

# **Accommodating Language Difference: A Collaborative Approach to Justice in the Koori Court of Victoria**

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## ***Abstract***

The Koori Court pilot program, initiated by the Victorian Government in 2002 following recommendations made by the Royal Commission into Aboriginal Deaths in Custody (1991), addresses some of the concerns of a number of linguists including Eades (1992,1993,1994,1995,1996a,1996b,2000,2003), Gibbons (1994,2003), Walsh (1994,1995) and Cooke (1995) regarding the cultural and language disadvantages experienced by Indigenous Australians in the formal court context.

This paper will examine ways in which the specific linguistic features that have been identified as problematic for Indigenous Australians in the courtroom context are addressed to some extent through the operation of the Koori Courts, such as alternatives to the question/answer format and recognition of cultural meanings attached to silence.

Other associated innovations will be reviewed. Since the introduction of the Koori Courts, under the jurisdiction of the Magistrates' Court of Victoria, findings indicate an overall increase in the level of awareness of legal professionals involved in this initiative, with a positive response from many of the Indigenous community groups involved in the legal process. New programs and specialist services have also been implemented by many supporting agencies, including partnership programs with Indigenous community groups by both Victoria Police and the courts.

Currently there are four adult Koori Courts in operation in Victoria, and a fifth, Australia's first Children's Koori Court pilot program, was recently launched in Melbourne to address the high level of recidivism of juvenile offenders. An awareness of cultural and language difference by participants in the court context, through ongoing education and training, has resulted in many of the special needs of Indigenous Australians being addressed, leading to a reduction in recidivism and a greater participation of local Indigenous communities in the legal process.

## ***Keywords***

Language and the Law / Forensic Linguistics / Sociolinguistics / Cross-Cultural Linguistics

# **Accommodating Language Difference: A Collaborative Approach to Justice in the Koori Court of Victoria**

## **1. Introduction**

This paper reports on the establishment of the Koori Court in Victoria, and examines the way in which specific linguistic features identified as problematic for Indigenous Australians in the courtroom context are addressed to some extent through its operation.

This study is part of a wider examination of the level of awareness of language diversity and disadvantage in the justice system in Victoria, which attempted to draw together a range of research on the relationship between language and the law (Stroud 2004). One of the key questions guiding the research was to determine if those linguistic issues of concern identified by academics were reflected in the practices of those agencies and legal professionals involved in legal process. The Koori Court program appeared to respond to many of the issues found to be problematic for Indigenous Australians.

Over the past two decades, a number of linguists have raised concerns regarding cultural and language disadvantages experienced by Indigenous speakers in the formal court context of the criminal justice system. In addition to the pioneering work of Eades (1992,1993,1994,1995,1996a,1996b,2000,2003), linguists such as Gibbons (1994,2003), Walsh (1994,1995), Cooke (1995), Koch (1985,1990) and Pauwels et al (1992) have noted the difficulties which can and do arise when communication fails in the legal or quasi-legal setting, when legal professionals fail to notice differences of lexis, intended meaning or cultural expectations of the accused or witness.

## **2. Cultural and Language Disadvantage of Indigenous Australians**

Gibbons (2003:227) suggests that the way language is used in the justice system can disadvantage people who traditionally are less powerful or already disadvantaged in other ways.

Indigenous Australians have struggled for 200 years with the loss of their language, their culture and their lands. Issues of discrimination, homelessness, unemployment, poor health, lack of education, drug or alcohol dependence, have contributed to a loss of identity and a sense of poor self esteem. Any one of these triggers can lead to a brush with the law. To be expected to conform to European ways and European laws ('whitefella' laws) is alien to their culture, and it is a sad fact that the percentage of Indigenous Australians in the corrections system is now disproportionately high.

In the 2001 Australian Census, the number of people who identified themselves as Indigenous was 410,003, or 2.2% of the total population in Australia of 20 million. When this is compared with the number of Indigenous Australians in the corrections

systems at that time - a figure of 4,445, or 20% of the total prisoner population, it is evident that there is an over-representation of Kooris in the system.

In spite of Victoria having the lowest imprisonment rate of Indigenous defendants in Australia, Kooris are six times as likely to be arrested as non-Kooris, and 13 times as likely to be imprisoned (Victoria, *Justice Statement* 2004:59). Eades suggests that cultural and language differences could be a factor in the breakdown of communication at police interview or in the courtroom (1994:234, 1995:174, 2000:163). Even though an Indigenous offender 'appears' competent in the language, cultural differences may lead to the offender not being able to tell their story, and misunderstandings on the part of the interviewer or prosecutor.

### **3. Specific Linguistic Features Identified as Problematic in the Courtroom Context**

Eades has identified key linguistic features that can cause miscommunication in a courtroom context, exemplifying them in specific Australian case studies (1993, 1995, 1996a). Pragmatic features found to be problematic, may include:

- a) non-verbal signs that are culturally specific, such as the use of silence
- b) a lowered gaze may be taken as being shifty or non-cooperative.
- c) Non-verbal markers of power and prestige that may cause a breakdown in communication. The formality of the traditional courtroom, with a raised magistrate's bench, robed legal professionals, intimidating police presence, and isolation of the defendant can be daunting to most lay people, let alone someone from a different culture.

Courtroom discourse can also result in miscommunication, for example:

- a) the legal register. The maximising of power by some legal professionals is shown in their manipulation of language. When there is no explanation of procedure, over-use of legal terminology, use of pronouns to include and exclude - any of these in a courtroom can cause misunderstandings. The complexity of legal language appears to flout most Gricean conversational maxims (Grice 1989).
- b) the question/answer format is difficult for people from an oral culture which uses a narrative format and operates by group consensus.
- c) cultural taboos may prevent the mentioning of a deceased person's name or sacred sites, and this may not be recognised.
- d) 'gratuitous concurrence' may occur in the answering of questions when there is an imbalance of power (Lieberman 1981:248-9, Eades 1994:246). A defendant may answer 'yes' to questions, sometimes only meaning 'yes I hear you', but in the black and white process of European law, there can be only a 'yes' or 'no' answer.

e) a speaker may talk about time or distance in different ways, relating them to a social event or situation rather than a quantifiable specification (Eades 1995:159, Cooke 1995:86-87).

f) language accommodation may be one way, with the defendant being expected to accommodate his language to that of the Court.

g) the semantic meaning of an utterance may not be understood, and may prevent the recognition of an instruction.

#### 4. The Establishment of the Koori Court in Victoria

The Koori Court in Victoria was created under the *Magistrates' Court (Koori Court) Act 2002*, following a recommendation from the Royal Commission into Aboriginal Deaths in Custody (1991) that the legal system be adapted to the cultural needs of Aboriginal offenders and their communities (Briggs and Auty 2003). The Victorian Government and the Koori community entered into a partnership agreement, the *Victorian Aboriginal Justice Agreement* (2000), which was initiated to address the ongoing issue of Indigenous over-representation within all levels of the criminal justice system, review cross-cultural awareness training programs, and build relationships between justice officers and local communities.

The Koori Court comes under the jurisdiction of the Magistrates' Court of Victoria and operates within the parameters of the traditional adversarial system. Although less formal, it still observes all legal procedures of the traditional court, but in a culturally sensitive manner. The Koori Court is similar in many respects to other courts in operation throughout Australia, such as the Circle Sentencing Court of New South Wales or Nunga Court of South Australia. However the Koori Court model is unique to Victoria, incorporating the best features of existing models while acknowledging the cultural diversity expressed by the Victorian Indigenous communities. Victoria is the only state so far to have legislated for the establishment of the Koori Courts.

The Victorian Government last year released the Attorney-General's *Justice Statement* (2004) containing major initiatives to modernise the Justice System in Victoria over the next ten years. The Government has worked with the Magistrates' Court to develop a framework for problem solving approaches to address the underlying causes of offending behaviour by people from groups who are over-represented in the criminal justice system. Victorian Deputy Chief Magistrate Jelena Popovic suggests that 'the dynamics of the courtroom are changed from the traditional, adversarial process of assertion and denial to the sharing of information and plans to address the defendant's behaviour'... 'the offender is part of the interaction rather than an observer speaking through their lawyer' (Popovic 2004:2).

One of the aims of the Koori Court is to allow greater participation by the Aboriginal (Koori) community in the court process and to create sentencing orders more culturally

appropriate to Aboriginal offenders. Aboriginal elders and respected persons of the local community are invited to participate in the court process.

Currently in Victoria there are five Koori Courts, the first commenced at Shepparton in September 2002 (Yorta Yorta and Bangerang country), with Dr. Kate Auty as the first magistrate and Daniel Briggs as the first Aboriginal liaison officer; a second court opened in metropolitan Broadmeadows in April 2003 (Wurundjeri country); a third in Warrnambool (Gournditchmara and Kirrae Whurrung country) in January 2004; a fourth commenced in Mildura in July this year (Ledji Ledji and Barkinji country); and a fifth, Australia's first Children's Koori Court, was recently launched in Melbourne in September 2005. The location of these courts was chosen not only to address the high number of recidivist offenders, but for the willingness of the local Indigenous communities and support services to participate in the legal process.

Eligibility for a case to be heard in adult Koori Courts requires that adult Koori defendants must be Aboriginal or Torres Strait Islander and live locally. They must plead guilty to an offence, and show an intention to take responsibility for their actions. All cases that can be heard in the Magistrates' Court can be heard in the adult Koori Court, except for family violence and sexual offences. Eligibility is widened in the new Children's Koori Court to include children or youth who have pleaded not guilty to an offence but have been found guilty by the Criminal Division. Family violence cases may also be heard in this court.

## **5. Operation of the Koori Court**

The interiors of all Koori Courts are similar in layout. Existing courtrooms are used with cultural modifications. A typical example is the Koori Court in Shepparton, which is a well-designed modern court, with Indigenous art on the walls, and the medium size room dominated by an oval shaped table in the centre. Three flags, the Australian, Aboriginal and Torres Strait Islander flags, stand together on poles at the front of the court.

The magistrate sits at the oval table together with all other participants including the family of the defendant. The elder and respected person sit either side of the magistrate and provide the court with advice relating to cultural matters, which the magistrate takes into consideration when handing down an appropriate sentence.

The seating at the table positions the magistrate at the centre, facing front, with the respected person on her right and the community elder (usually called 'Aunty' or 'Uncle'), on her left. Next to the elder is the corrections officer, then the prosecutor (police sergeant), the defending lawyer, the defendant, on his/her left, family members and/or support person, on their left the Aboriginal justice officer, then the respected person, completing the full circle. The defendant sits directly across the table from both the magistrate and the elders. The clerk of the court is seated at a desk behind the table. Support agency representatives (such as drug and alcohol support groups) and extra

family members or public are seated around the courtroom but close to participants at the table.

The Koori Court is informal but respectful. Those present do not stand when the magistrate enters or leaves the court as in other courts. Non-verbal markers of power and prestige in the courtroom are dispensed with. The language used in the court is Plain English. The magistrate commences each hearing by acknowledging the traditional occupiers of the land and introduces all participants around the table. She greets each defendant by first name, such as 'How are you Robert?', and acknowledges the reply. Honorifics such as 'Your Honour' and 'Respected Persons' are still used by some legal participants as a sign of respect.

The types of charges heard in sittings attended by the researcher ranged from driving while disqualified, using an unregistered vehicle, alcohol and drug problems, theft, breaking and entering, possessing controlled weapons, and drunken and aggressive behaviour.

## 6. Case Study

In one case observed by the researcher, the magistrate stated that the defendant was looking at a probable gaol sentence. She invited comments from one of the elders, who spoke to the defendant sitting directly across the table - 'you understand? You have a problem. This drink, and anger - you have no respect for people or yourself. Drinking and driving is dangerous - it's not acceptable'. The elder's point was clear, and she then told her own story, ending with 'broken hearted people - try to cover it up with alcohol. You have to have it in your spirit to stop destroying your life. Alcohol is destructive. And anger. There are people who want to help you.' The respected person added his comments, telling the defendant to 'be positive, work hard, set goals, go back to employment, counselling, anger management, be a role model for your children'.

The magistrate then invited anyone else seated in the court to comment. The sense of obligation to family and culture was stressed as those around the table gave their own story of how they overcame similar difficulties and were able to rise above them. The respected person then spoke of 'our culture', 'our elders', 'today's society needs to remember the struggles our elders went through'. 'Think about your culture, ground roots. It's all about struggle, justice!'

The defendant then spoke in a respectful voice and said how determined he was to make changes. At each hearing at Shepparton, at least one person at the table appeared to know the defendant or his family. The shame to family and community was stressed, but it was clear that all present really cared for a positive outcome.

At this hearing, a small daughter of the defendant's partner was sitting in the body of the court, close enough to her mother seated at the table to tap her on the shoulder and whisper endearments and hear a reassuring reply. This would not have been possible in a more formal court.

## **7. How the Operation of the Koori Court Addresses Some Concerns Raised by Linguists**

The informal, non-threatening but respectful format of the Koori Court appears to address some of the concerns of Eades regarding linguistic practices such as repeated questioning and differences in the use and interpretation of silence. The presence of elders and respected persons ensures that Indigenous speaking styles are present and that culturally specific matters are observed and problems neutralised as far as possible. The cultural context of silence appeared to be recognised in some hearings attended by the researcher. The seating arrangements of the oval table placing the defendant immediately across from the magistrate and the elders, appears to be specifically designed to make the defendant accountable to the elders of his community seated beside the magistrate, and to show that ‘whitefella’ and ‘blackfella’ laws are in accord.

The informal layout of the court does not appear as confronting as a traditional court with the raised magistrates’ bench separating the law from the people. The presence of family and friends appears to be reassuring to the defendant, and anyone in the courtroom is able to contribute their story during a case when invited by the magistrate.

The legal terminology used in courtroom discourse is simplified as far as possible, and the legal process explained to all participants. Language accommodation appears to be two ways – from the defendant to the court and the court to the defendant. The question/answer format is kept to a minimum, and the defendant given the time to tell his/her story, but only if he/she wishes. Others around the table are able to tell their own story of how they have overcome similar difficulties and are able to offer support and encouragement.

Although a defendant may begin the hearing with negativity or brashness, by the end of proceedings, he/she is often in tears and ready to promise not to re-offend. At some Koori Court hearings, the whole courtroom audience is reduced to tears with some of the stories which unfold. There is often an incredible feeling of obligation, respect and determination on the part of the defendant to change old habits. This is where follow up support services are critical to the success of the program.

In hearings observed by the researcher, there did not appear to be any cases of ‘gratuitous concurrence’, but a closer analysis of interaction is required, based on transcripts of recorded proceedings. A further study involving the detailed analysis of courtroom discourse is planned, and this may reveal some interesting linguistic patterns.

## **8. A Review of the Koori Court Program**

The collaborative approach to justice of the Koori Court program appears to have achieved a significant degree of success. Language difference is accommodated by the presence of Koori elders and by the recognition of cultural values and Aboriginal speaking styles, and the Magistrate takes all factors into consideration when deciding on an appropriate sentence for the defendant.

When first approached to take part in the Koori Court, some Aboriginal elders were unsure of the program. One of the elders recounted his feelings. He said:

“I am a mission man – Yorta Yorta – I was brought up in the mission under two laws, white fella and black fella. As I grew up, I realised that the laws were different and that the white law discriminated against us blacks. I had no time for white law because it was so discriminatory. When I was told about the new Koori Court being set up, I was very suspicious. And when I was asked to be an elder sitting on it, I thought to myself that I didn’t want to be part of a white law court and sit with a crabby old white woman. Then I decided that although I didn’t have any faith that it would be any good, I would take part so I could at least see what it was all about”. (At this point, he became very emotional). “The Koori Court shows that white law and black law can work together. I feel that finally, there is a just law for my people and justice for my people” (Popovic 2004:18).

The format of the court, and the involvement of Indigenous participants, encourages a strong identification with Aboriginal cultural values. Time is allowed for information sharing, as the Koori Court schedules only 8 cases in a day of hearings. One interesting benefit has been the sense of pride felt by the Koori community participating in the legal process in finally having a ‘voice’ and in being able to take ownership of the administration of law.

The establishment of the Children’s Koori Court as an independent court has been welcomed by both the Indigenous and non-Indigenous community. The Children’s Koori Court will focus on the individual through close collaboration with family, community service providers and criminal justice agencies. In launching the court in Melbourne in September this year, the Victorian Attorney-General the Hon. Rob Hulls commented that one of the benefits of the new court was ‘to give Koori children and youth the tools to write their own story’.

The creation of the position of Aboriginal Liaison Officer (ALO) attached to each Koori Court has been a positive step. He/she coordinates all participants at the court and in the community, provides advocacy and advice, runs education and training of elders, forms a collaborative approach with specialist services, organises partnership programs with Victoria Police, corrections officers, legal services, drug and alcohol rehabilitation services and community groups. He/she also arranges the regional Aboriginal Bail Justices Training Program.

Last year, the Judicial College of Victoria organised a full range of seminars and conferences for magistrates, judges and judicial officers, including a program on Aboriginal Cultural Awareness. Although attendance at these programs is voluntary, they are usually well attended. The Magistrates’ Court and Law Institute of Victoria also provide seminars and awareness programs for legal professionals. According to Stroud (2004), the overall level of awareness of legal professionals, through on-going education and training, has increased over the 10-15 year period, and this awareness of



language difference addresses many of the special language needs of Indigenous Australians.

New initiatives of the Victorian Government, Magistrates' Court programs such as the Diversion Program, Drug Court Pilot Program and associated support services have encouraged greater participation and accountability of the Koori community. Partnership programs and specialist services have also been implemented by many supporting agencies with Indigenous community groups and these have contributed to a change in behaviour of Indigenous offenders, with a corresponding reduction in recidivism.

Statistics available to date show that of the 230 matters heard in the three Koori Courts between October 2002 and June 2004, there were only 18 cases of re-offending. A breakdown of the total indicates that the re-offending rate was approximately 12.5% at Shepparton, and 15.5% at Broadmeadows, both these figures significantly less than the general level of recidivism of 29.4%. (Victoria, Department of Justice 2005).

Some Kooris think there is an inconsistency of system. But Warrnambool Koori Court elder Laura Bell has this to say. 'Those in the 1000 strong Gunditjamarra clan near Warrnambool find it harder to answer to their elders than spend time in gaol. They say 'if Aunty's on it, we don't want to go before the Koori courts because we know what she's like'' (Crawford, Sunday Herald Sun 8/8/04 p8).

## 9. Discussion of Findings

The Koori Court pilot program in Victoria has been independently evaluated over a two year period, and this evaluation is due to be released in October this year. The report has found that 'in virtually all of the stated aims of the program, it has been a 'resounding success'' (Victoria, Department of Justice 2005). Since the completion of the evaluation, a further two new courts have been opened, and another is planned for Gippsland. Australia's first Children's Koori Court pilot program aims to address the problem of over-representation of Koori juveniles in detention and the high recidivism rate of 65% within two years of completing a juvenile justice order.

According to Marchetti and Daly (2004:6), some critics believe Indigenous courts deliver 'apartheid justice'. They take another view, suggesting that 'the core elements of these courts of improved communication, citizen knowledge/control and appropriate penalties – could be applied to all court processes and all defendants. These new justice practices may indeed be signalling the way of the future'.

Briggs and Auty (2003) have acknowledged the pioneering work of Eades in identifying particular linguistic issues that could be addressed in the conceptualisation of the Koori Court. It is hoped that their obvious awareness of the issues raised by Eades continues to be taught as principles in the professional development of future magistrates to ensure the on-going success of the program.

On the one hand, the high participation of Indigenous people ensures that Indigenous speaking styles are present, allowing the defendant to give their story without it being truncated, bringing tacit knowledge to the task. On the other hand, the special training of the magistrate and the conscious awareness of linguistic features of Aboriginal speaking styles, brings an overt awareness to courtroom discourse.

The current success of the Koori Courts is no doubt a reflection of the commitment and sensitivity of its inaugural magistrate Dr. Kate Auty and Aboriginal liaison officer, Daniel Briggs. However, the ongoing success of the courts should not be based solely on the selection of 'specially sensitive' magistrates who have taken the time to study the work of linguists, but to the development of an awareness of the particular cultural and linguistic issues involved. It is hoped that an awareness of the relationship between language and the law continues to be the focus in specialist courts such as the Koori Courts, and that linguistic detail will continue to be the essential part of the awareness project.

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