors?

(If M had been informed of the need for a lawyer at the beginning of the interview she may well have requested one in which case the police would have been obliged to facilitate the obtaining of legal assistance. The presence of a lawyer during questioning would have made the elicitation of a confession for wilful murder highly unlikely.)

DS: Well there's um — we'll sort that out later, OK?

M: Yeah, thank-you.

DS: We'll sort that out. So I'll now stop the interview ...

(The time was 3:16 pm, making the interview 33 minutes in duration.)

#### 5.4.1 Discussion

This 33 minute interview reveals that the police were focussed on eliciting admissions from M that she had wanted to kill RB, had intended to kill him and had done so at a time when he was defenceless (and for the reason that he wouldn't let her go back home to the NT). At the same time M was attempting to relay the extent and force of the brutality she had been subjected to and to explain the stabbing of RB as an act of desperation to gain her freedom from virtual imprisonment.

There are strong indications that the information emerging from the interview was affected by the mind-set of police in seeking information showing that M had murdered her boyfriend. This led them to structure their questions in a way that promoted this outcome and they were assisted by M's demonstrable vulnerability to verbal manipulation—mainly the result of her limited proficiency in the English language evident in her frequent incomprehension and errors. In general the assistance of a native speaker in providing the language learner with verbal scaffolding can be beneficial in facilitating coherent and more fluent conversation, particularly when combined with a supportive communicative manner (i.e. when the native-speaker exhibits 'communicative leniency' as opposed to 'testiness'—see discussion in section 4.3.1 above). However, in the case of a police interview this verbal support carries the distinct danger that the statements of a suspect or witness contain elements which are not their own (having been provided by the police officer) and which may not even have been understood. In this interview, the scaffolding by police of M's contributions to the jointly constructed discourse—achieved through beginning or completing her utterances or by providing vocabulary and phrases for her to use in her replies, *together* with her propensity for gratuitous concurrence—enabled them to help construct her confession.

At the same time, DS and PS were able to limit M's telling of her own story. The behaviour of these interrogators in disrupting or prematurely closing M's attempts at narrative and recount had the effect of preventing M from explaining for herself how she came to kill RB. The same difficulty occurred when she was being asked about the actual stabbing. She was not able within the Q/A framework to provide a full recount of those minutes. As a consequence she omitted mentioning points that, when they were later revealed during her trial testimony, were powerful in her defence. Her input into the interview was delineated by the questions she was asked rather than by what may have been in her mind to say. The police obtained the confession that they needed and did not display interest in pursuing the sense of imprisonment, powerlessness and fear that M had begun to express.

There is a sense in which it can be said that miscommunication was not a significant issue in this interview, at least not for the police; they were generally not seeking information from M that they did not already have (there had been the previous interview covering the same ground). The purpose of the PRI was not therefore investigative: M had already been arrested as the only suspect and, with the benefit of her assistance at the crime scene together with answers she had furnished to their questions, they had already established for themselves that it was she who had stabbed RB on multiple occasions, even when he had no longer posed any physical threat.

Rather, the purpose of the PRI was to have this incriminating information presented and confirmed. And while it was preferable to have as much of this material as possible uttered by M it was nevertheless acceptable to fill any gaps that she left: by prompting and scaffolding her responses; by embedding incriminating information within questions that purported to establish something else; by presenting information to her and then eliciting her concurrence; or even by renegotiating unwanted replies. The PRI would thus serve to sustain in court the offence that she had already been charged with—or the offence that she was likely to be charged with once it was established that it had been the knife wounds that had caused RB's death.

This perspective upon the PRI points to the general communicative intent of the police questions. Apart from the first part of the interview when the police were attempting to administer the police caution it was often not important for the police that M understood the sentence meaning of their questions as long as she provided responses that assisted in the construction of the confessional text that they were generating. Thus in spite of the high level of miscommunication that *had* been evident when it *was* important that M understood what was being said to her—i.e. during the administration of the police caution—the police found it unnecessary to check M's comprehension of the admissions that she was supplying, as is evident in one of the questions that immediately followed the administration of the caution:

- DS: OK—— Do you agree —that when we —spoke before and I made all these notes — that you told us that ah you had an argument with [RB] last night — and that you stabbed him —on two different occasions, two times, —twice? —So you stabbed him a total of four times
- M: Yes.

Here the communicative intent was clearly to have M say 'yes' and this was indeed the communicative effect. However, 'yes' does not provide the evidence—given the context provided (i.e. the comprehension difficulties that M had just been exhibiting)—that M understood the meaning of '*two different occasions, two times, twice*'. But then her comprehension had not been important. The communicative intent of the utterance was essentially constituted in its pragmatic force, carried by '*Do you agree ...*'. Thus whether or



not M had understood the proposition was not so significant since the appropriate communicative effect was nevertheless signalled in M's 'yes'.

On the other hand there were occasions in the body of the interview when the pragmatic intent of a question could not be effected without M's full understanding of its sentence meaning. This situation is exemplified by the occasion when M's initial answer to the question of why she had not called an ambulance did not result in the incriminating admission that had been the intended outcome:

- DS: — Did you ring the ambulance?  
M: No.  
DS: Why not?  
M: — I was scared.  
DS: All right. Before you said there was a reason why you didn't ring the ambulance.  
M: — Beg you pardon?  
DS: Before, when, when I was asking these questions, there was something in here you said about why you didn't want to ring the ambulance.  
M: Because I wanted him to be dead.  
DS: — So if he didn't get any help he could've died? — You were hoping.  
M. I was hoping.

This extract contains quite explicit evidence of the police agenda and reveals the need to contextualise any assessment of miscommunication in the interview in its light. M's initial answer '*I was scared*' does not on the surface seem to indicate the presence of miscommunication: the answer appears appropriate in all the Gricean senses—it was informative, true, relevant and perspicuous. However, the police did not find it relevant; it was not the incriminating answer that they had obviously elicited before and they showed no interest in exploring M's fear on this point. The answer that the police had required was only forthcoming once it was clear to M that they wanted her to say the same as she had said before (i.e. that she had wanted RB dead). Understanding this enabled the intended pragmatic force of the question to be effected.

Further to this, by means of prompting they gained the admission that M had foreseen RB's death as a result of her inaction (in not getting help) and indeed that she had hoped for his death. The fact that the police were frequently able to prompt M's admissions (in one way or another) reduced their need for her full and sustained comprehension of everything that they said—while for M's part, their tendency to orchestrate her responses reduced her capacity to effect her own intended meaning. Thus M's communicative disempowerment extended to both comprehension and expression.

The presence of instances where the police appeared to be masking either the explicit or implicit meaning of their utterances is particularly disturbing. This occurred when

incriminating propositions were embedded within questions or uttered so quickly that M's comprehension was likely to be hindered. In other words, in such instances the communicative intent of police may actually be that the hearer incompletely comprehends the semantic meaning and/or pragmatic meaning carried by the Q/A adjacency pair, as in this example:

- DS:           What were you going to do when you hid the knife? — Where — what were your plans — what were you going to do? Now that you'd stabbed him to kill him and you'd hidden the knife, what did you want to do?
- M:            — Hitchhike to Darwin.

By tagging '*now that you'd stabbed him*' with '*to kill him*' DS has—apparently quite incidentally—proposed a purposeful killing. He has further obscured this proposition by inserting it between the questions '*what were you going to do?*' and '*what did you want to do?*'. Thus DS has minimised the likelihood that M will recognise the accusation of murder (i.e. the intent to kill). This then maximises the possibility that M will, in bypassing the apparent opportunity to challenge the accusation, leave the impression that she is acquiescent to it. And this is of course what happened.

While M exhibited communication difficulties throughout the PRI, occurrence of communication breakdown (i.e. two way miscommunication) was infrequent. It had only markedly disturbed the texture of the interview during the administration of the caution. The veneer of adequacy in communication in the body of the interview was achieved through effective collaborative discourse that was orchestrated by the native English speaking police officers. Their approach obviated the need for M to fully understand what was being put to her and prevented her from fully expressing herself. The effect was that her deficiencies were minimally displayed. Thus M projected herself as possessing the capacity to participate in an interview with speakers of SAE to the extent that the Crown saw fit to submit the PRI as evidence and the court accepted it. (It should be reiterated here that the defence saw fit, for the strategic reasons cited earlier, not to challenge the admittance of the PRI.)

The fact that significant language handicap in the PRIs can be overlooked or tolerated raises important general issues about: (1) how to determine the English language proficiency of NESB Aboriginal suspects, witnesses and defendants; (2) how to categorise different levels of proficiency; and (3) how to determine the lower limits of proficiency where the need for an interpreter is definitely indicated.

Having now provided a quite detailed sample of Anglo/Yolngu dialogue in the criminal justice context, consideration can be given to these issues. However, the question of determining for whom and under what circumstances interpreting assistance is warranted is both complex and contentious and will be worthy of comment in various other chapters apart from this one. In the next section a scale widely used in educational contexts for tracing development in second

language proficiency will be introduced in order to establish a framework for addressing these questions and, specifically, in order to discuss them in relation to M.

The scale provides an objective and straightforward means for describing the English language proficiency of Yolngu (and other NESB people) on the basis of police and court transcripts of their dialogue with native English speaking police and lawyers. Thus informed assessments become feasible concerning interpreting needs in individual cases, expressible against the level of proficiency that is appropriate to police and courtroom situations.

### **5.5 Measuring English language proficiency: ASLPR**

The Australian Second Language Proficiency Ratings (ASLPR) 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 (Ingram 1996). The function and status of the ASLPR are described by Ingram (pp2-3):

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 ...

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.

The ASLPR scale is used in Australian educational contexts as a means of defining entry standards to undertake English language certificates, interpreting courses and even post-graduate study. It has been used in the case of Aboriginal students in regard to their entry and progression through some courses at Batchelor College. The ASLPR has been cited by the Commonwealth Attorney-General's Department (*Access Report* 1991, para 3.3.28) and Queensland's Criminal Justice Commission (CJC 1996:70-1) for providing comparatively objective criteria that can assist monolingual lawyers and judges to assess the English language competence of NESB individuals in the context of determining any need for interpreting assistance.

The advantage of the scale is that it does not necessarily require formal testing to make an accurate determination about where a person stands. This is because each of the 12 levels is described comprehensively in terms of linguistic and discursive characteristics of learners' communication and by reference to *general proficiency* (i.e. 'the ability to use language communicatively in a range of situations related to the learner's roles as a consumer of goods and services, participant in social and recreational activities, citizen, worker and/or student' (Wylie & Ingram 1995:vi)).

Thus a reasonable sample of adequately transcribed native speaker/non-native speaker English language dialogue can usually provide the material required for a considered assessment. Even police and court transcripts can be considered sufficient—with some qualification.

Police and courtroom interviews are not the same as conversations conducted in general social, commercial or vocational settings and some extrapolation is required from the descriptions given by Wylie and Ingram of various generalised tasks that learners can perform at specified levels. How 'general' though can a police interview or courtroom interview be considered? The police interview of M reveals a number of characteristics that are quite typical of general interaction. For instance a parallel with social interaction can be seen in that M was giving biographical information and talking about familiar topics and recent events. And there was the quite successful attempt by one of the police officers to engage M in a conversational style.

In common with a vocational setting there was a certain formality and a requirement to attend to explanations and instructions, such as the explanation of the right to silence and instructions about answering questions on a voluntary basis. She was required (or at least, she felt obliged) to answer specific requests for information and for her considered opinion, and was under pressure to take serious decisions.

The variability of language in any given individual (where a person may use one linguistic structure on one occasion and a different structure on another) is a factor that must be considered if one is to use a single dialogue as the basis for a decision about proficiency. While this inherent variability applies to the learner just as it does to the native speaker it is fortuitous here that more formal contexts are likely to show learners at their 'best' (Ellis 1994:22):

Learners are more likely to use correct target language forms in situations and tasks that call for a *careful style* (i.e. formal language use) and more likely to use transitional, learner forms in their *vernacular style* (i.e. in informal, everyday language use).

However, there are also interactional factors that affect a person's use of language and which must be accounted for (see section 4.3.1 above). An interview that displays primarily monosyllabic replies from a NESB Aboriginal interviewee and a virtual absence of any attempt at structured utterances may be the result of fearful or embarrassed discomfort as much as English language handicap (see sections 1.1, 1.3 above). And, given the propensity of Aboriginal people to gratuitous concurrence, comprehension skills cannot be reliably assessed from simple affirmative responses to propositions put by the interviewer. Furthermore the particular discursive style and tone that develops (or is imposed) will help determine the degree and quality of participation by the learner in the interview (Shea 1994). Thus, for example, a witness may be much more linguistically forthcoming under direct

examination than under hostile cross-examination. These factors serve to emphasise the need to assess the linguistic performance of a learner in its interactional and sociolinguistic context.

Finally, the type of transcription has a bearing on the linguistic material that can be assessed. An official transcription that may incorporate some grammatical corrections or that may not indicate the response of silence to a question will be of more limited value in assessing English proficiency than a more detailed transcription such as was prepared from the PRI with M. Even so, provided that the official transcript is of sufficient length, the quality of the transcription is known, and the contextual dynamics of the interview are understood, there is the opportunity to make an informed determination as to the level of English proficiency by using the ASLPR framework.

The ASLPR levels are given by Wylie and Ingram in terms of each of Listening and Speaking (and Reading and Writing, but these dimensions are not so relevant here) 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)<sup>54</sup> 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 an ASLPR at Level 3 in both languages<sup>55</sup>. NAATI (1980:2) defines the level of communicative proficiency that must be demonstrated at the paraprofessional interpreter level<sup>56</sup>:

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.

It would also be useful to place a PRI in perspective with respect to the ASLPR level that seems reasonably to be required by NESB Aboriginal interviewees. Forster J's suggestion that a person requires an interpreter unless he or she 'is as fluent in English as the average white man of English descent' indicates a requirement for ASLPR Level 5 (Native-like

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<sup>54</sup> 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>>.)

<sup>55</sup> Source: internet <<http://www.aief.edu.au/study/instions/all/10.htm>>.

<sup>56</sup> The paraprofessional level was previously categorised by NAATI as Level II Interpreting.

Proficiency). Yet the requirement to provide interpreters to all NESB Aboriginal people below this level is seen as overly restrictive by other members of the NT judiciary (Mildren 1997).

A less unrealistic minimum proficiency should perhaps be put forward. The expression by NAATI given above is useful in this respect. It determines the language proficiency required by a paraprofessional interpreter in terms of being able to communicate successfully with (typical) native speakers in everyday language. A police interview of the type conducted with *M* largely represents this type of communication. Given that ASLPR Level 3 is a nominated requirement 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. This level 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. Nor does this level of proficiency ensure that subtle meanings carried by circuitous expression will be understood. And it does not imply sufficient competence for dealing with the more complex language of the courtroom.<sup>57</sup>

Descriptions of NESB speakers operating at each of the ASLPR levels are described in Wylie and Ingram (1995). Their characterisations of learners operating at Levels 3, 2, and 1+ are worth giving in some detail. Level 3 is of interest as a transitional level of competency revealing a capacity to communicate quite accurately and independently in normal environments. Levels 2 and 1+ are of interest because they cover the range of capabilities that are typical among Yolngu who are nevertheless commonly considered capable of coping without interpreting assistance within criminal justice proceedings (as will be seen in later chapters). It will become apparent from the descriptions below that *M*'s communicative performance in her PRI does not justify a Level 3 rating.

### 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 [i.e. 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'.<sup>58</sup> ... Gives relatively long

<sup>57</sup> 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 (*Access Report* 1991, para 5.4.10)—but does not necessarily reflect current practice.

<sup>58</sup> "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

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.

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 (e.g. 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 Level 2: Basic Social Proficiency

#### *Speaking:*

**Able to satisfy basic social needs, and routine needs pertinent to everyday commerce and to linguistically undemanding 'vocational' fields.** ... Expresses own emotional attitudes and (tentatively) own intellectual attitudes about familiar topics with some, though not great, precision. There may be a significant difference between what the speaker wants or intends to convey and the total message ... that is actually conveyed. ... Uses a variety of subordinate clauses, though not always securely. Usually handles simple, high frequency structures fairly accurately, but lack of grammatical control shows in more complex or less familiar structures. The influence of L1 is likely to result in non-standard forms. ... gaps in vocabulary ...

Can give biographical information about self and family (e.g. educational and/or employment background, past and present living conditions, a present or recent job or activity) in some detail and can express intentions and hopes in some detail. Can describe and/or comment on everyday things in the environment ...

Can use some indirect speech forms (e.g. introduced by *I said, she asked*) but tenses and other grammatical features within embedded noun clauses are likely to be inaccurate. ...

At this level, the use of modifying devices of the language, including a variety of subordinate clauses, permits elaboration and qualification in the expression of ideas. ... They have sufficient mastery of embedding processes to be able to convey simple reported speech. ...

Learners at this level may, however, often feel frustrated ... because their ability to convey their ideas, aims and attitudes does not match their intentions and self-image. They are particularly restricted in terms of the complexity of meaning and amount of abstraction they can convey. ...

Non-standard L2 forms are characteristic of the level as is a high incidence of circumlocution. Learners are likely to hesitate a great deal ...

#### *Listening:*

The learner understands sufficiently well to be an effective participant in basic social conversations ... Has great difficulty following most conversations overheard between native speakers. Gets the essential meaning in short monologues ... provided the rhetorical structure is very simple [and] speech is at the lower limits of normal utterance. ... Has particular problems ... where important meanings are carried in complex or elliptical syntactic forms. Utterances are sometimes misinterpreted, necessitating repetition or rewording. ...

Interlocutors must be prepared to regulate their speech in terms of cultural references and assumptions, language forms, and the rate of utterance and clarity of articulation. ...

Learners are likely to have problems with the language of the operations of 'mainstream' institutions which are unfamiliar to them.

#### ASLPR Level 1+: Transactional Proficiency

##### *Speaking:*

**Able to satisfy everyday transactional needs and limited social needs.** Provided there is support from the context, the learner can initiate and sustain simple conversations with sympathetic and/or experienced<sup>59</sup> members of the general public on a limited range of topics... Expresses (tentatively) own emotional and (very tentatively) own intellectual attitudes about such topics, although the information conveyed is limited in precision ... Uses simple, high-frequency conjunctions to relate contiguous parts of the text, and can use simple, high frequency discourse markers. In extended discourse, however, coherence may suffer. ... Grammatical errors may often cause or contribute to misunderstanding when there is less support from the context. Word order and other grammatical forms are influenced by L1. ... When verbs need to be modified to indicate time relationships, errors are frequent ... Limited vocabulary range necessitates a great deal of circumlocution, hesitation, and/or appeal to the interlocutor for help.

... can provide basic details of less predictable occurrences (e.g. an accident) provided key vocabulary is familiar. ...

Uses simple high-frequency connectives (e.g. *and, but, or, so, when, because*) and has tentative use of *if* (conditional). ...

Noun and verb inflections are unreliable. Uses the commoner tense and aspect forms but errors are frequent.

Is generally secure with *I, me, you, we, my, your*; other pronouns and possessive adjectives [e.g. *mine*] are likely to be hesitant or wrong.

Learners may often feel frustrated in social (and other) situations because their ability to convey their ideas, aims, and attitudes does not match their intentions and self-image.

##### *Listening:*

Provided there is support from the context, the learner understands short, simple texts on a limited range of topics beyond immediate 'survival' needs. Understands sufficiently

<sup>59</sup> 'Experienced' in this context means 'used to communicating with non-native speakers'.



well to participate in simple face-to-face conversations with a sympathetic and/or experienced member of the general public. ... If the topic is less familiar, or if there is little support from the context, misinterpretation of relatively specific information is likely, even with repetition, paraphrase or explanation. Has very limited ability to deduce other than surface meaning. ... Requires relatively careful articulation and slow rate of utterance. ... Has no facility with varieties of language other than those most frequently experienced. ...

Follows simple, high frequency relationships expressed by a subordinate clause (e.g. clauses marked by *when, because, if*).

May have considerable difficulty with colloquial 'run-on' forms such as *wanna, gunna, gotcha*. ...

At this level, the understanding of a variety of simple modifying devices (mainly single words and phrases, but some simple subordinate clauses) allows learners to cope with some elaboration and qualification of ideas at utterance level. Their repertoire of connectives extends beyond the simplest coordinating conjunctions and discourse markers. ...

An interlocutor must accommodate the learner by regulating language in terms of the kinds of meaning expressed, the kinds of language forms used and the rate of utterance and clarity of articulation ...

### 5.5.1 M's English language proficiency

The description at ASLPR Level 3 presents a picture that certainly does not accord with the difficulty exhibited by M in her PRI. There were many hesitations and she showed a distinct inability to convey precise meanings or to juxtapose 'planes of meaning' in order to express the relationship between her actions and her intentions or to explain what might have (or might not have) happened had she chosen one course of action over another (e.g. regarding ringing the ambulance or in stabbing RB *'those two more times'*). Her utterances included ungrammatical sentences (e.g. *'If I'm not scare I'll do my best to answer every questions'*; *'Some other men who was sitting at next to around...'*; *'Because I never seen a man taking a woman and being putting in the gaol'*) and a restricted vocabulary. On the comprehension side she was unable to understand the propositional content of many straightforward texts and, in relation to the caution, showed the need for extensive repetition and paraphrase—and even then understanding was not demonstrated. She was unable to present and debate her own ideas concerning the reasons for her stabbing RB and there were instances of blatant confusion such as occurred while being questioned about where she was living.

In assessing M's English proficiency it must be taken in to account that M's recorded interview had been preceded by another interview in which similar questions had been asked; the transcript contains several references attesting to the previous occurrence of detailed questioning by the same police about the same events and even extending to an explanation of her right to remain silent (*'... remember what I said to you before — now I'll go through that again, OK?'*). The fact that the police were in control of the questioning and that the events in question had already been discussed would have contributed to the relative rarity of occasions where they appeared not to have understood M's communicative intention. In other words, not only did they already have a good idea of what M was going to say, but their questions were constructed to elicit what they had already heard before (cf. *'Before, when, when I was*

*asking these questions, there was something in here [i.e. in the police officer's notes] you said about why you didn't want to ring the ambulance.').*

In the other direction frequent miscommunication was evident. M displayed difficulty in following explanation (such as at the beginning with the police caution and at the end with the matter of the impending post-mortem). As well, she frequently misunderstood what was being asked of her. Yet she had also had the benefit of the prior unrecorded interview (from which DS had taken notes) that had covered the same ground. It is possible then that M's communicative performance could be overestimated if the fact of the 'pre-interview' was not taken into account.

On the basis of the PRI M's linguistic ability as a speaker matches quite closely with ASLPR Level 1+ according to the linguistic features that Wylie and Ingram (1995) ascribe to the learner at this level (limited vocabulary range; frequent tense errors; noun and verb inflections unreliable; uses simple high frequency conjunctions to connect contiguous parts of text while coherence lacking in extended discourse). The matter of the police caution also revealed difficulty in comprehension that is consistent with ASLPR Level 1+ ('misinterpretation of relatively specific information ... even with repetition, paraphrase or explanation').

On the other hand there were signs of proficiency at ASLPR Level 2. This was evident in her attempts at reported speech where she occasionally demonstrated success in using indirect speech forms, but with inaccuracy in tenses and other grammatical features, as in the example: *'He start saying that same tuing — arguing me — about that man who was talking — I was talking to him.'* Her communicative ability also sometimes extended to ASLPR Level 2 with signs of the capacity to express her 'own emotional attitudes and (tentatively) own intellectual attitudes about familiar topics with some, though not great, precision'. This was most evident in her attempt to express a full answer to DS's question: *'Why did you stab him this time — these two times?'* While her reply was disjointed by her interlocutor's interruptions she nevertheless revealed a capacity over three conversational turns to express her emotional and intellectual attitude: *'I got wild at him. I wanted to get rid of him / because I never seen a man - taking a woman and being putting in the gaol / like to me it was I was in prison'*. On the odd occasion M also displayed a level of grammatical sophistication that clearly exceeded ASLPR Level 1+. This was particularly evident in: *'... when they tried to help me those two touris-, — tourists were — threatened by him'*.

Notwithstanding the occasional sojourn into the ASLPR Level 2 realm (perhaps having been aided by the 'pre-interview'), it is nevertheless evident that M cannot be considered a reliable communicator above ASLPR Level 1+. However, at either of these levels it is the case that the assistance of an interpreter is warranted. Why then was an interpreter not provided? As stated earlier, the policy of the WA Police Department is 'to use interpreters when the person

being questioned does not have adequate English language skills' (*Access Report* 1991, para 4.3.23). M had been able to provide the police with the admissions that they required to bring about a prosecution, without their need for an interpreter. For police purposes in building their case M's English language skills do appear to have been adequate. For M's own purposes in protecting herself against such an event, they appear to have been not.

In the NT the incorporation of the *Anunga* guidelines into Police General Orders places an explicit obligation upon police to provide NESB Aboriginal suspects with interpreters or risk their PRIs being ruled inadmissible as evidence. Yet competent, trained Aboriginal language interpreters are rarely evident in PRIs in the NT. One reason is that competent interpreters are difficult to find for most NT Aboriginal languages and for some languages they do not exist at all. A second is that judges have not enforced the requirement under the first *Anunga* guideline that Aboriginal suspects be provided with an interpreter wherever their English is not spoken with native-like proficiency (Mildren 1997). A third reason, as will be seen in the next chapter, stems from a flaw within the *Anunga* Rules themselves whereby the prisoner's friend can also double as the interpreter. This provides a loophole whereby an obvious need for effective interpreting assistance can be bypassed, affording police the opportunity to assert the kind of linguistic control that was so evident in the PRI with M.