Courtroom Talk and Neocolonial Control
Language, Power and Social Process 22

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Courtroom Talk 
and Neocolonial Control 

by 
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Transcription conventions

**Underlining** indicates emphatic stress

**SMALL CAPITALS** indicate raised volume

° before and after an utterance indicates that it is spoken in a very low volume

= indicates latched utterances, i.e. no pause between the end of one utterance and the start of the next

[] indicates talk overlapping with that of another speaker, marked at the point in each utterance where overlap begins

- indicates a pause within a turn of less than 0.5 of a second

A number in parentheses indicates the length of a pause in seconds e.g. (3.2)

Parentheses around a word or phrase indicates transcriber doubt

(xxxxxx) indicates an inaudible utterance

Double parentheses are used to enclose transcriber’s description of paralinguistic or other activity by the speaker, e.g. ((laughs))

**DC** defence counsel

**M** magistrate

**Pros** prosecutor

**Bold** type indicates particular segments of the transcript being highlighted in my analysis. It is used only in extracts where one particular utterance pertains to the discussion more than the rest of the utterances in that extract, as for example in the extracts in Section 2.2 of Chapter 4. In many of the extracts, there are several utterances which pertain to the discussion, and it is considered unhelpful to use bold type (e.g. in Chapters 7–9).

**Regular English spelling** is used throughout, except for a few places where a word or phrase is pronounced in a clearly abbreviated or nonstandard way (e.g. in a number of DC
Transcription conventions

turns the first utterance is *Nd*, a clearly abbreviated form of *and*.

Personal names (which are pseudonyms) are mainly used for the three witnesses, as they are the only personal names that occur with any frequency in the data. Any other personal names in the transcript extracts are also pseudonyms. Identifying locality names have been changed, with the exception of major towns and cities.
Abbreviations

ABC Australian Broadcasting Commission
AE Aboriginal English
ALS Aboriginal Legal Service
CA Conversation Analysis
CDA Critical Discourse Analysis
CJC Criminal Justice Commission
DC Defence counsel
Fitzgerald Inquiry Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct
M Magistrate
NISATSIC National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families
Pros Prosecutor
QPS Queensland Police Service
RCIADC Royal Commission into Aboriginal Deaths in Custody
SE Standard English
“the court” the presiding magistrate or judge in a particular case
Part I

Aboriginal participation in the criminal justice system
Chapter 1
Introduction

Late one night in a Brisbane shopping mall, three Aboriginal boys aged 12, 13 and 14 were approached by six armed police officers and told to get into three separate police vehicles. They were then driven 14 kilometres out of town to a swampy industrial wasteland, in the suburb of Pinkenba. After threatening to chop off their fingers and throw the boys in the river, the police drove off, leaving the boys to find their own way back.

Aboriginal community members in Brisbane said that such occurrences had happened before, and anecdotal evidence from a number of Australian cities suggests that such a practice is not restricted to this occurrence or this location. But for the first time, this event led to the police officers involved facing criminal charges for “unlawful deprivation of liberty”, which could have resulted in imprisonment. This book focuses on the cross-examination in the first stage in the trial process in this case, known as the Pinkenba case. This was the committal hearing in the Brisbane Magistrates’ Court (Crawford v Venardos & Ors 1995), in which the prosecution had to establish that there was a case strong enough to put to a jury in a District Court trial. This book will examine in detail the linguistic strategies used to discredit the evidence of the three boys, which were so successful that the magistrate not only dropped the charges against the police officers, but also devoted a considerable part of his decision to delivering a negative evaluation of the characters of the boys.

Why write a whole book about one courtroom hearing – especially one at the lowest level in the criminal justice process? The short answer to this question lies in the fact that the cross-examination of the boys was extreme in terms of linguistic manipulation, and that an examination of these linguistic strategies shows just how far the legal system can go in the “delivery of justice”. A critical sociolinguistic exploration of this case sheds light on a central issue in sociolegal studies, namely how the criminal justice system fails to deliver justice. The longer answer to the question lies in the way in which sociolinguistics can show the workings of the control which has been exercised by the state over Aboriginal people for more than two hundred years. This book will show that central to this control is the way that talk is used, both in the construction of Aboriginal people as a threat to public safety, and in the legitimisation of police removal of Aboriginal people from public places. A critical sociolinguistic analysis of the Pinkenba case, focusing on the cross-examination in this hearing, puts both of
these uses of talk under the spotlight, exposing mechanisms which enable the continuing oppression of Aboriginal Australians.

It is important to clarify from the outset the terms “Aboriginal” and “Indigenous” as they are currently used in Australia. The term “Indigenous Australians” refers to descendants of the original inhabitants, both Aboriginal people, whose ancestry comes the Australian continent, and Torres Strait Islanders, from the islands between Queensland and Papua New Guinea. As Aboriginal people and Torres Strait Islanders share many experiences and results of the colonial past and neocolonial present, many surveys and statistical reports combine both groups in the category of “Indigenous”. However, there are many differences in social and cultural life, as well as history, between the two groups (Mye 1994: 1089–1090), and it is Aboriginal people and their experiences which are a major focus of this book. Further, Aboriginal people number many more than Torres Strait Islanders, and they have assumed the greatest prominence in court cases involving Indigenous people (CJC 1996: xi). Thus, except where referring to issues or quoting from research, such as census analysis, which does not separate the two groups of Indigenous Australians, I use the term Aboriginal, rather than Indigenous.

1. Colonialism and neocolonialism in Australia

Archeological evidence indicates that Aboriginal peoples have inhabited Australia for at least 60,000 years (Thorne 2005: 38). The British invasion of Aboriginal lands began in the late eighteenth century, and in 1788 the first British colony was established in the area now known as Sydney. At this time, the continent was populated by Aboriginal societies with complex sociocultural organisation, and there were about 250 distinct languages (McConvell and Thieberger 2005). “Informed guesswork” currently suggests that the Aboriginal population at the time of British settlement was about 500,000 (Taylor 2005: 66). Such was the arrogance and ethnocentrism of British settlers and colonial rulers, that the country was legally considered to be terra nullius (an unoccupied country, literally “the land of no-one”). This legal doctrine was only overturned by the High Court of Australia in 1992 (Altman and Palmer 2005). So, although the leaders of the initial British settlement were instructed to deal with the Indigenous population with “amity and kindness” (Barton 1889: 483, cited in McRae et al. 1997: 33), their colonial preoccupation with the annexation of land soon resulted in conflict with its Aboriginal owners. Historical research depicts the time between 1788 and the 1840s as one characterised by brutal frontier conflict (Rowse 2005). As we will see in Chapter 3, the police played a central role in these frontier conflicts.
From the beginning of British colonial rule, the Indigenous inhabitants were subject to British control, yet they were not offered the same protection as other subjects. Thus, their land could be taken without compensation, as there was no legal recognition of their land ownership, and they could be removed from their own land to any area which the government chose. In the 1860s, a new phase of colonial rule began, with the enacting of the first “protective” legislation, which resulted in a large percentage of Aboriginal people around the country being rounded up and transported to settlements or reserves, where they were forced to live under state regulation. From this time on, many families were separated, and children placed in state care, as we will see in Chapter 3. The first Aboriginal settlement in Queensland was established in 1905, some 250 kilometres north-west of the state capital of Brisbane. Originally named Barambah Station, it has been called Cherbourg since 1932 (Hegarty 2000: 11). Cherbourg is the birthplace of two of the boys in this case, and the home of many members of their extended families. The legislation controlling the movements and lives of Aboriginal people on settlements and reserves throughout Australia was not repealed until the mid-late twentieth century, with Queensland being the last state to do so in 1984 (Rowse 2005). Thus, many adults of the generation of grandparents, and even parents, of the boys in this case still required written permission from a White manager to get married, and even to leave the Aboriginal reserve of Cherbourg, if only for a day, and they were not allowed to drink alcohol.

The colonial dispossession of Aboriginal people from their land, and the legacies of this dispossession are experiences shared with Indigenous people in many other first world countries. Australian Aborigines experience living conditions and indicators typical of people in third world countries. Thus, a recent government report (SCRGSP 2005: 1) found a “large gap between Indigenous people and the rest of the population” in all of the key indicators, including health, education, employment, home ownership, and criminal justice. For example, the average life expectancy for Indigenous Australians is 17 years shorter than for other Australians (ibid.: 5). The linguistic impact of colonisation has also been drastic. Of the approximately 250 distinct Indigenous languages spoken at the time of British invasion and colonisation in the late 18th century, most are no longer spoken on a daily basis (McConvell and Thieberger 2005: 78). There are still a number of communities in the remote northern and central areas of Australia where people speak one of the “traditional” languages as their first language. Of particular concern for the participation in the legal system of speakers of these “traditional” languages are the complexities involved in the training and work of interpreters. These and related issues have been examined by Cooke 1995a, 1995b, 1995c, 1996, 1998, 2002, Edwards 2004, Goldflam 1995, Mildren 1997, 1999, and Walsh 1994. Two English-lexified creoles are
also widely spoken in the remote north of Australia. Kriol is spoken predominantly in parts of the Northern Territory and Western Australia, and Torres Strait Creole is spoken predominantly in the Torres Strait Islands and on the northern tip of Queensland. But for the great majority of Aboriginal people, including those who live in southeast Queensland, the location of the Pinkenba case, their first language is Aboriginal English, which will be introduced in Section 4 below.

Arguably, the colonial situation extended nationally at least until 1967, when full rights as citizens were finally extended to all Indigenous Australians, and they began to be counted in the census (although for Aborigines on Queensland reserves the colonial situation did not end until 1984, as explained above). It may seem that Indigenous Australians are now in a postcolonial situation, given that they have citizenship and “formal equality” with other Australians (Cunneen 1996: 18). But the way in which government power, through the criminal justice system, systematically oppresses Indigenous Australians, makes the use of the term “neocolonial” particularly apt. This is a term widely used in political science writing to describe a postcolonial situation in which a former colonial power continues to dominate its former colonial subjects (Bealey 1999: 222). As Cunneen (2001: 232) puts it, the concept of neocolonialism “recognises the fact that the relationship between Indigenous people and the dominant society is still manifestly colonial, although the modality of colonial power may have changed with the formal emphasis on equality and citizenship”. We will see in Chapter 3 that central to the ongoing inequality between the coloniser and colonised in Australia are continuities in policing.

Much has been written about Aboriginal Australians in the criminal justice system, with greatest attention focusing on the excessive rate at which Aboriginal people are taken into police custody and imprisoned. In Section 6 of Chapter 3, we will consider the Royal Commission into Aboriginal Deaths in Custody, which focused national attention on this. We will see that this wide-ranging investigation concluded that a host of historical, social, cultural and economic issues are involved. Despite considerable recognition being given to the Royal Commission’s findings and its more than 300 recommendations (Johnston 1991a), the rate at which Aboriginal people are taken into police and prison custody remains alarmingly high. Recent statistics show that Australian Aborigines are twenty times more likely to come into contact with the criminal justice system than non-Aboriginal people (Findlay et al. 2005: 326). The overall national imprisonment rate for Indigenous people is 11 times the rate for non-Indigenous people, while for juveniles that figure goes up to 20 times (SCRGSP 2005: 3.79). This continuing high over-imprisonment rate is a clear indication that there are serious problems with the participation of Aboriginal people in the criminal justice system. The underlying realities are complex and
Colonialism and neocolonialism in Australia

multi-faceted: the Royal Commission’s wide-ranging sociolegal analysis highlighted the ongoing control of the state over Indigenous Australians, through such practices as selective policing and over-policing. Particularly disturbing, as we will see in Chapter 3, is the criminalisation of Aboriginal young people, to a large extent through public order offences, such as “disturbing the peace” (e.g. Cunneen 2001; Cunneen and White 2002). This criminalisation can be seen in part as the outcome of bitter asymmetrical struggles between Aboriginal communities and the police force.

Sociologists, political scientists and sociolegal scholars argue that the criminal justice system continues to fail Aboriginal people in a number of ways, and that a wide range of factors are implicated in this failure. This book asks why, in the words of criminology professor Fay Gale and her colleagues, “Aboriginal people have no reason to believe in the capacity of our legal system to provide protection or justice, nor in the willingness or ability of the administrators of justice to act in an even-handed manner” (Gale et al. 1990: 1). Criminologists such as Gale and Cunneen have provided rich historical, sociological and criminological evidence of the ways in which the criminal justice system particularly fails Aboriginal people, as we will see in Chapter 3. This book addresses the question put by Gale et al. in rather a different way, focusing on linguistic detail in one particular case. In doing this, it aims to add to the discussion of why the criminal justice system continues to fail in this way, by taking a detailed look at how. Thus, this book takes up the call by leading sociolegal and linguistic anthropology scholars Conley and O’Barr (1998) for the analysis of the actual mechanisms through which the legal system fails to deliver justice. We will see that talk matters, and the sociolinguistic analysis of talk can make a powerful contribution to our understanding of how neocolonial control continues to work.

This case is unusual in that the defendants are police officers, and the prosecution witnesses are Aboriginal young people – something of a reversal of the typical involvement of Aboriginal young people in the criminal justice system. But, in another way, this case is a version of a familiar story about police removal of Aboriginal young people. Issues involved in the removal of Aboriginal people, particularly children, for most of the twentieth century, have become salient in national discourse in Australia, particularly since the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (NISATSIC 1997). There is now a growing recognition that the ubiquitous problems that affect Aboriginal communities, such as alcohol related violence and child abuse, have to be understood as part of the legacy of these “stolen generations”. The internationally acclaimed feature film Rabbit Proof Fence (2002, directed by Phillip Noyce) presents some of the experiences of the stolen generations. This film may leave the impression that state intervention in
the lives of Aboriginal people is a thing of the past. This book will show that this intervention continues, and it has become so naturalised that even the legal process legitimises it. And another recent Australian feature film presents some of the earlier colonial experiences of Aboriginal people when they were being chased off their traditional lands, as the invaders took over, namely *The Tracker* (2002, directed by Rolf DeHeer). *Rabbit Proof Fence* and *The Tracker* show some of the forces which legitimised the police removal of Aboriginal people in the earlier historical periods they depict – including blatant racism, colonial expansion, and the legal doctrine of *terra nullius*. Detailed sociolinguistic analysis of the courtroom talk in the Pinkenba case will show how these colonial removal practices are legitimised now, for example through the construction of Aboriginal people as a law and order problem, and through the construction of the use of “four-letter words” as an offence requiring police intervention, and even at times, imprisonment.

### 2. The Pinkenba case: what happened

Let us now turn to what happened after the police drove the three Aboriginal boys to Pinkenba and abandoned them in the industrial wasteland there. After taking hours to find their way back to the Valley, they met a relative in a park and they told her what had happened. Her anger at their treatment by the police led to her contacting the Aboriginal Legal Services organisation. As a result, an investigation into the incident was conducted by the Criminal Justice Commission (CJC). This investigation found that the police did not have any lawful reason for taking the boys anywhere without their consent (CJC 1996: 2), and recommended that criminal charges be laid against the six police officers. Thus, the police officers were charged that they had unlawfully deprived each of the boys of his personal liberty by carrying him away in a motor vehicle against his will. It is important to know that the boys had not been charged with any offence that night, nor were they taken to any police station, and they were not in custody or under arrest. According to a statement from the police union to the media, the boys were “taken down to Pinkenba to reflect on their misdemeanours” (ABC 1996).

The first stage in the trial process was the committal hearing held in the Magistrate’s Court in Brisbane in February 1995. The purpose of this hearing was for a magistrate to hear the prosecution case, in order to decide if there was sufficient evidence for a trial, which would be heard in the District Court with a judge and a 12 member jury. There was considerable public interest in this case, as it involved such serious allegations against the police officers, and the committal hearing was attended by a large contingent of reporters, as well as onlookers.
Introducing the boys and their Aboriginality

Under the British system of justice which forms the basis of the Australian system, the accused were “innocent until proven guilty beyond reasonable doubt”, and they had no need to give any evidence. Apart from the three boys, there was brief evidence from only two people. The examination-in-chief of the CJC investigator who had interviewed the boys lasted about one minute, and consisted of eight questions about two minor corrections to her statement. Her cross-examination lasted twenty minutes, and was mainly about three instances of the use by one of the boys of a specific swear word in her interview with him (to be discussed in Section 4 of Chapter 6). After the boys’ evidence was concluded she had two minutes of re-cross-examination and one minute of re-examination. There was also nine minutes evidence from a surveillance video monitor operator about the technology involved in the Valley Mall, where the police approached the boys. But most of the four day hearing consisted of evidence from the three boys, which included lengthy cross-examination by each of the two counsel who represented three of the police officers. The case centred on the issue of whether or not the boys had travelled in the police cars against their will: no doubt was ever raised that they were approached and told to get in the police cars, and that they were taken to the industrial wasteland and abandoned there. The defence case was that the boys gave up their liberty and that there’s no offence of allowing a person to give up his liberty, and therefore that the deprivation of liberty was not unlawful (as quoted by the magistrate in his decision, 24 Feb 1995).

3. Introducing the boys and their Aboriginality

The three boys, who will be referred to with the pseudonyms David Pender, Albert Carter and Barry Coley were aged 12, 13 and 14 years respectively when the incident took place in May 1994. At the time of their evidence in the committal hearing, which forms the focus of this book, they were 13, 13 and 15 years old respectively. The boys had grown up in extended Aboriginal families in southern Queensland. Two of them had spent most of their lives in Cherbourg, the rural Aboriginal community 250 kilometres northwest of Brisbane, which was the first Aboriginal settlement in Queensland (see Section 1 above, and Section 1.2 of Chapter 3). The oldest of the three boys had spent most of his time in Brisbane, having been born in a rural town about 750 kilometres west of Brisbane. At the time of the alleged abduction they were not regularly attending school, and they could be described as “part-time street kids”. That is, although they were in the habit of staying with different relatives in Brisbane and Cherbourg, at times they stayed in the city or Valley, sleeping in disused buildings, and meeting friends in parks and pin-ball parlours. At other times,
they stayed in a youth refuge. Each of the boys had a criminal record, which included such offences as “unlawful use of motor vehicle”, “break enter and steal” and “destruction of property” (smashing street lights). The oldest of the boys, Barry, was in the Brisbane juvenile detention facility at the time of the hearing, as a result of a street robbery of a young woman in which he had participated, which had occurred several months after the Pinkenba event.

Based on my two days of interviews with, and observations of the boys, in early June 1994 (to be explained in Section 6 below), I formed the opinion that the boys’ communication styles were typical of many young Aboriginal people in cities and towns in southeast Queensland. Being raised in Aboriginal families and communities, most of their interaction with non-Aboriginal society was in schools, where they had not been regular or successful participants.

It is important to the understanding of this case to set out some relevant aspects of contemporary Aboriginal social and cultural life in southeast Queensland. In doing so, I am mindful of the danger of essentialisation. It is not my intention to present Aboriginal society and culture as homogeneous, static or reified. It is now widely recognised in sociolinguistic research that “participants’ identities are fundamentally multi-faceted” (Sarangi 1994: 416), and that we need a “non-essentialist and action-oriented perspective” on “culture” which “enables analysts interested in intercultural miscommunication to take on board the complexities related to the uses and functions of ‘culture’ in contemporary societies” (see also Shea 1994; Kubota 1999). Interactional sociolinguistics, which is an important part of my approach, is less at risk of overgeneralising and stereotyping than other approaches because of its focus on interactions between individuals (see Scollon and Scollon 1995: 154–163).

There are many ways of being Aboriginal, and there is much that is shared between Aboriginal and non-Aboriginal people of the same socioeconomic class and regional identity, for example. But, Keen’s (1988: 10) finding almost two decades ago is still pertinent today, in my view. He found that there is “a great variety in Aboriginal styles of life, but the gulf between these and the social life of other Australians is even greater”.

One of the main difficulties in describing aspects of contemporary Aboriginal social and cultural life in southeast Queensland is that there is little published research on this topic. In the last two decades there has been no substantive ethnographic account of Aboriginal societies in Southeast Queensland, or indeed of any Aboriginal society in the non-traditionally-oriented southern and eastern areas of Australia (but see Malin 1997; Malin et al. 1996). This does not mean however, that we can ignore cultural beliefs and practices of Aboriginal society in southeast Queensland in this book. And nor should we, given the central relevance of the Aboriginal identity of the boys to the Pinkenba case.
The ethnographic observations below, and in various places throughout the book, are based on several sources. Following my initial ethnographic fieldwork in an extended Aboriginal family in southeast Queensland over a three-year period in the early 1980s (Eades 1983), I have continued observations and involvements with Aboriginal people from that area, in varying capacities. These include enduring personal friendships, specific research related to individual legal cases, and wide-ranging reading of accounts of the lives, views, expectations, and experiences of Aboriginal people from that area in diverse print media, such as newspapers, newsletters and biographies (e.g. Bell 1997; Hegarty 2000, 2003; Huggins and Huggins 1994). And given the many continuities in Aboriginal culture around Australia (Keen 1988), observations and reading about Aboriginal people in other localities can also help in understanding contemporary Aboriginal social and cultural life in Brisbane. Where I cite research from other parts of Australia (e.g. Malin 1997) or dated research from southeast Queensland (e.g. Eckermann 1977; Koepping 1977), I do so only to provide some additional support for my observations in contemporary southeast Queensland, and not in the absence of such observations.

As in many other Australian cities and towns, Aboriginal people in southeast Queensland live in a variety of localities and types of housing. In the cities, most do not live in discrete communities, but they are mainly clustered in poorer neighbourhoods. In Brisbane, the highest density of Aboriginal population live in the southern outer suburbs (Taylor 2005: 73–74), which include Woodridge and Riverview, two of the suburbs where David had been staying with relatives before the Pinkenba event. Houses are often overcrowded by non-Aboriginal standards, and this can probably be attributed both to financial necessity and to preference, as people fulfil reciprocal obligations to relatives, and enjoy their support (see Barwick 1988: 28).

Aboriginal people in southeast Queensland today belong to overlapping kin-based networks in which they typically share residential and travel arrangements, as well as social activities, personal loyalties, responsibilities and rights. Barwick’s (1974: 154) summary of Aboriginal identity three decades ago is still pertinent: “To be Aboriginal is to be born to, to belong to, to be loyal to a family”. Some twenty years later, The Encyclopedia of Aboriginal Australia (Howie-Willis 1994b: 356), talks of family as “an essential factor in defining Aboriginality” (see also Peterson et al. 2005: 90). When people talk about being Aboriginal, they invariably talk about Aboriginal family relationships. Family involves a wide network of people, many of whom are related only distantly in non-Aboriginal terms.

Aboriginal people place a high priority on visiting family and spending time with a wide range of relatives, as well as widely sharing money and goods
within this kin network. It is common for people to move between relatives in different towns. This “high rate of mobility” can also involve other factors, such as seeking employment, housing or access to health care (Taylor 2005: 75). Taking care of children is generally seen as the responsibility of a wider range of kin than within the nuclear family. It is common for children to be in the care of an aunt, or uncle, or grandparent, or older sibling, for example (see Keen 1988: 12–13). It is also common for children to move between different relatives. Within Aboriginal societies, such movement of children is frequently seen as responsible child-rearing, which enables children to build relationships within the wider family. Further, the movement of children between relatives can be quite dynamic and flexible, responding to a variety of contingencies. This is readily criticised, for example by teachers and welfare workers, as deficient parenting, and as denying children “security” and “stability”, which are typically defined in middle-class Anglo terms.\textsuperscript{5}

Several researchers have written about Aboriginal child rearing practices in the last three decades. Barwick (1974, 1988) worked with urban and rural families in Victoria, Eckermann (1977) with urban families in southeast Queensland, Hamilton (1981) with traditionally-oriented families in remote northern Arnhem Land in the Northern Territory, and more recently Malin et al. (1996, 1997) with urban families in Adelaide, the capital of South Australia. There are many similarities in the findings of all of this research, and they resonate with my observation of contemporary practices in urban and rural Queensland (and New South Wales). Malin’s (1997: 142–143) summary of the home socialisation of Adelaide Aboriginal children is consistent with the findings in other parts of Australia, and is pertinent to the situation in Brisbane and southeast Queensland:

In sum, the important aspects of child-rearing in the Aboriginal families of this study included encouraging autonomy by expecting that children would be self-reliant, able to make decisions for themselves regarding their basic needs, be naturally observant, practically competent, and prepared to seek help and attention from their peers as much as from adults . . . To balance this individual independence, the parents encouraged their children to be affiliative – that is, to be affectionate and nurturant with those younger than themselves, to maintain an awareness of the whereabouts of everyone, to help those needing it and to trust that their peers will be similarly dependable.

As Malin points out, there are significant differences between these expectations and the resulting practices on the one hand, and those of non-Aboriginal families on the other, where autonomy and self-reliance of children is not as highly valued or supported.
4. Aboriginal English in southeast Queensland

An important part of Aboriginal identity throughout much of Australia is found in the Aboriginal ways in which people speak English, known collectively as “Aboriginal English” (also AE). Nationwide, there is considerable variation in the dialectal varieties of Aboriginal English, with the “heaviest” (or furthest from Standard English, hereafter SE) varieties being spoken most in more remote areas, and the “lightest” (or closest to SE) being spoken most in urban and metropolitan areas. Aboriginal English has “a complex history of multiple origins” (Malcolm and Kaldor 1991: 68) including depidginisation in some areas, as well as the Aboriginalisation of English, and possibly decreolisation in some remote areas.

My work over two decades, to be introduced in Section 1.2 of Chapter 2, has highlighted the importance of including pragmatic features in defining language varieties. Because even where there is considerable overlap between SE and AE, and grammatical and phonological differences between them are not great, there can be significant pragmatic differences, which have implications for intercultural communication (e.g. Eades 1984, 1988, 1991, 1993). There may well also be semantic differences, following recent work on Aboriginal English in Western Australian, which shows the role of Aboriginal cultural schemas in the semantic system of the English lexicon (e.g. Malcolm and Sharifian 2002; Sharifian 2005).

It is the pragmatic features of AE which are most relevant to the Pinkenba case, as we will see. For example, much information seeking in Aboriginal interactions is carried out indirectly, avoiding direct questions. Important personal information is often sought in a reciprocal manner, where a person may give some information or hint at certain matters, as a kind of unspoken invitation to the interlocutor to provide information. Further, as we will see in Chapter 4, silence is positively valued in Aboriginal conversations, so that its use is not generally considered to be an indication of a failure of communication. While most of my research and applied work has been carried out in southeast Queensland, there is reason to believe that there is much that is shared between AE varieties around Australia (see, for example, Cooke 1996; Hiley 1996; Lavery 1992; Malcolm 1994; Malcolm et al. 1999; Mildren 1999).

I have written in a number of places about the importance for the legal system of significant differences between AE and SE in the role of questions in information-seeking (e.g. Eades 1992, 1994a, 1996a, 2003b). There can be no denying that questions are central to the legal system at all stages, and indeed to many other mainstream institutions, events and practices, including interviews, questionnaires and quizzes, as well as in many interpersonal relationships. On the other hand, much information-seeking in Aboriginal societies avoids direct
questions. The significance of this contrast was underlined in a 10-part ABC television drama in 1994 titled Heartland. The series focused on Aboriginal and non-Aboriginal interactions in a fictional New South Wales coastal town, located about 500 kilometres south of Brisbane. The story centred around a legal case which shared many similarities with the Condren case, to be discussed in Section 1.1 of Chapter 2. The protagonist was an Aboriginal police liaison officer, played by internationally-acclaimed Ernie Dingo. His “love interest” was a local white woman, played by the not-yet-famous Cate Blanchett. The series included much perceptive material on Aboriginal social and cultural life and intercultural communication, partly through Blanchett’s character’s well-meaning attempts to become a part of Dingo’s character’s community. In one scene, Blanchett’s character happily tells Dingo’s character that she has heard that the local Aboriginal people have given her an Aboriginal name – waadjin – and she wants to know what it means. Dingo’s character translates it for her as little questioner. Interestingly, any Aboriginal person watching the series would know that waadjin is a widely used Aboriginal English word, which simply means white woman. But this meaning was, to my knowledge, never made available (for non-Aboriginal viewers) during the television series. Dingo’s character’s translation of the AE word for white woman as little questioner highlights the widespread Aboriginal complaint that whites ask too many questions. And this widespread complaint encapsulates a significant difference between Aboriginal and non-Aboriginal varieties of English, which is relevant to any Aboriginal involvement in the legal system.

Turning specifically to the use of English by the boys in the Pinkenba case, my observations of them in Aboriginal peer group interactions and in individual interviews (see below), as well as in the Pinkenba hearing, led me to conclude that they were speakers of a “light” variety of Aboriginal English. That is, much of their talk shared features with other varieties of Australian English. The following examples of AE grammar, pronunciation and lexicon come from the boys’ talk during my observations, conversations and interviews with them some eight months prior to the Pinkenba hearing, as explained below in Section 6. The features mentioned in the discussion of Extract 1 can be found in general descriptions of AE (e.g. Malcolm and Kaldor 1991; Eades 1992; Malcolm et al. 1999).

Extract 1. From conversations between David, Albert and Barry, June 1994
[telling me about a concert the boys had attended starring the famous African American rap artist Ice Cube]
a) Das his autograph dere la- Ice Cube.
‘That’s Ice Cube’s autograph.’
b) *Dey all cheeky up dere.*
‘All those people are wild.’

c) *E name Jim.*
‘His name’s Jim.’

d) *Where you stay up dere?*
‘Where are you staying up there?’

All of these examples illustrate the widespread AE use of alveolar stops corresponding to SE interdental fricatives, e.g. in *das* (a), *dey* (b), and *dere* (a, b, d). The AE word *dere* (seen in Examples (a), (b) and (d) is widely used both as a location adverb (as with SE *there*), and with demonstrative function, translating SE “that, those”. The AE double subject construction is exemplified in Example (a). This example also illustrates an AE discourse marker, clause-final *la* which functions like clause-final *eh* and question tags to involve the interlocutor (possibly a contraction of English *look*). Examples (b) and (c) exemplify the verbless equational/descriptive sentence structure, which is the most persistent AE grammatical feature, found in even very light varieties of AE. Example (b) also contains the word *cheeky* which typically means “wild”, “dangerous” or even “violent” in AE (Arthur 1996: 92), in contrast to its general Australian English meaning of “impudent” or “insolent”. Example (c) illustrates the deletion of word-initial *h*, as well as the expression of possession by the juxtaposition of possessor with possessed. Example (d) illustrates the widespread AE question structure which involves no statement inversion or auxiliary insertion. The example also shows the finite verb form functioning as a progressive.

Because these three boys speak such a “light” variety of Aboriginal English, which shares many features with other varieties of Australian English, there would be unlikely to be major problems of communication in the areas of phonology, morphosyntax and lexicosemantics. Further, they said so little in their courtroom evidence, that it might seem that Aboriginal English is barely relevant to this book. Indeed, there was very little distinctive AE in the linguistic form of their answers in court, of which we will see many examples in Parts II and III below. (And, as we will see in Section 8.1 of Chapter 6, at least 60% of their answers in cross-examination were *yes, yeh, mm, no, nuh, I dunno* or *I don’t know*). This might lead to the erroneous conclusion that the boys’ English is just like that of other speakers of Australian English. My observations,
conversations and interviews with them in May 1994 indicated that when given the chance to give more than minimal answers, whether in peer interaction or in an interview with a SE speaker, they used many features of linguistic form that are characteristic of AE. But, more relevant than the linguistic form of the boys’ answers, was the fact that the boys had had little chance to develop bicultural competence, which is essential to successful participation in interviews, particularly in the legal system (see Eades 1992, 1994a). That is, we can assume that they were using Aboriginal ways of communicating which involve significant cultural differences from mainstream English, and which disadvantaged them in the interview situation, as we will see throughout Parts II and III. As I explained in radio interviews after the hearing, although these boys were “streetwise”, and much was made of this in the media as well as in cross-examination, they were not “interview-wise”. And, as we will see in Chapter 4, some of the most significant differences between “light” Aboriginal English and other varieties of Australian English are relevant to the minimal answers given by the boys to many of the cross-examination questions in this case.

5. Child witnesses in an adult court

In Queensland and Victoria, anyone under the age of 17 is defined as a child in the criminal justice system, while in the rest of Australia, people retain legal status as a child for twelve months more (Cunneen and White 2002: 268). This means that if the boys in this case had been defendants, they would have been most likely to give their evidence in a Children’s Court. At the time of the Pinkenba hearing, hearings in Children’s Court were closed hearings, magistrates in these courts were generally trained and experienced to deal with children, and there were support services which recognised some of the needs of children. Where children admitted guilt or were found guilty, they could participate in a restorative justice process known as Youth Justice Conferencing. This was introduced into Queensland by the Juvenile Justice Act 1992, and modelled on restorative justice approaches developed in New Zealand and Canada, and used in other Australian jurisdictions. Youth Justice Conferencing includes the offender and the victim as well as their support people, in addition to a prosecutor or police officer. Like other restorative justice processes it emphasises the restoration of balance to individuals and the community, in contrast to the punitive and/or welfare approaches which typify approaches to juvenile justice (Cunneen and White 2002: 358–359).

But, as child victim-witnesses in the prosecution of adult defendants, the boys in the Pinkenba case had no choice but to appear in the regular adult
Child witnesses in an adult court

They would have been eligible to be treated as “special witnesses” under Section 21A of the Queensland Evidence Act 1977. According to this section it should have been possible for them to give evidence-in-chief without being able to see the defendants, or in another room, or even by videotape. However, it seems that these provisions are rarely utilised (ABC 1999), and they would not have provided any protection from the cross-examination.

While most of the research on child witnesses has looked at issues directly concerned with child sexual abuse cases, and there has been a particular focus on quite young children, there are nevertheless some important findings from this area of research which need to be taken into account in the consideration of the 13- and 15-year-old witnesses in this case. The most comprehensive linguistic research is that of Walker (e.g. 1999) whose extensive analysis of a wide range of psycholinguistic and linguistic studies, including those which she conducted herself, led her to conclude (ibid.: 2) that even “very young children can tell us what they know if we ask them the right questions in the right way”. While much of the research involved children of younger ages than the boys in the Pinkenba case, Walker (ibid.: 5) believes that “adolescents [aged roughly 11–18] are . . . in some ways at greater risk than young children of misjudgment” by adults. Some of the reasons which led to this conclusion include the findings that adolescents . . .:

- Still have difficulty with complex negation . . .
- Are likely to lose track of long, complex questions . . .
- Are reluctant to ask for clarification of a question or acknowledge that they don’t understand.

The complexity of cross-examination questions addressed to child victim-witnesses was the focus of an Australian study in the mid-1980s (Brennan and Brennan 1988; Brennan 1994, 1995). This study found a number of linguistic strategies which caused comprehension difficulties for child witnesses, including negative rhetorical questions, juxtaposition of topics, nominalisation and unclear anaphora. Part of their study involved an experiment which tested children’s comprehension of questions through asking them to repeat questions selected from databases of courtroom questions. The study concluded that “children six to fifteen years of age fail to hear as sensible language around half of what is addressed to them during cross-examination” (Brennan 1995: 71).

The analysis of questions addressed to the child witnesses in the Pinkenba case will provide some examples in which the syntactic structure of questions raises concerns about possible comprehension difficulties. But perhaps the most disturbing implication for this case from research on child witnesses relates to suggestibility. As we will see in Section 1.2 of Chapter 4, a wide range of studies
have found that it is easier to mislead children than adults. While this may not be a surprising finding, it appears to have been completely ignored in this hearing.

6. My involvement in the Pinkenba case

At this point, it is important to introduce my involvement in the case specifically, and in issues concerning Aboriginal English in the legal process more generally.

Following my ethnography of communication PhD research with an extended Aboriginal family in southeast Queensland (Eades 1983), my interest in Aboriginal English in the legal process began in the mid 1980s, when I gave expert linguistic evidence in the case of *R v Condren*. This linguistic evidence related to the allegedly fabricated confession of a speaker of Aboriginal English (Eades 1993, 1995a), and it will be briefly discussed in Section 1.1 of Chapter 2. My work on this case drew my attention to the widespread lack of understanding among legal professionals about the subtle ways in which Aboriginal ways of using English differ from mainstream English. This realisation, combined with growing legal concerns about better communication with Aboriginal people, led to the publication of my handbook for lawyers titled *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (Eades 1992). This lawyers’ handbook, which was published by the Queensland Law Society, will be discussed in Section 1.2 of Chapter 2. It received considerable publicity, as did its relevance to a high-profile 1993 appeal case, that of Robyn Kina (see Eades 1996a, to be discussed in Section 7.2 of Chapter 3). Since the early 1990s I have taken up numerous invitations to present workshops and lectures to lawyers, magistrates and judges in several Australian states, on the topic of communicating with Aboriginal speakers of English in the legal process.

Because of this work, I was approached by Aboriginal Legal Services in Brisbane in May 1994 in relation to the three boys in the Pinkenba case. I was asked to provide a report about “aspects of [the boys’] language and communication patterns, together with [my] recommendations for maximising communication with these boys, should they be required to give evidence in relation to the incidents involved in their alleged abduction” (Eades 1994b: 1). In order to write this report I spent two days with the three boys at the beginning of June. Facilitated by an Aboriginal field officer from ALS, I was able to observe the boys in a number of casual conversations with their peers, as well as with field officers and other ALS staff, and to a limited extent with some Aboriginal adults. I also conducted a formal interview with each of the boys. My resulting nine-page report summarised aspects of their communication and language use, relating it to the
My involvement in the Pinkenba case

lawyers’ handbook (Eades 1992). I found each of the boys to be “lively, bright and highly communicative” (Eades 1994b: 8). However, I found that “the language and communication skills which these boys use in their community are . . . not the skills which are needed in formal legal interviews in police stations, lawyers’ offices, or in giving evidence to an inquiry or a courtroom hearing” (ibid.: 9). My report made a number of specific recommendations including the following (ibid.: 6–7):

– avoid ‘big words’
– ask questions with a simple structure, questioning only one proposition at a time
– wherever possible minimise the risk of gratuitous concurrence, by inviting the boys to give their own details. In particular avoid long strings of Yes-No questions (that is questions which can logically be answered with yes or no).

It is unclear how this report was used, but it seems to have assisted the CJC in its initial investigation of the boys’ complaint. After the committal hearing began in February 1995, I attended the second day of the hearing (Tuesday 21 February) and was amazed by the way in which the cross-examination of the witnesses was proceeding. It appeared that significant differences between Aboriginal and non-Aboriginal ways of using English were being exploited to distort the boys’ testimony, and to show them as untrustworthy and unreliable witnesses. During a morning adjournment I was introduced to the prosecutor who asked me to assist, by studying all of the boys’ evidence in this hearing (from the official transcript) and by writing a report in the form of a statement. He also asked me to be ready to appear as an expert witness two days later (on Thursday 23 February).

My ten-page report, which analysed cultural and linguistic issues involved in the cross-examination of the boys, was completed and left for the prosecutor early on the morning of 23 February. When I arrived at the court that afternoon, I was informed that the Director of Public Prosecutions had decided that I should not be called as an expert witness, and that my statement was not to be used. Thus, in coming to his conclusions (delivered on Friday 24 February) about the reliability and credibility of these Aboriginal witnesses, the magistrate was, in my view, not informed about important cultural and linguistic issues which needed to be understood in order to accurately interpret the boys’ answers to many of the questions in cross-examination. However, the lawyers’ handbook (Eades 1992, referred to above) had been clearly visible on the Bar table during the hearing. I was disturbed, as were a number of legal professionals present at the hearing, with the realisation that it had been used by the DCs to facilitate less effective communication with the Aboriginal boys, contrary to its intended purpose (see Section 1.2 of Chapter 2 below, and Eades 2004a, 2004b).
My involvement with the case did not stop with my report. The following week (on Monday 27 February), I issued a press release, calling for a public inquiry into the case, and calling the cross-examination of the boys of “an obscene travesty of justice”. This press release was reported in a number of newspapers, and my comments were rejected by one of the two defence counsel as “plain lies”. This resulted in another press release from me (on Tuesday 28 February) titled “Time for the public to know what was happening in the trial”. At this time (on Monday 27 February) I was also interviewed on national radio (on the morning current affairs Australian Broadcasting Commission – hereafter ABC – program AM) and Queensland state television (on the evening current affairs ABC program 7.30 Report, which was later televised in other states). I also did a number of other regional radio news interviews in that week, and appeared in a television documentary the following year about Queensland police and Aboriginal people which featured the Pinkenba case (ABC 1996). In the week after the Pinkenba hearing, I pursued my calls for an inquiry into the case in a telephone call with the Attorney-General, who had, some three years earlier, launched the lawyers’ handbook, with considerable enthusiasm, saying it was “an important work”, which would be made available to all state government legal officers (Gagliardi 1992). There was no public inquiry, but the Criminal Justice Commission undertook an extensive research project on Aboriginal witnesses in Queensland’s criminal courts (CJC 1996), which will be discussed in Section 6 of Chapter 10.

7. Data sources and transcription conventions

My analysis of this hearing is based on a number of data sources, namely:

– the official transcript of the three days of evidence, totalling 197 pages,
– copies of the official tape-recordings of almost the whole hearing (including the magistrate’s decision),
– my transcript of these tape-recordings,
– notes from my direct observations of most of the three days of evidence,
– notes from my informal discussions throughout the hearing with the prosecutor, other lawyers following the case, and members of the Aboriginal community,
– official transcripts of pre-trial interviews of the boys by investigating officers,
– newspaper cuttings, press releases, national radio and television interviews about the case,
notes from my two days of participant observation with the three boys in the interim between the Pinkenba event and the hearing (discussed in Section 6 above).

Several stylistic features of my discussion of the cross-examination (Parts II, III and IV of the book) need to be explained:

– Although the plural form of the noun phrase defence counsel is also defence counsel with no overt plural marking, when using the abbreviated form DC, I use the plural form DCs, which is consistent with spoken convention, and which can help to reduce any confusion.

– In the microanalysis of the Pinkenba hearing, (Chapters 4–10), I use the historic present tense. This is consistent with other sociolinguistic publications on courtroom hearings (e.g. Ehrlich 2001; Matoesian 1993, 2001), and it parallels the conventional academic use of present tense to refer to contemporary published material, as for example in “Ehrlich (2001) argues that …”.

– To avoid cumbersome expression, some of the discussion in Parts II and III uses the form Ye# to refer generically to the answers yeh, yes, or mm, and the form No# to refer generically to the answers no or nuh.

– In Chapters 4–10, all numeric specification of times and numbers of occurrences uses digits, rather than words (e.g. 4 times, rather than four times, 12 minutes, rather than twelve minutes).

– Italics are used throughout the book when quoting any utterance from a spoken source, primarily the courtroom hearing, but also radio and television broadcasts.

– All page numbers given in the form “p1, p23” etc refer to the official transcript of the Pinkenba hearing.

Data extracts throughout the book are my transcriptions from audiotapes. Where my discussion quotes only one short turn (or a short part of one turn), this quote is generally given in the text in italics, and thus it does not appear as a numbered extract. Where I quote one long turn or two or more turns, this quotation generally appears as a numbered extract. Where these extracts are from the cross-examination (i.e. the majority of the extracts), the extract heading gives the following information:

Extract number: Interviewing DC (DC1 or DC2) to named boy (David, Albert or Barry), Day of hearing (1, 2, or 3), corresponding page of official transcript.

I use the following standard transcription conventions for data transcribed from audiotapes: