Submission to the Criminal Procedure Review – Queensland Magistrates Courts 2022

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Summary of Submission

The submission proposes that dedicated Magistrates Courts be established to allow every aspect of the court process to be conducted by staff who are Indigenous to reduce the likelihood of linguistic and cultural miscommunication resulting from interactions between Aboriginal English and Australian Standard English, and, to improve access to justice for Aboriginal and Torres Strait Islander Queenslanders.

Background

Aboriginal English, a dialect of Australian Standard English, is the primary language spoken by Aboriginal Queenslanders. It is distinct from Australian Standard English (ASE) and misunderstandings are common. These misunderstandings can lead to distortions of evidence and outcomes in the criminal justice process; misrepresentation of witnesses and lack of awareness of proceedings for defendants. This issue is exacerbated by two factors: the lack of awareness of the existence of the two distinct languages, even by speakers of Aboriginal English; and the inability to provide interpreters for a dialect rather than a different language.

At the bare minimum, justice demands that the participants in the court process be proficient in Aboriginal English to prevent miscommunication between the court staff, legal profession, defendants, victims and witnesses. As one Cairns magistrate noted: 'If access to English is an issue then there is no access to justice' (Lauchs, 2010). Attempts over the last two decades to increase education of Aboriginal English have shown that it is not feasible to implement a system to inform the courts of potential or actual misunderstandings, or to take retrospective action. The only solution is communication comprehension during the justice process. It is acknowledged that the communication problems faced by courts are also faced by jurors, and this submission does not propose a solution for that scenario. It does propose that the most frequent point of contact for Indigenous Queenslanders and the courts, Magistrates Courts, be staffed and organised to allow all Queensland to have equal access to justice.

The communication breakdowns that can occur between the court and Indigenous Queenslanders become an even greater issue given the disproportionate appearance of Indigenous people in Queensland criminal cases. In 2019–20, Queensland police commenced criminal proceedings against 78,844 Aboriginal and Torres Strait Islander offenders or 24.2% of all offenders. This was a 7.1% increase from the previous year. Indigenous offenders as a share of all offenders have increased from 21.5% in 2008–09 (Queensland Government Statistician's Office, 2021). Indigenous offenders under 20 years were almost double that of non-Indigenous offenders, with 37.8% for Indigenous males and 33.6% for Indigenous

females compared with 18.2% and 19.0% for non–Indigenous offenders (Queensland Government Statistician's Office, 2021).[1] There are no records of how often Aboriginal and/or Torres Strait Islanders people give evidence in court (CJC, 1996, p. 14). However, it is highly likely there is a significant number of potential Indigenous witnesses, given there also exists a disproportionate representation of Indigenous people as victims being 13.2% in 2021-21 where Indigenous status was stated (Queensland Government Statistician's Office, 2021, para.7.2.1). It is important to note here that this discussion is not premised on a presumption that speakers of Indigenous languages and Aboriginal English are inherently likely to appear as accused in a court case, but the recognition of the systemic overrepresentation just discussed and that many will also be involved in court as witnesses or parties to civil matters.

The Queensland Government response to this overrepresentation focuses on the wrong number when seeking proportionality. According to the Magistrates Courts of Queensland *Stretch Reconciliation Action Plan 2022-2025* (the RAP) (Queensland Courts, 2022), Aboriginal and/or Torres Strait Islanders made up 19.25% of people presenting on charges to the Magistrates Courts. In response, the department has sought to match Indigenous representation by meeting the proportion of the Queensland population (4.6%) rather than the proportion of people presenting in the courts. Consequently, there are four magistrates and only 36 courts staff, from the entire organisation and not those working in courtrooms, who identify as Aboriginal or Torres Strait Islanders. The situation in the legal profession is even worse. There are no available numbers of the proportion of the Queensland Legal Profession who identify as Aboriginal or Torres Strait Islander, but the national figure is less than 1% (Doraisamy, 2021). There are no public figures for police prosecution staff.

There are already examples in Queensland of the justice system adapting to accommodate Indigenous culture and demography, such as the Murri Courts (Magistrates Court of Queensland, 2009) which provide culturally appropriate sentencing hearings and the Remote Justice of the Peace (Magistrates Courts) Program that allows Indigenous JPs in remote communities to hear minor matters (*Criminal Code 1889 (Qld)*, s.552C(5)). It is recommended that the excellent work conducted in this court be used as the framework to expand to courtrooms in which all legal and court participants are fluent in Aboriginal English.

The need to address these issues is compounded by the other issues relating to access to justice faced by Indigenous Queenslanders. People from Indigenous communities face considerable difficulty in court, most significantly from their distrust and unfamiliarity with the justice system, as well as the fact that Australian Standard English is not their first language (CJC, 1996, p. 6; JAG, 2000, p. 7). Indigenous people can suffer the additional burdens of being intimidated by the court process, being unfamiliar with the questioning style and language and apparently contradictory styles of answering questions, avoiding eye

[1] In 2020–21, Queensland police proceeded against 72,215 Aboriginal and Torres Strait Islander offenders, a decrease of 8.4% from the 78,844 offenders recorded in the previous year. 2019-20 statistics are referred in this instance due to impacts of COVID-19 pandemic (Queensland Government Statistician's Office, 2021)

contact and the lack of mathematical terms to describe information. As will be discussed below, these are cultural differences between mainstream Queensland society and Indigenous communities. The solution proposed by this paper will have the added benefit to addressing these concerns as well as communication issues.

These issues are often discussed in a manner that implies an obligation on Indigenous Queenslanders to take the responsibility for resolving the problems; the "why don't they just learn English?" approach. This approach does not acknowledge that these are Australian First Nations languages. Further, given the presumption of innocence and the guarantees of due process provided by the Queensland justice system, it would be better to describe them as issues for the system in its inability to meet its obligations to all Queenslanders.

Language Support in Courts

In Queensland, court is conducted in ASE, which is not spoken by, or is not the first language of, many accused and witnesses. Only 81% of Queenslanders speak "English" as their primary language at home. While it is logical that this be retained as the primary language of the justice system, accommodations must be made to ensure the other nearly 20% of the population have sufficient understanding of their role in a justice process to ensure they have access to justice (ABS, 2017). Standard 3 of the Recommended Standards for Courts and Tribunals states: "Courts and tribunals must accommodate the language needs of parties and witnesses with limited English proficiency in accordance with the requirements of procedural fairness." (JCCD, 2022b) In practice, this means that a witness or accused be able to participate in their first language.

The introduction of the *Human Rights Act 2019* now provides that Aboriginal and Torres Strait Islander peoples "must not be denied the right, with other members of their community… to use their language" (*Human Rights Act 2019*, s.28(2)(b)). Two international instruments are the basis for this provision. One being the *International Covenant on Civil and Political Rights* article 27, ratified by Australia in 1980. The second being articles 8, 25, 29 and 31 of the *United Nations Declaration on the Rights of Indigenous Peoples*. Additionally, section 31 of the *Human Rights Act 2019* provides persons charged with criminal offences to a right to a fair hearing. The rights and procedures in practice are laid out in the Queensland Language Services Policy 2016.

The situation is most important for Indigenous Queenslanders who are overrepresented in the justice system both as offenders and victims. By 2001, half of the 500 traditional languages and dialects in Australia that existed in 1788 were extinct, and the majority of the remainder 'under threat' because they were only spoken by a small number of elderly people (McConvell & Thieberger, 2001, p. 17). According to the Census, by 2016 only 9.8% of adult Indigenous Australians 'spoke an Aboriginal or Torres Strait Islander language as their main language at home'. In fact, 84% of Indigenous Australians – mainly those living in non-remote areas – only spoke 'English' at home (ABS, 2017). In the most recent Census, 167 Aboriginal and Torres Strait Islander languages were used at home by 76,978 Aboriginal and Torres Strait Islander peoples. In the Queensland context the second most widely reported language group used was Torres Strait Island Languages (12.0 per cent) (ABS, 2022).

But this dialect of English was Aboriginal English and not ASE. As we will see, there are significant differences between these two versions of English and the lack of awareness of these differences has been shown to result in injustice.

Thus, there are two priorities for the Queensland courts: provide interpreters for the traditional languages still spoken in the state and ensure that speakers of Aboriginal English are not disadvantaged. Only one of these can be met.

Interpreters

The most effective solution to language problems is to provide an interpreter. The United Nations recognised the need for an accused to understand court proceedings and be understood by the court under article 14 of the *International Covenant on Civil and Political Rights* (ICCPR); this was also recommended by the Royal Commission into Aboriginal Deaths in Custody (rec. 99) (1990). Further, under article 26 of the ICCPR, discrimination on the basis of language is prohibited. These rights are now contained in Queensland *Human Rights Act 2019*.

There is no legal impediment in Queensland to accessing an interpreter in court. The *Criminal Code Act 1899* (Qld) provides that a case cannot proceed for 'want of understanding of the accused person' (s.613) as they would not be able to follow proceedings or instruct their counsel. Section 613 includes the inability to speak English (*Ngatayi v R* (1980) 147 CLR 1), although the case notes that the situation can be rectified by the provision of an interpreter. In a 2010 review of judges, magistrates and prosecutors, Lauchs (2010) found it was rare that this section was raised in cases involving Indigenous accused, but most agreed that it should be used more often. The common law also recognises that a non-English speaking accused needs an interpreter (*R v Johnson* (1987) 25 A Crim R 433). But the rights of the accused are only part of the issue.

There is no right to an interpreter for a witness in criminal or civil cases in Queensland. Ideally, the accused and the jury should be able to understand the evidence given by a witness, and a witness, often an alleged victim of crime, should have the confidence that their evidence will be understood. This requires that they, in the same manner as the accused, can communicate in their first language. But the final decision to allow an interpreter for a witness still rests with the court (*R v Johnson*). Queensland courts will pay for interpreters for all accused in criminal matters, but interpreters for witnesses and for parties in civil matters are paid for by the parties (Queensland Courts, 2019). In practice, this is met by the Government as prosecutor in criminal cases. There have been recent developments where Queensland Courts Service will arrange and pay for interpreters to assist the parties in domestic and family violence proceedings (Magistrates Courts, Practice Direction No 6 of 2017) however it is not clear where Indigenous languages, if at all, are contemplated in this policy.

Regardless of the rules and guarantees, there are very few interpreters in Queensland for Indigenous languages and no public figures on how many there are or how often they are

employed in the justice system. The Recommended National Standards for provision of interpreters (JCCD 2022) recognise that not all languages can be accommodated with the ideal levels of interpreting services. They provide a tiered system of decreasing standards to accept that Australia does not have the expertise to provide ideal services for all languages. The highest standards apply to Tier A in which there are only 11 languages including Auslan – the Australian sign language. Even at this standard there are limited resources with the number of certified interpreters nationwide ranging from 2186 for Mandarin down to only 62 for Auslan. Some Indigenous languages are in Tier C and most in Tier D. In effect this means that certified interpreter services are rarely available, and the court will rely on a person carrying out the role of interpreter under Model Rule 4.2, discussed below.

There will probably never be enough interpreters for the volume of cases proceeding through Queensland courts. Many languages have only a few hundred speakers. According to Korff (2022), the following Queensland languages are still spoken at home (with the number of speakers included):

Warrego Region Language	
Bidjara/Pitjara	12
Cape York/Far North Queensland Languages	
Djabugay	28
Girramay	28
Guugu Yimidhirr	783
Kayardild	25
Kok-kaper	101
Kriol	4213
Kuku Yalanji	360
Kuuk Thaayaorre	24
Kuuku Ya'u	13
Lamalama	20
Lardil	50
Wik Mungkan	1050
Yidiny	140
Torres Strait Languages	
Kala Lagaw Ya	1216
Kalaw Kawaw Ya	1216
Meriam Mir	212
Yumplatok	6042

In addition, Biri, Butchulla, Djiru, Dulgubarra Mamu, Dyirribarra Mamu, Ganggalida, Gubbi Gubbi, Gudjal, Gugu Badhun, Gugu Wakura, Gulngay, Gunggari, Gureng, Kaanju, Karawali, Mandandanji, Mbabaram, Muruwari, Ngawun, Nyawaygi, Tagalaka, Taribelang, Thaynakwith, Tjungundji, Waka Waka, Waluwarra, Wangkumara, Wargamay, Yugambeh, and Yuwaalaraay all have less than ten speakers.

Professional interpreter recognition is only given to a person who is equally fluent in both ASE and the other language. Those still fluent in the Indigenous languages are so, in part, because these languages are used in remote communities where ASE is not common. Only a very small percentage of these speakers, probably none in languages with less than 1000 speakers, will have sufficient ASE skills to meet the required standard, and then, will have better career options than becoming an interpreter in the courts. There is the further issue that it is highly likely that these persons speak Aboriginal English rather than ASE. This issue has not been raised on any of the Indigenous Interpreter training material in National Accreditation Authority for Translators and Interpreters (NAATI) or TAFE courses viewed by the authors.

It may be possible for first language ASE speakers to learn the Indigenous languages in the same manner as they would be become an interpreter in a foreign language. However, this is not feasible as the necessary educational resources covering the Indigenous languages are not available. Nor is it likely that they will be available in the future. The language recognition process requires linguistic experts, the overwhelming majority of who are not native speakers of Indigenous languages, to analyse and judge the proficiency of a language spoken by a few hundred people. This would seem an act of extreme hubris. It is highly unlikely that the speakers of languages with less than 500 speakers will ever be adequately supported by interpreters in the courts.

We can, therefore, conclude that provision of interpreters will never be available in sufficient numbers to meet the needs of Indigenous participants in Queensland courts. The few qualified interpreters are also in demand for other less stressful work in health and education, and cannot be presumed to be available for work in the courts. The JCCD Model Rule 4.2 allows the court to engage a person as an interpreter because of their "specialised knowledge based on their training, study or experience" which would allow them to translate to and from English and the other language (JCCD, 2022a). This is inadequate but the best available solution and raises potential for appeals based on disagreements over the veracity of interpretation. However, as we will submit below, the communication issues and dangers associated with this arrangement could be mitigated by dedicated Indigenous courts.

New Kreole Languages

The previous discussion is based on official records of languages spoken by Indigenous Queenslanders, but this data is unreliable. Ultimately, we do not know for certain what languages are spoken in Queensland nor the number of people who speak them. Current data on languages spoken in Queensland are collected via the Census which is heavily reliant on the literacy of those surveyed. No records have been located of any thorough survey of language use in Queensland. The courts cannot plan for language services when they do not know what languages to plan for or even know if all the languages that are spoken have been recognised. Further, there is no publicly discussed mechanism for expert language recognition when a person enters the justice system beyond the Telephone Interpreter

Service. This service is no better informed of Indigenous languages and is reliant on the interpreting skills of its staff.

To add further complexity, young people in remote communities may not be speaking either traditional languages or Aboriginal English. Lauchs (2010) found that prosecutors and magistrates had noticed a new 'bastardised' Creole amongst adolescents in remote communities. Dr Robert Pensalfini (2010) of University of Queensland has suggested that this would be linked to the existing Creoles such as Top End Creole or Roper River Creole – the fastest growing Indigenous language with over 15,000 speakers in the Northern Territory and the Kimberly region of Western Australia. If it is such an extension, then Dr Pensalfini has suggested developing an interpreter program in the same manner as Torres Strait Islander Kreol. He suggested that there needs to be linguistic investigations in the area to identify whether there is a new language issue and the nature of the language spoken.

Lauchs (2010) also heard from respondents that children in remote communities mix languages in their normal speech, for example, a child victim of sexual assault mixing Torres Strait Creole, her traditional language and English into a pidgin mix often used together in the same sentence. This is impossible to interpret. The inability to use the witness statement or interview tapes means children then must give evidence in court creating all the psychological stresses resulting from this situation (Peterson et al., 2020; Saywitz & Nathanson, 1993). It also adds additional costs as every potential child witness must be interviewed by a psychologist to assess their ability to give evidence. However, even the psychologist would need an interpreter in the best circumstances and would be unable to obtain assistance to talk to a child speaking a mixed language or a new Creole. No solution can be developed for these problems until rigorous study has been conducted into the languages spoken by young residents of remote communities.

<u>Interpreters and Aboriginal English</u>

The situation is graver in the case of Aboriginal English. Aboriginal English is not a different language to English but a different dialect thus interpreters cannot be used to address communication breakdowns.

Aboriginal English is the first language of most Indigenous Queenslanders. It is a dialect that uses English words combined with the grammar of traditional languages and can be almost indistinguishable from ASE to an uninformed listener. In fact, speakers of Aboriginal English are rarely aware that they are not speaking ASE (Eades, 1988, p. 98). Aboriginal English is not homogenous across the state and can vary in distinctness from very close to ASE to a version similar to the *Kriol* spoken in the Northern Territory (Cooke, 2002, p. 3). It is also spoken across the entire Indigenous community and not restricted to remote locations. A study of children in Newcastle found that all the Aboriginal children in the study used Aboriginal English to some degree, although this varied across the cohort (Webb & Williams, 2021). The authors found that this demonstrated the "strength of community identity and group cohesion" (Webb & Williams, 2021, p. 44) within the Indigenous community regardless of their residential location. Thus, Aboriginal English is part of the daily language of metropolitan Indigenous Australians.

Interpreters cannot be provided for Aboriginal English for several reasons. First, Aboriginal English sounds like ASE, thus a jury listening would not understand why an interpreter said something different to what they heard the witness say. Second, the differences in the dialect relate to meaning rather than interpreting words, thus the interpreter would be giving opinions of what the witness intended by their statement rather than acting as a conduit of the words spoken (JAG, 2000, p. 3). While awareness of the issue has grown, very few participants in the justice system are cognisant of all the issues involved or are able to recognise a speaker of Aboriginal English without some inquiry. There has been no legal test as to whether Aboriginal English is sufficient to trigger a 'want of understanding' claim under s.613 of the Criminal Code. But there has been extensive study of the potential for injustice resulting from miscommunication. The linguistic differences can lead to misinterpretations of the witness's evidence by the court (Eades, 2006), and a skilled barrister could use their knowledge of Aboriginal English to create a false impression that a person is proficient in Australian Standard English (Cooke, 2009).

Further, Aboriginal English is not spoken words in isolation. The language exists as a communication tool parallel to non-verbal communication (CJC, 1996). The communication issues are exaggerated by unfamiliarity with the courts. Indigenous people in remote communities are less familiar with court processes than the members of mainstream society. Linguists have noted that one response to the intimidation of appearing in court can be for the Indigenous person to speak very softly (Edwards, 2004). There was also evidence that unfamiliarity with the court can paralyse Indigenous witnesses even before communication issues arise. Magistrates, barristers and registry staff described some Indigenous witnesses as looking 'absolutely bamboozled' by what was going on around them and that it was difficult to get them to participate in the proceedings, say more than 'I don't remember' or even speak. Magistrates noted that rape or domestic violence witnesses will often just sit in the stand and say nothing at all (Lauchs, 2010). These concerns primarily apply to witnesses. Conversely, the accused must be able to understand the proceedings but rarely interacts with it personally. The danger is that the silence of the accused will go unnoticed leaving the person unaware of the nature of the proceedings, and, thus, the court in breach of that person's rights to have a full understanding.

The misunderstanding and abuse of Aboriginal English occurs in interactions with witnesses giving evidence. The CJC listed a number of key issues for Aboriginal witnesses including:

- gratuitous concurrence/suggestibility
- complex questions
- misinterpretation of silence
- avoidance of eye contact
- methods of giving specific information
- how kinship affects witnesses
- reluctance to speak on some matters. (CJC 1996, 19) [2]

[2] It should be noted that none of these characteristics are unique to Indigenous Queenslanders and can even occur for ASE speakers who are intimidated by the court.

The three most recognised issues were gratuitous concurrence, silence and avoidance of eye contact. Gratuitous concurrence, or *suggestibility,* occurs when a person agrees with the questioner regardless of whether the questioner's statement was true or false. This can occur in an Indigenous context either out of respect for the questioner, creating a positive atmosphere by being agreeable, avoiding confrontation, or because the listener was confused by the question (Eades, 1992). This can lead to unintended confessions in police interviews where a person is asked as series of questions about guilt to which they reply uniformly in the affirmative. Unfortunately, gratuitous concurrence can also make it easy for a cross-examining counsel to discredit a witness by getting them to agree with a statement that contradicts the rest of their testimony. This is done by asking leading questions that require a yes/no response. The existence of gratuitous concurrence makes it highly likely that the reply will be yes (Eades, 2008). Lauchs' (2010) research found gratuitous concurrence was the most common communication issue both in and out of the court.

Silence is often misinterpreted as lack of cooperation, when it can indicate that the person is considering the answer, disapproval with the question, discomfort with the surroundings, a cultural inability to discuss a topic, or misunderstanding of the question (Eades, 1992). Silence is easily misused by a cross-examining counsel as a means of making a witness appear untrustworthy. Similarly, avoiding eye contact is a form of respect in Indigenous culture which is mistaken by Westerners as a sign of sullenness, dishonesty, and guilt. An Aboriginal witness who avoids eye contact is an easy target for a savvy defence counsel (Eades, 2008). There are other non-verbal cues (JAG, 2000) but it takes a well trained eye to identify and understand these signals and they are difficult to incorporate into the trial record. As a magistrate said, he could not write in a judgement that "I accepted his testimony because he raised his eyebrow in a particular way" (Lauchs, 2010).

Further, communication styles such as "yarning" (Louro & Collard, 2021) – an unstructured form of explanation – do not fit well with the court room examination process which requires direct responses to questions. These again can lead to characterisations of the witness being untrustworthy.

Accommodating Aboriginal English in Court

Given that it is extremely rare for a defendant to give evidence, it is almost always the case that allegations of misuse of language involve cross-examination of a witness. It is most commonly used by defence counsel to discredit witnesses (Eades 2008). However, Lauchs (Lauchs, 2010) found the consensus of opinion by judges, magistrates and prosecutors was that defence counsel should act this way to best serve the interests of their client. It was up to the prosecution and the judge or magistrate to take action to clarify issues for example through the use of re-examination.

However, normal interventions such as raising an objection was not as useful. Lawyers reported that they try to limit their objections to their opponent's line of questioning lest they lose the confidence of both the bench and the jury. So, they limit their objections to very clear examples of abuse and missed more subtle instances of misunderstanding. Even

so, some judges blamed barristers for not intervening often enough to protect their witnesses (Lauchs, 2010).

The Queensland *Evidence Act 1977*, s.21, empowers a court to disallow an 'improper question', that is one that was considered 'misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive' given the character of the witness, including their cultural background. As of 2003, if it is a child witness s.21AH(4) requires that the magistrate or justice must disallow the question. There has been no research on how often, if at all, this intervention is used in relation to Aboriginal English.

Judges have the added problem of being able to unfairly influence a jury. They face two problems. Firstly, a judge cannot raise a matter themselves; if a party does not introduce the concept of language problems to the jury then the judge cannot direct the jury in relation to the matter. Secondly, a judge's direction may unfairly skew the jury members' interpretation of evidence. For example, pointing out that a witness's statements could have a different meaning, not only makes a judgement about the veracity of a witness's statement, but could lead to a jury questioning the whole testimony of the witness.

This issue is enlarged by the rarity of Indigenous jury members – a further issues briefly discussed below. No research has been conducted on this topic, but it is unlikely that there has ever been a jury empanelled in Queensland made up entirely of Aboriginal English speakers. The confusion experienced in the courtroom would be replicated in the jury deliberation if one of more members could see miscommunication and were trying to explain that to the other members.

The Queensland *Supreme and District Court Benchbook* (2005, 21.1) already provides the following jury 'directions before summing up' for 'Translation and Interpretation'. The Northern Territory Supreme Court Justice, Dean Mildren, was the first to put forward a standard jury direction covering issues relating to Aboriginal witnesses (Mildren, 1997) and a version of this direction was included in the *Aboriginal Benchbook for Western Australian Courts* (2008). The CJC reviewed the Mildren directions and put forward two suggested jury directions (Criminal Justice Commission, 1996), one for Queensland Aboriginal witnesses (Mildren accommodated Northern Territory Indigenous culture) and one for Torres Strait Islander witnesses. Neither was adopted in Queensland. The West Australian Court of Criminal Appeal effectively quashed the use of the Mildren direction in *Stack v the State of Western Australia* ((2004) 29 WAR 526). Murray J said that the direction should not have been made "without any substratum of fact properly proved before the jury in the ordinary way" ((2004) 29 WAR 526 at [19]); the matters should have been proved via expert testimony. In making the direction without expert testimony the trial judge was introducing concepts to the jury which would place them in a position of making amateur judgements as to the occurrence of breakdowns in communication and the true intent of the witness ((2004) 29 WAR 526 at [19]). All judges and magistrates contacted by Lauchs (2010) agreed that a direction would not work and that expert testimony was needed before a jury could receive instruction on a matter of Aboriginal English.

Courts will accept expert opinion on matters outside the knowledge, or 'normal range of experience' of the judge and jury (*R v. Watson* [1987] 1 Qd R 440); and Aboriginal English falls within this category. An expert would be required to have verifiable academic qualifications and testable expertise (*Clarke v. Ryan* (1960) 103 CLR 486) and not simply a person who is only a natural speaker of the language. There are only about half a dozen people in Australia who could fill this position. Given the over 70,000 potential cases in Queensland alone, they are too few to meet the potential workload and the cost of paying for experts in thousands of cases each year would be prohibitive. The consensus of academic opinion is that cultural interpreting may be more appropriate for non-adversarial and nurturing situations like interpreting in the health environment (Hsieh, 2006; Laster & Taylor, 1994, pp. 111-128). Judges said they would never allow a facilitator or cultural interpreter to be employed by the court, or to give evidence other than as an expert witness (Lauchs, 2010).[3]

It is possible to have Indigenous witnesses treated as 'special witnesses' under the *Evidence Act 1877*, s.21A. This would give the court more leeway to intervene. However, not all Aboriginal witnesses could qualify as special witnesses and it would be very 'paternalistic' to try and use this method to resolve the communication breakdowns.

Cooke (2002) proposed introducing a facilitator to the court who would act as a 'cultural broker' to brief witnesses on the nature of the court and act on behalf of the court to identify communication breakdowns between Australian Standard English and Aboriginal English (Cooke, 2002; New South Wales Law Reform Commission, 2000, para.7.33). This assumption challenges the notion of 'referential transparency' (also referred to as verbatim theory), which is the view that expressions in one language can be readily converted into propositions and translated verbatim regardless of the nature of the two languages or the intercession of the interpreter (Haviland, 2003, pp. 766-767). In 2000, the Queensland Department of Justice and Attorney-General original goal tried to introduce an alternative method with facilitators working as part of the defence and prosecution teams. These non-experts would advise the barristers in their team when a communication breakdown had occurred and then suggest a solution using the Handbook. These facilitators would be acting as a cultural interpreter as they would not have attempted 'to discern what a witness means or otherwise give evidence to the court' (JAG, 2000, p. 4). A free training and accreditation course was developed by the Department of Justice and Attorney-General and TAFE Queensland to build a pool of facilitators from speakers of Aboriginal English. Unfortunately, no one enrolled in the course.

The human elements of the courtroom such as perceptions of jurors, combined with the real chance of triggering an appeal means that better mechanisms are needed. Jury directions are not available without evidence from an expert witness. The latter is very expensive and any solutions that rely on additional funding are unreliable. We have also seen that it is exceedingly difficult for police to take effective witness statements when they are equally ill-

[3] The Queensland Intermediary Scheme designed to improve how evidence is taken from people with comprehension and communication difficulties may offer some relief but it is not designed with Aboriginal English in mind.

equipped with interpreter support and face potentially new languages. Thus, it is unavoidable that Indigenous people who speak Aboriginal English will be witnesses in trials but the court process cannot accommodate the communication issues and these difficulties are multiplied in cases with a jury, due to the lack of the jurors understanding of Aboriginal English and the absence of a reasonable method of resolving this misunderstanding. Any solution must be based on evidence before the court:

- The information must be introduced by one of the parties during the trial;
- Disputes over the meaning of a statement must be avoided as they would rely on expert evidence;
- The solution cannot rely on a direction to the jury, and
- Excessive interruptions of cross-examination by either the bench or the prosecution will create a counterproductive perception.

This leaves the re-examination of a witness as the best place for rectification of the communication breakdown. If a point is clarified then the clarification is introduced into evidence, sufficient clarification should avoid a dispute over meaning, it will not rely on a jury direction and does not involve an objection during cross-examination. As these solutions relate to the actions within a trial the solution must come from the participants: the judges, magistrates and lawyers. Any solutions produced from this exercise will then produce a circular problem; once developed how do we train new judges, magistrates and lawyers?

Many courts have developed education packages to promote similar material and other issues of cultural awareness that relate to communicating with speakers of Aboriginal English. The Supreme Court of Western Australia's *Equity Before the Law Benchbook* (2009, para.9.4.1) recognises gratuitous concurrence but not Aboriginal English. However, the court's *Aboriginal Benchbook for Western Australian Courts* has an extensive section on 'Communicating Effectively with Aboriginal English Speakers' (Supreme Court of Western Australia, 2008, para. 5.11). Queensland has the *Supreme and District Court Benchbook* (Supreme Court of Queensland, 2010) and the *Equal Treatment Benchbook* (Supreme Court of Queensland, 2005). Other such publications include the *Equity Before the Law Benchbook* from New South Wales (Judicial Commission of New South Wales, 2006). Awareness has increased but communication issues remain. No studies have been undertaken of the prevalence of Indigenous language use – Aboriginal English or traditional languages – in Queensland courts, or in other Australian jurisdictions, thus there are no indicators of whether the raising of awareness has produced more just outcomes.

In short, training is not a solution. There is no evidence that training will produce sufficient awareness of the issues to sufficiently overcome the communication problems to ensure access to justice.

Teaching all Indigenous Queenslanders to speak Australian Standard English is not an option. First, it has been tried and had limited success in remote communities (Storry, 2006). Second, it would be paternalistic and enforcing Australian Standard English on communities may breach the UN *Declaration of Rights of Indigenous Peoples* 2007 (articles 13 and 14) and

the *Human Rights Act 2019*. Finally, teaching English would take years; the issue of appearance in court exists now and must be addressed within the existing system.

To add further complexity, young people in remote communities may not be speaking either traditional languages or Aboriginal English. No solution can be developed for these problems until rigorous study has been conducted into the languages spoken by young residents of remote communities.

Other solutions like improving the teaching of ASE in remote communities are not viable and run the risk of paternalism and the extinction of Indigenous languages. Training of judges, magistrates, lawyers and court staff cannot be carried out to a sufficient level to overcome the issue.

Proposition for a Partial Solution

It is proposed that the Queensland Courts establish dedicated Indigenous Courts in which all participants: judiciary, lawyers and court staff, are Indigenous. This proposition is intended to solely address the issues associated with unfamiliarity with the courts and speaking Aboriginal English.

As has been noted, Indigenous Australians, including those living in metropolitan areas, share an understanding of Aboriginal English in all of its nuances. They do not need to be trained and, as participants in the shared language, inherently understand each other without the need for interventions. In essence, rather than train non-Indigenous Australians in Aboriginal English, it is easier to train Indigenous Australians in the law.

The impact of unfamiliarity may be alleviated by the immediate awareness of the staff understanding the accused. The lack of confusion from communication breakdown may put some people more at ease. This would flow over into the court proceedings as it became apparent that the accused could understand the proceedings and be understood.

The shared understanding could also act as a break on abuse of Aboriginal English during cross-examination. The simple awareness that language was being manipulated would allow for options by the bench or through re-examination for clarification.

This solution does not, and cannot, address the legal and resource issues needed to respond to a jury trial. As such, this proposition is only relevant to the Magistrates Courts, but this could extend to all matters before such courts including Domestic and Family Violence. It may in the future also be used for administrative matters involving mediation.

This solution will take planning and dedicated policies to target and train Indigenous staff, legal professionals, police prosecutors and magistrates. At best, this is probably a decade away, but gradual roll-out is possible as interim measures to pilot such a scheme.

In conclusion, everyone who works with Indigenous accused and witnesses wants to learn about cultural and linguistic issues that will help them better serve their clients. The

Handbook is not the best method for doing this and respondents prefer face-to-face training, online exercises and videos. The training has to be more than awareness-raising and contain practical advice to assist trainees to do their job. There was consensus that training should be targeted at those most likely to interact with Indigenous people in the legal system and provided at induction and supported by annual refresher courses. There was also support for introducing the material into university courses and continuing legal education. Ultimately, these are resource issues for government departments and professional organisations.

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