PART SIX

Conclusion

Introduction

The final chapter presents a collated distillation of findings from this study that specifically refer to the three focus questions posed in section 0.1. These questions relate to: the nature and features of Anglo/Yolngu communication in criminal justice contexts; the capacity for courts to receive and hear Yolngu evidence; and the utility of (socio)linguistic expertise in improving communication. The reader will be frequently referred to the sections of the thesis where the identified issues have been analysed and discussed, and where relevant citations from other research can be located. Sections are referred to by their number, given in brackets.

CHAPTER 12

FINDINGS

12.1 Qualities of Anglo/Yolngu communication in criminal justice contexts

Anglo/Yolngu communication in criminal justice contexts cannot be singularly characterised since the differing effects of various contextual parameters must be taken into account. These principally include:

- the language and language varieties used in communication (Standard Australian English (SAE), English Yolngu Matha (E-YM) interlanguage forms, Yolngu Matha);
- interpreting assistance (form of assistance and extent of utilisation; competence and professionalism);
- the level of English language proficiency and Anglo cultural knowledge exhibited by Yolngu witness, suspect or defendant;
- the extent to which Anglo officials acknowledge, and are familiar with, the Yolngu interviewee's use of interlanguage;
- the role of the Anglo interviewer (police, counsel, tribunal) in respect of the interviewee (suspect, 'friendly' or 'unfriendly' witness, client, defendant);
- the type of interview (PRI, examination-in-chief, cross-examination), interview style (Q/A, narrative), and questioning approach (e.g. confrontational, probing, oblique, coercive).

Mindful of these (among other) parameters it is useful to characterise communication considered in this study in respect of three broad categories:

1. Anglo/Yolngu communication involving Yolngu whose English proficiency was considered by a court to be sufficiently developed so as to enable them to testify without interpreting assistance (witness GW in *Elcho Coronial*, 9.2); or so as to admit into evidence a PRI conducted either without interpreting assistance (defendant in *R v M*, 5.3.1), or conducted with ineffectual and minimal interpreting assistance (defendant in *R v G*, 6.4.3).
2. Anglo/Yolngu communication involving Yolngu who are granted interpreting assistance but who are sufficiently bilingual so as to require only occasional or partial assistance (the defendant in *R v M*, 9.5; witness BG in *Elcho Coronial*, 11.2).
3. Fully interpreted Anglo/Yolngu communication (witness YB in *Elcho Coronial*, 11.1; and coroner's findings in *Elcho Coronial*, 11.3).

12.1.1 Where an interviewee's English is considered adequate

Few Yolngu, and none who have appeared in this study, speak English with sufficient proficiency so as to allow them to communicate without disadvantage in police or courtroom contexts. Yet many Yolngu speak English at a conversational level sufficient to permit their interview in English by courtroom lawyers and police. This is not to say that Yolngu communicating in these circumstances are able to understand all that they are asked, or are able to communicate what is in their mind to say, but that the institutional processes of the criminal justice system can adjust to accommodate minimal levels of informed participation by NESB Aboriginal interviewees (cf. Goldflam 1995). A veneer of adequacy in communication is often achievable through effective collaborative discourse orchestrated by an Anglo official who helps 'construct' the NESB interviewee's contributions through collaborative discourse, verbal scaffolding, prompting replies, and exploiting gratuitous concurrence (5.3.1). This obviates the need for fully informed participation by the Yolngu interviewee and minimises the display of their English language limitations (5.4.1).

This masking of English insufficiency enables courts to ratify PRIs involving NESB Yolngu suspects conducted without interpreting assistance, or with patently inadequate assistance, on the basis of arguments such as that a suspect was able to respond to questions addressing 'factual matters' (6.4.2), or concerning 'simple concepts expressed in uncomplicated English' (7.1.1). Yet this focus on a suspect's capacity to respond to questions may disregard their failure to discern implied meanings and nuances of questions that their responses may unwittingly address, whereby the way is open for police to subtly direct the shaping of a confession (5.4, 5.4.1). Furthermore, it is not sufficient that the suspect can react to concepts put by police since the suspect must be heard as well, and have the opportunity to explain concepts that may not be simple, but which may be critical in their defence (9.5.2, 9.5.3).

The point at which the quality of *two way* communication in the PRI is most clearly revealed is during the administration of the police caution, where the Yolngu suspect must *demonstrate* their understanding by repeating its meaning back to police in their own words. In the two PRIs investigated here—one without an interpreter (Ch 5) and one with prisoner's friend as 'interpreter' (Ch 6)—analysis of attempts by police to have the suspect explicate their understanding of their right to remain silent *and* of the potential consequences of speaking, revealed the extent of communication breakdown.

A parallel situation is found in respect of NESB courtroom witnesses when a court accepts that a witness should testify in English (even when an interpreter is available) on the basis that they can provide basic autobiographical information in answer to preliminary questions (9.2); or where the question of interpreting assistance does not even arise—perhaps because of a witness's confident manner, or because their occupation is suggestive of developed English

skills, or because they have themselves acted as interpreters (*R v G* witness W (6.3.3); *Elcho Coronial* witnesses AG (10.2) and JG (10.3)).

English language deficiencies of these witnesses may be masked by linguistic support from Anglo counsel. The preponderance of question forms under both examination-in-chief and cross-examination that confine a witness to giving restricted amounts of specific information (*yes/no* questions, disjunctive *either/or* forms, *wh-* and *yes-no/wh-* questions: 8.2.4) and which, in series, serve to guide the witness through their testimony, may permit the semblance of effective two-way communication. The reality is that the witness may not understand, or may only partially understand, the meaning of many questions and may not be aware of the communicative effect of their responses. Witnesses can in fact sometimes be seen to have meant the opposite of what they have been understood to have said (10.4.4), a clear indication of communication breakdown.

During confrontational cross-examination (9.1) miscommunication is further hidden by the overwhelming use of declarative *yes/no* questions (frequently with tags), where the witness can be explicitly directed to their replies (9.2). The suggestibility of witnesses questioned under these circumstances is enhanced by their proclivity to gratuitous concurrence so that the cross-examiner is afforded undue control in either reconstructing or destroying a witness's previous evidence. That the confrontational cross-examiner recognises their control is demonstrated by the vigour of their efforts to preclude interpreting assistance, even where miscommunication is patently manifest (9.4, 10.4.5). In fact, the judicious use of miscommunication can be seen to be of strategic value (9.4.3.2, 10.1).

The extent of miscommunication may be obvious at points where requests for particular information have to be approached indirectly or obliquely during examination-in-chief (in order to avoid leading the witness) revealing a witness's inability to deal with nuance or implied meanings—or where counsel needs to adopt a probing approach through the use of elaboration questions. In these circumstances miscomprehension and expressive limitations are well exposed (6.3.3).

The analysis of questioning that occurred without interpreting assistance has revealed a predominant pattern of miscommunication that extends through linguistic and cultural levels (Ch 10), and is often unrecognised (9.2, 9.4.1, 9.4.5, 10.4.2, 10.4.3, 10.4.5).

Strong influences of Yolngu Matha are noticeable in the 'interlanguage' variety of English (or 'learner's English': 2.8.2) that is manifest in both comprehension and speech. Contrasts between SAE and E-YM interlanguage were observed to contribute to miscommunication in respect of: pronunciation (10.1); temporal reference (10.4.2); questions with embedded

clauses (10.3.1); negative questions (10.4.4); locational prepositions (10.4.3); word meanings (5.3, 9.2, 9.4.5); and, pragmatics (10.2, 11.2.4).

Of particular relevance to the PRI is that the construction *don't have to* has the meaning *must not* in E-YM interlanguage (6.3.3): this may cause misunderstanding during the administration of the police caution when Yolngu suspects are told that they *don't have to answer* questions (7.1.3). The right to silence may also be confused by interference from Yolngu understandings of the meaning and role of silence and confession in their own conflict resolution contexts (7.1.3). Similarly, Yolngu conceptualisations of companionship may interfere with their understanding the intended role of the prisoner's friend (7.1.2).

Anglo/Yolngu communication on spatial matters (location, orientation, direction, distance, quantified measurement) is characteristically problematic. Yolngu may respond inconsistently and unreliably to questions demanding enumeration of distance in standard units (9.4.1). Western conventions for discussing orientation in space (compass terminology, maps) and specifying direction of movement are unfamiliar, leading to confused communication compounded by problems with English locational prepositions (10.4.6). At the same time, Anglo interviewers may be confounded when Yolngu refer (by gesture or word) to actual directions and geographical locations in relation to the place where the interview is being held (10.4.6).

Cultural interference in responding to hypothetical questioning leads to the Yolngu addressee bringing the issue back into a familiar context in order to answer (11.2.4). Cultural interference may affect both parties where Anglo/Yolngu conceptualisations are contrastive, such as in mind/body distinction in reference to sickness and health (10.4.5), and in perceptions about familial duty of care (10.2). A particular difficulty for Anglo interviewers stems from the complexity of the Yolngu kinship system which is fundamental to Yolngu social organisation, community structures, cultural values and world view (2.6). Without an appreciation of its basic structures, the values and laws it embodies, and its extent of influence, intercultural misunderstandings are inevitable (6.3.4), and may persist even with the assistance of an interpreter (11.2.2).

12.1.2 Partially interpreted interviews

Those Yolngu who exhibit sufficient English language proficiency to participate in ordinary conversation with Anglo-Australians, but whose English language skills and Anglo cultural understandings remain limited, demonstrate significant handicap in police and courtroom interviews. The handicap is exacerbated by the formality and formidability of these contexts, by the Q/A discourse structure common to police and courtroom questioning, and by their suggestibility and susceptibility to verbal manipulation.

With ready access to interpreting assistance (of a competent kind) this communicative handicap is drastically reduced. Yolngu whose English language proficiency falls in the range just described benefit from being able to call upon assistance as required in understanding questions or in expressing their responses, while still able to participate in English to an extent. Similarly, counsel may benefit by being able to pose more challenging and complex questions and may elicit more information than they would otherwise be able—and yet have opportunities to directly engage with the witness in English (9.4.6, 9.5, 11.2). Furthermore, a court is afforded greater assurance that testimony is not marred by miscommunication, and may also elicit or accept assistance from the interpreter to resolve difficulties in communication (11.2.4, 10.3.1). Equally, interpreting assistance may be unwelcome where it serves to weaken the force of confrontational cross-examination (9.4.2, 9.4.3).

A critical factor affecting the quality of Anglo/Yolngu communication during partially interpreted evidence is the role afforded to the interpreter, in respect of two points: the extent to which the interpreter is permitted to explicate and explain in order to adequately account for the range of meanings comprising the communicative intent of an utterance (3.2.1, 3.2.2.4, 8.1.3); and the opportunity to intervene while counsel and witness are speaking in English in order to alert the court of instances of hidden miscommunication. The importance of this latter function derives from the need to account for interlanguage: the situation commonly arises where a witness incorrectly interprets the meaning of a question through having done so according to the rules and properties of E-YM interlanguage—or where counsel incorrectly interprets the witness's meaning according to the grammatical rules and semantics of SAE—and neither realises their error (Ch 10). In addition to being bilingual in English and Yolngu Matha, the interpreter is familiar with the communicative properties of 'Yolngu English'. A significant illustration of this function for the interpreter in alerting the court to unrecognised miscommunication (in fact, communication breakdown) was given in section 9.4.5.

However, the utilisation of interpreting assistance is not necessarily sufficient to ensure efficacious intercultural communication. Even where the interpreter is afforded a broad role—in the nature of a communication facilitator (8.1.3)—there remain obstacles to effective two-way communication such as when one party's culturally-specific conceptual framework operates as a filter limiting comprehension of the other's meaning. This could be manifest, for example, where Yolngu evidence is viewed as irrational, appearing to emerge from a basis in ritual and superstition disconnected from reality (11.2.3). An interpreter may not be able to overcome constraints to intercultural understanding imposed by ethnocentricity.

A factor that bears greatly upon the capacity of Yolngu to participate effectively in an interview is its style: the Q/A interview style is not familiar to most Yolngu, who generally communicate information and explanation more effectively in narrative style. Communicative

empowerment afforded by the opportunity to testify in this culturally appropriate genre and with appropriate linguistic support was highlighted in *R v M* (9.5).

12.1.3 Fully interpreted communication

Two examples of fully interpreted communication were considered in this study: extracts from the testimony of the witness YB at the *Elcho Coronial*, and a section of the coroner's findings which were fully translated into Djambarrpuyngu for oral delivery to a Yolngu audience. (While analysis did not encompass their delivery, it did address the challenges to Anglo/Yolngu communication that the translators faced in attempting to render Anglo arguments sensible in Yolngu form—thus warranting consideration in this section.)

YB was a Yolngu elder with little English and with limited experience of Anglo-Australian society, culture and institutions. Courtroom questioning proceeded laboriously and with difficulty—not so much with language (he had an interpreter)—but arising from the extent to which Western cultural knowledge is presupposed in typical courtroom questions. Communication floundered when questions referred him to his witness statements as they presupposed his understanding of literacy, transcription and the relationship between prior conversation and present courtroom documents (11.1). For such witnesses translation of questions is often insufficient. Discussion between witness and interpreter may be required in order to identify and explain presupposed meanings that must be understood in order for a question to be meaningful—and therefore answerable.

The need for an interpreter in these circumstances to attend to meanings beyond the question itself renders the court interpreter vulnerable to criticism for overstepping the role of translator for each party's utterances. Yet the alternative of a narrow 'conduit' type role may render the interview unproductive. It becomes necessary for courts to permit flexibility in the nature and level of interpreting assistance so that it remains responsive to the communicative needs of different witnesses, and so to the needs of counsel and court (8.1.3).

The process of translating the *Elcho Coronial* findings into Djambarrpuyngu (11.3) exposed a number of obstacles to effective intercultural communication on topics of Anglo-Australian law. First, there is the predictable problem of legal jargon, the meaning of which cannot often be interculturally communicated without jurisprudential explanations. Second, there may be cultural interference where the sense of Western legal concepts may not hold when viewed from a Yolngu perspective. An example is the assertion that no unfavourable inference should be drawn (in terms of innocence or guilt) from exercise of the right to remain silent since, from a Yolngu perspective on disputes and their resolution, inferences are unavoidable. Third, the process of translating *legal reasoning* magnifies these difficulties, entailing detailed analysis and reconstruction of a text in order to accommodate characteristics of the target language and culture, and to address Western understandings which must be inserted for the

argument to remain sensible (11.3.3 . This extensive intervention carries the risk of usurping the role of the legal/judicial source from whom the communication emanated. The findings here illuminate the theoretical understanding of intertranslatability (3.2.2) by providing a clear case of translation being achievable only when translation is defined in the broadest sense (3.2.2.3).

Yolngu who require full interpretation because of very limited English also lack many Western cultural understandings that Anglo interlocutors may presume to be present, so that communication easily falters. Effective communication in these circumstances may require explication of specific cultural meanings that are embedded but not enunciated in either party's utterances.

12.2 The capacity for courts to receive and hear Yolngu evidence

The extensive miscommunication that characterises police and courtroom interviews of Yolngu where they are conducted without interpreting assistance severely limits the extent, coherence, reliability and value of their evidence. A fundamental consideration is that interviews are generally conducted in the unfamiliar and disorienting Q/A discourse structure (9.4.4) whereas Yolngu are able to provide more information, more coherently, in narrative form (9.5.1). Apart from this there are other significant factors mitigating against the capacity of courts to accommodate Yolngu evidence.

Failure to recognise the occurrence of miscommunication results in misinterpretation of witness testimony: a response taken to have addressed the proposition that has been put may have in fact addressed some other (10.4.2); or, the meaning of an E-YM interlanguage utterance may be incorrectly interpreted as though it was SAE (9.4.5). Confident responses by some Yolngu witnesses frequently belie their miscomprehension of grammatically complex questions and their failure to appreciate the pragmatic force of some questions (10.2). Communication at cross purposes occurs even with the use of straightforward grammar and everyday English words, such as when Yolngu fail to recognise polysemous senses of ordinary English words (9.4.1, 10.4.1).

Where unrecognised miscommunication persists during questioning then it is inevitable that testimony appears confused, incoherent or contradictory (10.4.2)—even when the witness may possess clear recollection and firm opinion. Equally, when it does become apparent that a witness has become confused, the failure to at least address any linguistic basis—by providing interpreting assistance—ensures that it persists, again with the result that the witness is not afforded a genuine opportunity to be heard (6.3.3).

A consequence of limited English language proficiency is a restricted expressive capacity exacerbated by linguistic dependency on verbal support from the Anglo interviewer whose influence (conscious or unconscious) may curtail or distort responses (5.4). A serious consequence of limited English proficiency is that it confers power to verbally manipulate a Yolngu interviewee through subtle miscommunication. With use of coercive leading questions (8.2) this power is magnified (8.2.3, 8.3.4, 9.2). The assumption that a witness is protected against suggestibility in leading questions by their partisanship and by knowing that they are being questioned by an adversary (10.5), simply cannot be relied upon to hold for Yolngu witnesses. The role of an interpreter in rendering Yolngu evidence more accessible to courts is thus clearly crucial. However, even with the benefit of interpreting assistance, with a competent interpreter assigned a broad role, limits to the efficacy of Anglo/Yolngu communication are imposed by any entrenched incongruity in Anglo and Yolngu world view affecting interlocutors in respect of the issue at hand (11.2.3, 11.4).

The habitual absence of interpreters from PRIs involving NESB Aboriginal suspects, or the use of a prisoner's friend or community police aide as an ineffectual and partisan quasi interpreter, frequently results in their inadmissibility as evidence because a suspect's linguistic handicap was manifestly operative (7.1). On the other hand, when grounds are identified for the admissibility of PRIs conducted in this way (6.5), the value of the interview is compromised since the suspect may have been constrained to brief or incoherent replies, unable to initiate or sustain their own accounts and explanations, and is prone to manipulation (5.4.1, 6.4.2).

The pronounced recent increase in the number of accredited interpreters (albeit at paraprofessional level) in Aboriginal languages in the Northern Territory, the establishment of a NT register of Aboriginal languages interpreters, and the successful trialing of an Aboriginal languages interpreter service (7.1.1, 7.2.1)—have established that continued use of incompetent quasi interpreters in PRIs in the NT should not be justified.

The capacity for courts to accommodate Yolngu evidence would be enhanced by their insistence that any interpreting assistance in PRIs be provided by registered interpreters and by vigilant regard for the communicative handicap operative upon NESB Yolngu suspects and witnesses notwithstanding a capacity to respond to simple questioning. Attention is required by the government to the absence of legal interpreting training opportunities in respect of Aboriginal languages and to the absence of any interpreting service to cover Yolngu and other Aboriginal languages of the northern region (7.2.1).

12.3 The contribution of (socio)linguistic expertise

The utilisation/applicability of (socio)linguistic expertise in criminal justice contexts involving Yolngu and other NESB Aboriginal people in the NT has been identified in a number of

topics in this study:

- the development of information tapes in NT Aboriginal languages providing explanation of the police caut on and other information relevant to the needs of NESB Aboriginal suspects in the co ntext of PRIs (7.2.2);
- sociolinguistic evidence give n at the *voir dire* in *R v G*, concerning communication between participants in the PRI and commenting on role conflicts arising from use of prisoner's friend as a quasi ir terpreter (6.3.5);
- submission of, and courtroom responses to, sociolinguistic analysis of Yolngu evidence given without interpreting assistance at the *Elcho Coronial* (0.1, 9.4.7);
- analysis of E-YM interlanguage ('Yolngu English') as a rule-governed language system (2.8.2, 2.8.3) applicable to identifying and analysing Anglo/Yolngu miscommunication in police and courtroom contexts (4.2.5, 5.3, 5.4, 6.3.3, Ch. 10);
- use of Australian Second La nguage Proficiency Ratings (ASLPR) as an appropriate framework for systematic assessment of English language proficiency in determining communicative handicap of NESB Aboriginal suspects/witnesses and determining need for interpreting assistar ce (5.5, 7.1.1).

The last two points warrant restatir g in that they present foundations widely used in the scholarly community (i.e. so that they might be considered as matters for expert evidence) for assessing the quality and/or features of Anglo/Yolngu communication that may be usefully applied in circumstances where these become issues in an aspect of a trial.

12.3.1 Applying the concept of E-YM interlanguage

If is accepted that in conversation with Anglo-Australians NESB Yolngu are using a language system that is quite distinct from English (at least in the earlier and intermediate stages of their English language development), and that the system is capable of linguistic analysis and description (2.8.2, 2.8.3, 4.2.5)—then it is reasonable to consider that a linguist with the appropriate knowledge might apply his/her insight in revealing meanings in Anglo/Yolngu communication that may not be acce ssible to those without this knowledge (10.1).

The linguist or interpreter who is familiar with the grammatical, semantic and pragmatic features of the E-YM interlanguage c ontinuum may be able to reliably identify what a Yolngu speaker is intending to communicate by an 'English' utterance, while the Anglo interlocutor may be hearing something quite diff erent (9.4.5, 10.4.4). Equally, what a Yolngu listener is likely to be understanding of an English utterance may be determinable as different to the Anglo speaker's apparent communic ative intent (10.3.1). It thus becomes possible to identify points in an interview where a suspect or witness has meant or has understood something quite different to that which is appar ent. Even where rules of evidence may mitigate against linguistic evidence from being given on such a matter (0.1), parties to a case may still benefit

by their counsel taking advice to enable more reliable assessment and analysis of witness statements, PRIs and witness testimony, where Yolngu have communicated without an interpreter.

12.3.2 ASLPR in assessing communicative handicap

In the NT a NESB witness may have the services of an interpreter only with the leave of the court (8.1.2). In the case of those who, while not fluent, obviously speak some English, the determination of any need for an interpreter requires an assessment of their level of English language proficiency; yet the judiciary do not generally have the expertise required and frequently overestimate (7.1.1, 8.1.2, 9.2). The required expertise is available from the discipline of applied linguistics, backed by an extensive literature on second language acquisition research (2.8.2). An established framework and methodology for the systematic assessment of oral (and written) skills in the English language for those from a non-English speaking background is available for the Australian context in the ASLPR (5.5).

Assessment of both skills and limitations can be performed by analysing audio-recordings or transcripts of conversation between the NESB individual and their Anglo interlocutor(s) (as has been done here: 5.5.1, 6.3.3). In the situation where the admissibility of a PRI is at issue, a court could be assisted in arriving at an informed assessment of the level of communicative handicap operative in respect of a Yolngu defendant. (The admissibility of expert linguistic evidence concerning the English language communicative skills of a NESB Aboriginal defendant has been established in the NT (7.1.1).)

12.4 Generalising to other NESB and indigenous groups and to other judicial contexts

Section 1.3 provided a review of research into Anglo/Aboriginal communication in criminal justice contexts and in respect of Aboriginal land claim hearings, revealing that Anglo/Aboriginal communication difficulties in these situations are widespread and broadly based. A range of characteristics pertaining to Anglo/Aboriginal communication in these contexts was identified in the work of Eades, Walsh, Koch and Goldflam—none of whom had based their research on data involving Yolngu. Yet it is now apparent that the patterns they identified have been broadly confirmed here. These patterns included:

- Eades (1991, 1992, 1995b): witness suggestibility and manipulability in courtroom interviews, and confusion with particular question types (e.g. those requiring numerical responses) deriving from Aboriginal sociolinguistic features;
- Koch (1985, 1991): use of interlanguage, frequent miscommunication, attempts by parties to accommodate the other's communicative features (e.g. section 10.4.4 above);
- Walsh (1994, 1995): degree of communication difficulty affected by background of witness—greatest difficulty with more traditionally-oriented, non-literate witnesses;

- Goldflam (1995): endemic m scommunication in PRIs and courts so that Aboriginals present poorly as witnesses; frequent failure to use interpreters in spite of need.

The fact that these patterns can also be discerned in Anglo/Yolngu communication does not of course mean that the detail of this comparatively extensive study can be necessarily applied in reverse to encompass interaction involving other Aboriginal people. Along with attributes that are found to be common across many Aboriginal groups, there is also the obvious linguistic, social and cultural heterogeneity (and this increases in consideration of Torres Strait Islanders) (1.3). And until more comprehensive studies involving other Australian indigenous groups in their interaction with Anglo officials in police and courtroom contexts are available, the *extent* to which Anglo/Indigenous communication in the criminal justice system can be characterised remains unclear. Nevertheless, more obvious implications in respect of other groups may be drawn.

One feature that has emerged from this study has broad applicability to NESB interviewees. This is their vulnerability to verbal manipulation that stems from dependency upon collaborative discourse (featuring heavily in the PRI in *R v M*: Ch 5) in their conversations with native speakers (5.3.1). Uninterpreted police and courtroom interviews of NESB suspects/witnesses are characterised by formidable linguistic power accruing to an Anglo interviewer from deft use of collaborative discourse. Such interviews therefore warrant suspicion. In the case of interpreted interviews the adverse consequences of using blatantly inadequate interpreting assistance that were visible in the PRI in *R v G* (6.4.2) apply regardless of the language group of the suspect (6.2, 7.1.1). The handicap to NESB Indigenous interviewees is, however, distinctive in degree due to general lack of interpreter services in their languages compared with a relative abundance in respect of languages exotic to Australia (7.2.1).

Divergence in Anglo and Yolngu cultural experience and world view was seen to severely test intercultural communication at several points in this study (10.4.5, 11.1, 11.2, 11.3) and this factor is of course operative in respect to other traditionally-oriented Indigenous people, particularly where their intercultural experience is limited. In these cases the availability of interpreters becomes even more critical (along with a broad interpreting role: 11.4).

Broad similarities in Aboriginal communicative style may be reflected in the prevalence of communicative features common in many groups (gratuitous concurrence being a more obvious example: 1.3) and, for those who speak traditional or traditionally-based languages, certain of the common features in their different interlanguage varieties may accrue from transference (2.8.2) of structural, semantic and sociolinguistic features that are prevalent in Aboriginal languages (notwithstanding that most Aboriginal languages are so different from

one another as not to be mutually intelligible) (1.3). Importantly, however, the operation of language transfer would also serve as the limit to any complete uniformity in the way members of different Aboriginal language groups use English at equivalent stages of development, and therefore prevent identical patterns of Anglo/Aboriginal communication and miscommunication from occurring in respect of members of different language groups. Thus, while the patterns of Anglo/Yolngu miscommunication that were revealed in Chapter 11 may be generally applicable in respect of Aboriginal people other than Yolngu, there would be inevitable difference in the detail.

The probability that the characteristics of Anglo/Yolngu communication identified in this study would apply to judicial or quasi-judicial proceedings apart from the criminal justice system is high. It is pertinent that the research of Elwell (1979), Christie (1985) and Stephen Harris (1984) cited in section 1.2 was based in the study of Anglo/Yolngu interaction in community and school contexts 15 to 20 years ago, and yet their descriptions and assessments of Anglo/Yolngu miscommunication and misunderstanding have been shown to be equally relevant in interviews examined here. Of course, as was noted at the beginning of this chapter, Anglo/Yolngu communication cannot be singularly characterised and each interaction or interview is subject to effects from specific contextual parameters. However, underlying this variability there are consistent interactional patterns that have been identified here, and that may inform understanding of intercultural interaction involving Yolngu, or indeed other NESB Aboriginal people, and Anglo-Australians.

12.5 Conclusion

This study began with the knowledge that Anglo/NESB-Aboriginal communication in the criminal justice system is, and is recognised to be, problematic. The identification and investigation of the 'problems' specifically in Anglo/Yolngu contexts have revealed that they are extensive and entrenched. Their causes extend beyond the obvious language/culture differences, and derive significantly from systemic features of police and courtroom interview procedures and questioning practices.

The challenge of achieving effective intercultural communication is not however insuperable. It is greatly facilitated by straightforward measures: the participation of a competent interpreter—where the role is expanded by the acknowledgment that some utterances cannot be translated and must be explained; the granting of opportunities for the interviewee to provide information in a culturally appropriate narrative style; and by excluding questioning that exploits suggestibility.

The imbalance against NESB Aboriginal people in the criminal justice system is grave and, equally, it is tolerated. Until interpreting services are established for speakers of Aboriginal languages (as they are for speakers of other languages); until there are opportunities for

training and accreditation of Aboriginal languages interpreters at a professional level (as there are for interpreters in other languages); and, until the gravity of the communicative handicap facing most traditionally-oriented NESB Aboriginal interviewees is fully acknowledged (through insistence on the use of recognised interpreters with a suitably expanded role)—then injustice is seen to be tolerable.

Appendices

Appendix 1:

The Anunga Rules

***R v Anunga* (1976) 11 ALR 412 at 414-415 (NT Sup. Ct)**

(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.

(5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources ... [Forster J continues with comments particular to this case].

(6) Because Aboriginal people are often nervous and ill at ease in the presence of white authority figures like policemen, it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.

(7) It is particularly important that Aboriginal and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.

(8) Should an Aboriginal seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue.

(9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

It may be thought by some that these guidelines are unduly paternalistic and therefore offensive to Aboriginal people. It may be thought by others that they are unduly favourable to Aboriginal people. The truth of the matter is that they are designed simply to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with the police. These guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements are excluded.

Appendix 2:

Front-translation version of Preamble to the Police Caution

PREAMBLE TO THE ADMINISTRATION OF THE CAUTION

To be administered to any person police propose to interview, either before or after arrest.

The police are holding you because there has been some trouble and they think you are connected with that trouble. The police want to find out about that trouble and they want to talk to you about that trouble.

The police can keep you with them while they talk to other people and while they see for themselves to find out about that trouble. Maybe this finding out will take a short time or a long time and they can keep you while they are doing this.

The police will also want to talk to you about that trouble, but first, the police must follow some rules. This story will explain these rules that the police must follow and will explain the different pathways you can choose to follow.

If you decide that you want to talk to the police but you do not speak good English, then the first rule says that the police must find a person who speaks your language well and English well to help you talk with the police.

Another rule says that the police must let you talk to your people or someone you think can help you so that you can tell them where you are and that you are with the police.

If you decide to talk with the police about the trouble then another rule says that the police must find out from you if want to choose a friend to sit with you and help you while the police are talking to you.

Another rule says that the police must find out from you if you want to tell them about that trouble or if you want to sit silently without talking.

Now I will explain about interpreters.

An interpreter is someone who will turn into English everything that you say in your language, and everything that the police say in English the interpreter will say to you in your language. This means that you can speak to the police in your own language. But the interpreter cannot help you to decide how to answer a question or tell you what to say to the police. The interpreter cannot talk about the trouble privately with you or with the police. The interpreter must stay in the middle and not jump to your side or to the side of the police.

If you decide to tell the police about the trouble then you should think and decide about what language you will use to talk to them. You must be careful to think about how well you speak and understand English. Sometimes police use hard words and they want to look deeply into what you are thinking and feeling when that trouble happened.

If you think that you have trouble understanding and speaking English well, you should ask for an interpreter. If you can't explain this to the police in English then you only need to say the word "interpreter" and the police will find someone to help with language.

You can ask for an interpreter now or later or at any time that you find it hard to communicate with the police. Soon the tape will stop so that you can ask for an interpreter now, if you want to. After you have told the police whether you want an interpreter or not, the police will play you more from this tape so that you can listen to more about the rules for the police and about the different ways you can choose to go. If you ask for an interpreter then the police will wait until the interpreter comes and then they will ask you if you want to tell them about the trouble.

If your English is strong then, when the tape stops, tell the police that you don't need an interpreter. If your English is not good and you think you need an interpreter then say "Interpreter". The tape will stop here. Tell the police now if you want an interpreter or not.

(A RECORDED SOUND WILL ALERT THE POLICE TO SWITCH OFF THE TAPE HERE).

This part is about telling other people where you are sitting now.

The police must let you talk to your people or someone you think can help you so that you can tell them where you are and that you are with the police.

You must decide for yourself if you want to tell other people that you are with the police. Maybe you will decide that you don't want other people to know that you are with the police. The choice is for you.

Later, after the tape has finished, the police will ask you about this and, if you want the police to tell someone you are with them, then you must tell the police that person's name and where they can find that person.

This part is about choosing a friend to sit with you and help you while the police are talking to you.

The law says that you can have a friend come and sit with you and talk with you to help you decide whether to tell the police about the trouble or to sit silently. Later when the tape has finished, the police will ask you if you want a friend to come. This friend should be a person

that you trust and who can help you to feel strong while you are with the police. Then, if you decide to tell the police, that friend will sit with you. If you want to talk to that friend privately then you can ask the police and they will let you.

If you ask the police to bring your friend to sit with you and help you decide about telling the police about that trouble, then the police will wait until your friend comes, and you and your friend have finished discussing. Then the police will ask you if you want to tell them about that trouble or not.

This part is about telling the police about the trouble or staying silent.

Later, after the tape has finished, the police will ask you if you want to tell them about that trouble or if you want to sit silently without talking.

You must decide for yourself if you want to tell the police about that trouble or not. The police want to ask you questions about that trouble. The law says you can tell the police about that trouble if you want to or, if you don't want to talk about the trouble the law says you can sit silently and not talk to the police This is a decision that you make for yourself. If you decide to sit silently the law says that the police cannot force you to talk and the Magistrate will not make trouble for you because you did not talk to the police. If you decide that you want to tell the police about that trouble they will record your words on a tape. The police will take this tape to the court so that everybody can know the words that you said to the police. The Magistrate will listen to your words and these words will help the Magistrate to decide what will happen to you.

This part is about telling you again about interpreters

Soon the tape will finish. If you are waiting for an interpreter to come then, when the tape stops, you should sit silently and not say anything about the trouble until the interpreter arrives.

Maybe you didn't ask for an interpreter when the tape stopped before, but you want to ask for an interpreter now. You can ask for an interpreter to come by saying the word "Interpreter" when the tape finishes.

The tape will stop soon. Then the police will ask you several things.

First they will ask you about whether you want an interpreter to help you speak to the police in your own language.

They will also ask you if you want to choose a friend to sit with you and help you while the police are talking to you.

They will also ask you whether you want to talk to your people or to someone you think can help you so that you can tell them where you are and that you are with the police.

The last thing they will ask you is whether you want to tell them about that trouble or if you want to sit silently without talking.

The tape will stop now.

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