

An Absence of Mutual Respect

Bäyñu Nayañu-Dapmaranhamirr Rom ga Norra

rom-bakmaranhamirr *Appeal* **Arrest** Commit **Assault**
Wäwunguykthun *Remand* Sentence **CONDITIONS** **Guarantee SECURITY**
manañirr **Warraw** **Bail** Legal **Liberty**
yoram birra'yun *dharrpal* Offend **BREACH** **Consent**
rom nhirpanawuy *Mägayamirr* **monuñu** Reside **Charge** **Warrant**
Romkurr Madayin Undertake **Guilty** *Failure*



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Aboriginal Resource and
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(Bäyṇu Ṇayaṇu-Dapmaranhamirr Rom ga Ṇorra)

published 2008 by

Aboriginal Resource and Development Services Inc.

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What is Balanda?

The word 'Balanda' is used by Yolŋu people to refer to non-Aboriginal and European people. The word comes from 'Hollander' and was adopted from south-east Asia, home of traditional Yolŋu overseas trading partners.

What is Yolŋu?

The word 'Yolŋu' is used to refer to the indigenous people of north-east Arnhem Land. In the local Yolŋu Matha languages, 'Yolŋu' literally translates as 'person' or 'people'.

Acknowledgements

Bryan Macdonald - ARDS Field Educator and Researcher
Bininydjirri Wunungmurra - Yolñu Consultant
Aboriginal Interpreter Services
North Australian Aboriginal Justice Agency

ARDS would like to express deep appreciation to the many Yolñu who were prepared to share their personal experiences of the Balanda legal system. Some Yolñu contributed to this research whilst directly experiencing the confusion of the Balanda legal system either through personal contact or through supporting a family member. The willingness of these Yolñu to participate honestly in this research has enabled ARDS to provide the clearest picture to date of the communication gulf which exists between Yolñu and Balanda and its impact on justice, Yolñu and the wider society.

ARDS would also like to convey profound gratitude to the many Yolñu elders who shared their inestimable and invaluable knowledge of Yolñu law, as well as their experiences and their history, which was vital in contextualising the current crisis.

This document was produced by Aboriginal Resource and Development Services Inc. (ARDS). It is based on research material collected for a legal education program funded by the Commonwealth Attorney General's Department as a part of the National Community Crime Prevention Program (NCCPP).

Who should read this report ?

This report is vital reading for you if you are:

- * in the Northern Territory Attorney General's Department
- * in the Northern Territory Department of Justice
- * in the Commonwealth Attorney General's Department
- * in other government agencies working in the criminal justice system
- * in non-government organisations working in the criminal justice system
- * in non-government organisations working in Indigenous affairs
- * interested in social justice



Introduction




This project set out to identify perceptions, misunderstandings and 'knowledge gaps' that Yolṇu¹ people have in relation to the Balanda² legal system.

Yolṇu people are the Indigenous people from north-east Arnhem Land in the Northern Territory. They live in one of the five main communities or one of the many homeland centres³ or outstations on their clan estates throughout the region. A considerable number have moved into larger centres like Nhulunbuy and Darwin.

Research relating to this project was conducted in Darwin, Gapuwiyak, Galiwin'ku and a number of homeland centres.

North-east Arnhem Land is still an Indigenous language-rich area where almost all Indigenous people are English-second-language speakers. All of the Yolṇu people who had input into this research were Yolṇu Matha⁴-first-language speakers. Many of the middle-aged to older Yolṇu people spoke a number of Indigenous languages or dialects, but had poor proficiency in English.

This research was undertaken to help understand some of the reasons why:

-  crime levels are increasing in many Aboriginal communities in the NT
-  there are disproportionately high numbers of Aboriginal people in the Balanda criminal justice system of the Northern Territory (NT)
-  increasing numbers of young Aboriginal males are coming to the larger centres and falling into trouble with the “white man's” law

The research was done through many hours of Yolṇu Matha-rich dialogue with Yolṇu people who had personal experience with the Balanda criminal justice system, as well as community consultations. We kept close contact with Yolṇu people as they progressed through the justice system, making use of any opportunities that presented themselves to dialogue about the Balanda legal system.

¹ 'Yolṇu' literally means 'person', but regularly nowadays is used to refer to the Aboriginal people of north-east Arnhem Land.

² Balanda - Non-Aboriginal person.

³ Homeland Centre - Small community on a clan's estate.

⁴ Yolṇu Matha - Languages and dialects of north-east Arnhem Land.

Executive Summary

This research explored how well the Balanda legal system is understood by Aboriginal people (especially English-second-language-speaking Aboriginal people) by focussing on:

- ◆ the interface between the Balanda legal system and the Yolñu people of north-east Arnhem Land
- ◆ the misunderstandings and 'knowledge gaps' by:
 - ▶ ascertaining the level of understanding Yolñu have of the Balanda legal system
 - ▶ identifying legal terms and words that Yolñu had difficulty properly understanding or did not understand at all

During the research, many Yolñu people expressed the opinion that most non-Aboriginal people demonstrated a serious lack of knowledge and understanding in relation to Yolñu people, Yolñu law and Yolñu ways. Consequently, the current situation was perceived by many Yolñu as being a two-sided problem.

Yolñu conveyed distress that many Balanda did not even recognise that a Yolñu legal system was in place, hence the title “Bäyñu Njayañu-Dapmaranhamirr Rom ga Njorra” which means “*no existence of deep and mutual respect*”. This was a sentiment echoed many times throughout the research for this project.

This finding has since been further substantiated in the “Little Children are Sacred” Report:

“An overwhelming request from both men and women during community consultations was for Aboriginal law to be respected, recognised, and incorporated with the wider Australian law where possible.”⁵

It was found that *misunderstandings and 'knowledge gaps' were very common* by both Yolñu people and Balanda. These were *often of a serious nature*, leaving the Yolñu individual very exposed and at *great risk of sliding further into trouble* with the Balanda legal system.

These serious misunderstandings and 'knowledge gaps' were often unrecognised. If they were recognised, the extent of the problem was regularly underestimated. These failures were not isolated to one party. At times

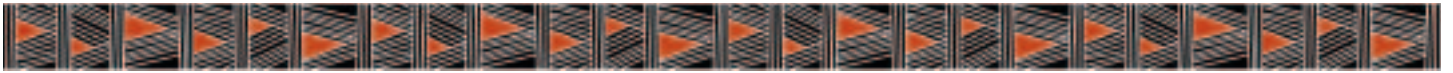


both Yolñu and Balanda failed to recognise communication problems. The majority of requests for assistance, though, were received from Yolñu clients.

Regularly it was assumed that the Yolñu person concerned had a basic understanding of the Balanda legal system when in reality this was rarely the case. *Communication* to the Yolñu clients based on this assumption *was usually ineffective*.

ARDS Legal Educator Bryan Macdonald (left) at work with Gundu Wunuñmurra and Edwina Ngalmi.

⁵ Rex Wild QC and Patricia Anderson, ‘Little Children are Sacred’, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007, p. 54.



Seldom was any feedback sought from the Yolŋu person to establish if they understood sufficiently. This represents *a serious failure in following good communicating practices*.

Frequently interpreters were not used when they should have been. In some cases, glaring communication failures existed, but no help was sought.

Police, court staff and legal professionals often spoke too quickly and/or used legal jargon in their communications with Yolŋu people.

Yolŋu people constantly commented that they found the Balanda legal system meaningless or very difficult to understand. This left them feeling disempowered and confused. Most were surprised to hear that all those in the Balanda legal system were following processes of law.

Again, the “Little Children are Sacred” Report has since made the same findings:

“It was a common theme in consultations that many Aboriginal people did not understand the mainstream law and many mainstream concepts.

...

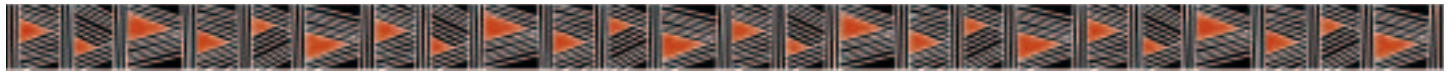
The Inquiry was also told that many youth today have an erroneous belief that the wider Australian society is lawless.”⁶

The lack of deep and mutual respect was regularly put forward by older Yolŋu people as the real reason for the current situation of increased crime in Aboriginal communities.

When deep and mutual respect is restored, then real communication can occur and we can work together much more effectively in reducing crime and making the NT a much better place to live.

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⁶ Rex Wild QC and Patricia Anderson, ‘Little Children are Sacred’, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007, p. 51.





Methodology

We have used a relational approach to researching the 'knowledge gaps' that Yolŋu people have with English legal words and concepts and the Balanda legal system.

ARDS staff involved in this project were all English as a first language speakers and had lived in Arnhem Land communities for years, developing many relationships during that time. In practice, our research was undertaken in the following contexts:

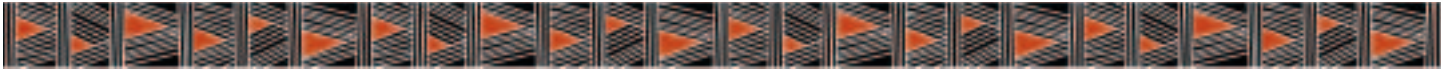
-  ARDS would be contacted by a Yolŋu person who was already in the Balanda criminal justice system, and asked for assistance in understanding and interacting with this system. This usually provided excellent opportunities to engage with Yolŋu people about the Balanda legal system.⁷
-  ARDS would be contacted by a concerned family member and asked to help their relative who was in the Balanda legal system. Again, this provided good opportunities to engage with Yolŋu people.
-  ARDS staff often encountered Yolŋu people who were experiencing difficulty, but for a range of reasons had not sought assistance. They often exhibited their misunderstandings regarding the Balanda legal system by making incorrect statements about their situation. These misunderstandings often placed them at risk of sliding further into trouble (e.g. breaching bail, resulting in an arrest warrant being issued).
-  ARDS conducted consultations in communities with individuals and clan groups. We worked through existing relationships. Often these dialogues occurred 'after hours', at night, when Yolŋu families gather around a fire and discuss matters of interest or concern to them.

It should be noted that:

-  ARDS staff with English as a first language are required to learn one of the Yolŋu Matha languages of north-east Arnhem Land. This proved vital in identifying communication problems during this research. Without this knowledge of a relevant Indigenous language, this research and these findings would not have been possible.
-  Often we used these 'sessions' as an opportunity for the ARDS English-first-language speaker to learn, practice and record Yolŋu Matha. Apart from being very useful as far as language learning is concerned, this approach has the important additional result of putting the Yolŋu person or people in the 'teacher' role and the ARDS staff members in the 'student' role. This helps create equal standing and thus more open and frank dialogue.

Culturally appropriate methods of research were utilised.

⁷ Even though there are Aboriginal Legal Aid Services, and more recently an Aboriginal Interpreter Service in the NT, there remain many language and knowledge gaps in the system through which many Aboriginal people are falling.



Methods that were considered *inappropriate* included:



Conducting research with a list of predetermined questions



Conducting large public meetings. People from all cultures are reluctant to discuss their private legal matters in public. Yolŋu people are no different. As will be shown later in this report, many English legal words and concepts are problematic for Yolŋu people. Many view the Balanda criminal justice system as *mulkuru* (strange/foreign). Those 'caught' in this system are usually already feeling uncomfortable and do not wish to be further embarrassed by having their lack of understanding exposed in a large meeting.

For these reasons the relational approach was adopted in this research to identify misunderstandings Yolŋu people have regarding the Balanda legal system and thereby some of the possible causes of crime.

For more information about ARDS methodology see Appendix One.



Background History

Pre-contact

Numerous Yolŋu people expressed strong feelings of resentment and frustration caused by the Balanda system coming in and *likan dhu ŋurrkam* (usurping) and *djäl ŋupan* (interfering in) their legal and cultural *rom* (ways). Many stated that their *maḍayin rom* (system of law) was in existence from the beginning of time, long before any Balanda arrived. One senior Yolŋu man, who has held many Balanda and Yolŋu leadership positions in his community, described these concerns by telling the following story:

“It is just like another problem we have on my mother's country. I am a *djungaya* (*manager*) for that land.

In recent years, buffalo, pigs and cane toads have come into that area. The buffalo and pigs have bred up. They have *bar'parmarañal ga miḍikuñal ŋunhi guļun mala* (*invaded, polluted and messed up the billabongs and lagoons*).

We used to eat a lot of things from the billabongs, like *rākay* (*sweet nut*). Now there are only a few. The *gurrumattji* (*magpie geese*) eat the *rākay* too, and we used to hunt them. Not many *gurrumattji* come around now. Most of the fish have died in those billabongs. The cane toads have also killed most of the goannas, lizards and frogs.

All those animals and plants used to live happily here, but these outside things have come in and destroyed a lot and made the water very muddy. Those plants and animals that are still alive in the billabongs, they do not feel comfortable. It is hard for them just to live.

The Balanda have come in just like the buffalo, pigs and cane toads. They could not see that there was peaceful life there in the billabongs. They came and took over. Like the buffaloes, they have also made the water very muddy for us Yolŋu people.

How can we get away from this problem and get back to a meaningful life? We could go to another billabong, but the "Balanda buffaloes, pigs and cane toads" are there too.' ”

The terms *māgayamirr* (peaceful, tranquil), *mayali' mirr* (meaningful), *rommirr* (legal, proper) were used regularly when referring to the *ŋathiliñu rom* (old ways). Everyone in traditional Yolŋu society had an ordered and meaningful role and when there was any trouble there were legal and social systems and processes to deal with these problems. Generally people lived to a good, old age.

But that all changed. The late 1800s and early 1900s saw major changes and upheaval in north-east Arnhem Land.



Balanda Frontier - Pastoral Industry

Pre-contact

Balanda Frontier

Mission Era

Post- Mission Era

Today

Late 1800's

Early 1900's

Late 1900's






During the latter part of the 1800s the pastoral industry attempted to establish itself in Arnhem Land. These attempts were met with fierce resistance, resulting in the abandonment of pastoral leases. In the process many lives were lost, both Balanda and Yolŋu, but more Yolŋu died as guns and rifles proved more lethal than spears.

Any history that was recorded, was heavily biased towards the Balanda frontier. Any resistance by Yolŋu people was viewed as being troublesome and treacherous. This was usually dealt with very firmly.

From a non-Aboriginal point of view, much of the history about these desperate struggles were never written down and are now secrets of the Australian bush. Generally, if Balanda stay long enough and develop good relationships, they will be told these accounts of history.

The Yolŋu recording of this period of history describes a desperate struggle to defend their land, their ways and their people. There was a guerrilla-style war. There were massacres of Yolŋu people. There were brutal whippings and other violence against Yolŋu people. There was widespread disrespect shown to the Yolŋu people and their social systems and legal structures.

It is a very sobering experience to go to some sites where massacres occurred in the past and have the horrific stories recounted to you:

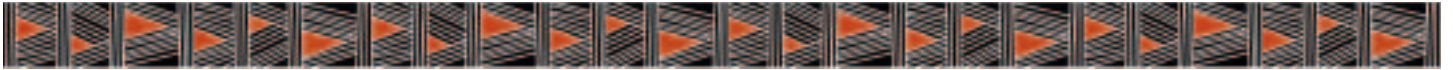
-  Yolŋu people being given food by mounted police who returned the next day and shot 30-40 of them
-  Old Yolŋu people being bashed to death with rifle butts
-  Unarmed women and children being shot as they sought refuge
-  Others being run down by horse-borne pastoralists and being shot in the back
-  The practice of 'heeling' (cutting people's Achilles tendons and releasing them to die a slow death).

A middle-aged Yolŋu man told of an incident in the mid-1960s when he and his extended family were shot at by white crocodile hunters in the Arnhem Bay area. They had to take refuge in hollows in the ground until darkness came allowing them to escape.



One former stockman, now in his early 60's, made this comment about the general treatment that Aboriginal stockmen received:

“A few station managers were ok, but most were real bad. They used to whip us Aboriginal stockman or put the boot into us (kick us).



A now elderly Balanda woman who lived in the Victoria River area during the 1950s and '60s, whose husband was involved in the pastoral industry, told ARDS the following account of her relationship with her Aboriginal 'house girl':

“I had an Aboriginal house girl. She was a similar age to me and we seemed to have our babies at about the same time. I would sometimes give her some food for her children. After a few years she adopted me, but I never ever told my husband or any other Balanda about that. It was really frowned upon to associate too closely with Aboriginal people in those days. If I had told them they would have laughed at me and ridiculed me. This sort of news would have spread through the pastoral community very quickly. It was sad that we could not treat each other as equals.”

This Balanda women's lament is shared by the great majority of Yolŋu people.

Missions

The church missions were often left to come along and 'pick up the pieces' after the Balanda frontier had established itself. Missionary staff often endured terrible conditions and had to do their work with meagre resources.

One mission leader saw their main role with the original inhabitants of this land in the early 1900s as 'supplying a soothing pillow for a dying race'.

Missions were often seen as temporary protection areas where Aboriginal people could be shielded from the negative aspects of the Balanda world whilst at the same time learning the 'civilised Balanda' ways.

What happened in actual practice varied greatly. Some missions were cruel and very rigid places that actively sought to crush traditional ways. A number of older Yolŋu people told of being whipped if they used any traditional language within the mission compound.

Other missionaries are still spoken of in very favourable terms today by Aboriginal people. They showed deep interest in and respect for Aboriginal people and their ways.

In Arnhem Land the combined effects of the missions and the Arnhem Aboriginal Reserve did provide a buffer between Balanda and the Aboriginal people inhabiting this area. In recent times this buffer has progressively been broken down.



History of Policing in Arnhem Land

As happened in many other parts of Australia during the frontier years, the police in Arnhem Land were often used to quash any resistance from Aboriginal people and secure the area so that pastoralists and miners could conduct their activities in safety.

In the late 1920s and early 1930s, grave concerns were held by the Balanda authorities about a 'large and aggressive clan' called the Balamumu. Their territory was thought to stretch along the eastern coast of Arnhem Land, from Nhulunbuy to the Roper River. The Balamumu are in fact one of about twenty clans along this strip of the Arnhem Land coast.

Yolŋu accounts of this period tell of many massacres and brutal treatment at the hands of mounted police. There are Yolŋu Elders alive today who were alive then. It is important to realise that this is not ancient history - these experiences occurred within living memory.

The following account from a senior Yolŋu man about his early working life experiences shows that this brutal treatment continued on into the 1950s and '60s:

"I am a Yolŋu man. I used to be a police tracker based at Roper Bar. Many times I was upset by what we had to do.

Yolŋu people had to carry the chain - you know, in a line they were chained from neck to neck. They had to walk on foot from maybe Numbulwar to Roper Bar police station, on the other side of Ngukurr (approximately 180 kms).

The police and trackers were on the horses. The Aboriginal people used to be tied up like dogs.

There was only one small cell there at Roper Bar police station that could hold two or three people. The others were tied up to trees. Some others had the chain and a heavy ball on their leg.

One man nearly died with that chain and ball. He tried to run away and jumped into the river and nearly drowned, but I jumped in and saved him.

When the big boss policeman came down to Roper Bar I told him that you should not treat people like this. He told me that if I did not like it, I can resign. So that is what I did."

A number of Yolŋu people expressed deep concerns regarding an incident at Galiwin'ku (Elcho Island) in 1990 when a skinny, weak and sick Yolŋu man was shot dead by Territory Response Group (TRG) police. This incident was viewed by many Yolŋu people as the police themselves acting in a very lawless way. Even now, more than 15 years on, there is still much strong feeling regarding this incident. An Aboriginal Community Police Officer (ACPO) at the time commented:

"I was supposed to arrest that man, but the TRG commander changed his plan, but did not tell any Yolŋu people. They shot that man dead in the head. I nearly lost my life because of that.

This community was very angry at the police and they were angry at me, because I was the ACPO. It is very hard being an ACPO. I resigned after that."



These incidences, and others like them, have influenced the way many Yolŋu people view the Balanda criminal justice system. This fact still needs to be recognised, accepted and managed by much of mainstream Australia.

This painful historical experience has resulted in many strongly held negative views about the police and the Balanda legal system. Our research found that contemporary misunderstandings resulting from poor communication were often based on, and ultimately reinforced, these previously held negative views born out of painful historical experience.

Any educational material or programs about the Balanda legal system, aimed at Yolŋu people, must acknowledge this painful historical experience. New knowledge does not fill a void. To be effective, new knowledge must build on, and where necessary, address currently held knowledge.

Current Perceptions - Balanda Legal System

During the course of our community consultations and work with Yolŋu people in the courts and prisons of the NT, it has become very clear that widespread and serious misunderstandings exist for Yolŋu people in relation to the Balanda legal system.

It should be noted that serious and widespread misunderstanding also exists by Balanda people in relation to Yolŋu people and their social and legal systems⁸ and structures. Many Yolŋu people felt that the Balanda misunderstanding of Yolŋu law was, and still is, far greater than Yolŋu misunderstanding of Balanda law.

Many older Yolŋu people went further, saying that there was little or no respect shown by Balanda towards Yolŋu people and their legal systems and structures. The words *ñayañu-wutthun* (deep assault on the emotions and the soul) and *morrumurru* (seething anger lying just below the surface) were used often by Yolŋu people giving their views.

Overall there exists considerable underlying distrust by Yolŋu people of the Balanda criminal justice system.

Underlying Distrust - Lack of Trust and Respect

When talking about the lack of understanding, trust and respect shown by most Balanda towards the Yolŋu system, chambers, objects and articles of law, Yolŋu people regularly used the following phrases:



Yaka Balanday ga rum'rumdhun romnha, limurruŋ

'Balanda do not respect our laws and ways'



Bayañu makmakthunnamirr rom ga ñorra

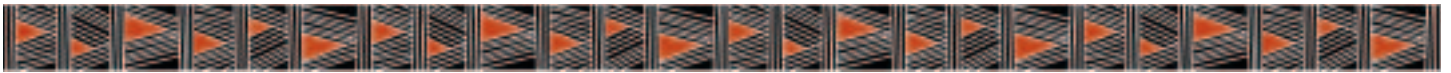
'No respect and admiration for each other exists'








Bayañu ñayañu-dapmaranhamirr rom

'No capturing of each other's feelings and soul - no deep respect and admiration which is mutual'

⁸ Many Yolŋu people continue to legally assent, and therefore adhere to, their Maḍayin system of law through their Buku-lupthun ceremony. Most have never assented to the Balanda legal system and in fact many view this system as inferior and lawless, a system where the powerful people get their way.






This lack of understanding and respect on the part of Balanda produces a number of effects:

-  Balanda may (unintentionally) violate Yolŋu law creating a feeling of resentment amongst Yolŋu people.
-  It creates and adds to the pre-existing distrust of the Balanda criminal justice system. One senior clan leader held grave concerns that a riot similar to the 2004 Palm Island riot could happen in his community if the police continued doing what they had been doing.
-  It reinforces many previously formed, strong, negative views Yolŋu people have relating to the Balanda criminal justice system. The words *rommiriw* and *mayali' miriw* (uncivilized/lawless and meaningless) were used regularly.
-  It leads many Yolŋu people to respond with the term *ŋayanju-wuŋthunnamirr rom* (a serious assaulting of the soul) when asked about Balanda law courts, prisons and police.
-  A number of senior elders were sure that this lack of respect from the Balanda world generally was a major contributing factor in the current high numbers of Yolŋu people in the courts and prisons. Many went on to say that respect must be reciprocal: it must be a two-way thing if we are going to be serious about addressing this problem.

Search Warrants

During the course of this project ARDS detected considerable resentment from Yolŋu people towards the NT Police in relation to the exercising of both search and arrest warrants where *dhuyu* (sacred/holy) articles of law are involved or *nunŋat wäŋa* (restricted areas) and *warraw'* (traditional chambers of law) are violated. The following is a sample of comments:

-  The police just barged into my house and they were looking through the bags with the sacred, holy objects of law in them. They should not see them. We tried to stop them but they would not listen. Really they should make a large payment for what they have done. (Senior Yolŋu *Dalkarramirr*, appointed Yirritja clan leader.⁸)
-  Those police came into this area close to the *warraw'* and arrested a Yolŋu person. They did not even talk to the *dalkarramirr* or *djirrikaymirr* (appointed clan leaders). They showed no respect at all. Their actions made everyone feel very angry and hurt. (Former Council Chairman, former ACPO and Northern Land Council member.)
-  If the police come to this *warraw'* (chamber of law) to search for something or arrest someone we would tell them to stop and go back. We will come out and talk to you in a public area. If they continued, we would spear them. They would not leave this area. We would bury them here. We know that we would go to prison for a long time but this is not their jurisdiction. They would not just barge into another jurisdiction like Queensland or Indonesia and do this. (Senior Yolŋu *Djirrikaymirr*, appointed Dhuwa clan leader.⁹)

⁹ Yirritja - Everything in Yolŋu society is divided into one of two moieties, Yirritja and Dhuwa.



For this education program and other crime prevention initiatives to be successful, the NT Police must urgently review and change their current practices in this area. If current practices of exercising warrants are continued, any efforts to reduce or prevent crime will be significantly undermined. Many senior Yolŋu people, including many *Dalkarramirr* and *Djirrikaymirr* (political leaders), expressed strong desires that the police should work *with* them, not work against them or ignore them as they regularly perceive to be the case.

Police

Many Yolŋu people felt that police generally acted in a lawless way towards Aboriginal people. Many who had been to Berrimah Prison (the main prison for the Top End of the NT) and seen the high numbers of Aboriginal prisoners there put this forward as conclusive proof that the police and courts do not act in a fair and just manner towards Aboriginal people.

The case of the \$15 watch band

This case shows something of the views held by many. This incident arose when a very senior and very respected Yolŋu man inadvertently walked out of a shop without paying for a \$15 watch band.

Upon realising his mistake he returned immediately to the shop admitting his mistake. This was clearly an ‘honest’ mistake. There was never any intent to steal and therefore no offence had been committed. Unfortunately for the old man, this shop has a zero tolerance policy and moved immediately to prosecute.

The old man was summoned to court. Despite numerous requests during the court process to drop the charges, the Department of Public Prosecution, Police and the shop management refused to see reason.

The matter went to a hearing. At the beginning of the hearing the prosecutor withdrew the charges. There was now no case to answer. Almost \$3000 was spent by the man on travel and accommodation attending court commitments to defend himself. Whilst the old man was relieved that the charges had been finally dropped, this whole incident left him with a range of emotions from concern and confusion to anger.

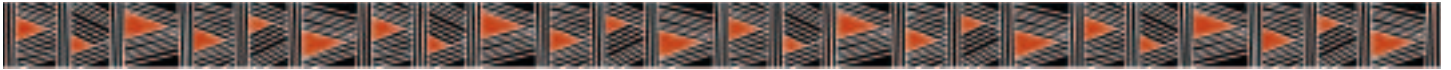
He commented:

“Many times I have talked in my community about respecting the law, both Balanda law and Yolŋu law. Many times I have helped police when they came into our community. When the police act like this it makes it very hard to respect them. Also many young men in this community already hate the police.

I am really worried that something like that riot at Palm Island last year might happen here in this community. If the police keep on acting like this it will be hard to stop a riot happening here.”

This same elder felt that the ACPOs were not working to help the community. He felt that they could be doing a lot more to bridge the gaps between the NT Police and the community. From our research data it would appear that ACPOs are experiencing their own communication problems which would be one reason why they are not bridging the gap between police and community.

⁹ Dhuwa - Everything in Yolŋu society is divided into one of two moieties, Dhuwa and Yirrtija.



Balanda Courts

Our research revealed a widespread lack of understanding or incorrect perceptions amongst Yolṇu regarding Balanda court processes and the roles of different people in these processes.

This comment, by a Yolṇu man who had himself been in court previously, represents the view of many Yolṇu:

“Nunhi Balanda court gumurr-däl ṇayi ga mayali’miriw ga warwuyunmirr”

(‘That white man’s court is very difficult and hard to understand. It does not make any sense. This makes us worry a lot.’)

Many Yolṇu people who were in court or had been through court felt that they stood there in the court alone, that no one helped them. When asked about their lawyer helping them, many were surprised to hear that this person was ‘on their side’.

All but one person felt that the prosecutor was a ‘persecutor’ who *Nunhi ṇayi prosecutor ṇayi ga ṇupan yolṇuny* (relentlessly pursued them). Some Yolṇu used the word ‘persecutor’ when referring to the prosecutor. When queried about this they felt these words meant the same thing. Many felt that the prosecutors regularly lied and fabricated stories.

Three Aboriginal Interpreter Service (AIS) interpreters stated that their first legal interpreting job was in fact the very first time they had been in a court room. One interpreter went to considerable lengths to locate an ARDS staff member, asking them to accompany her to court for support. At the end of the first day of legal interpreting she stated:

“I feel like I have been given a very large and very tough piece of meat to eat today”.

Most respondents used the word *bunḡawa* (big boss, dictator) when referring to the magistrate or judge and few had any idea that this person was in fact neutral and following processes of law. ARDS has observed many police, lawyers and AIS interpreters using the words ‘boss’ or *bunḡawa* when referring to the magistrate or judge. This is confusing and unhelpful, adding to the already considerable misunderstandings that exist.

The way lawyers are rostered also proved to be a common point of concern or complaint during our research. One Yolṇu man had six different lawyers represent him in relation to one matter. It was common to see Yolṇu clients having three to four different lawyers during their court process. This was found to be frustrating and confusing. When ARDS raised this matter with NAAJA (North Australian Aboriginal Justice Agency) and asked them if defendants whose matters were lengthy (eg. going to hearing or trial) could have a lawyer assigned to them and that this lawyer be allowed to follow the matter until it was concluded, NAAJA claimed that due to their budgetary constraints they could not handle matters in any other way than the current approach.

All but a very few felt that the Balanda legal system was *rommiriw ga dhukarrmiriw* (had no proper legal processes).



The NT Law Society's 'Indigenous Protocols for Lawyers in the Northern Territory' advises lawyers:
 “You have an obligation to explain to your client what the processes of law are, what they involve, the options they have and the risks associated with those options.

You have a duty to ensure that they understand what you have told them so they can make informed decisions ...

For this reason it is critical that you are certain that your client has made an informed choice in instructing you.”¹¹

From the high level of misunderstanding Yolŋu people experience, as identified through this project, it would appear that often the above standards are not being met in practice.

The United Nations International Covenant on Civil and Political Rights to which Australia is signatory states the following in Article 14:

“1. All persons shall be equal before the courts and tribunals.....

3. In determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and of the cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- ...
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;”¹²

Again, it would appear from our research that regularly the above standards not being met, in relation to Yolŋu in the Northern Territory.

¹¹ 'Indigenous Protocols for Lawyers in the Northern Territory', 1st edn, NT Law Society, 2004, p. 10, paragraphs 4-6.

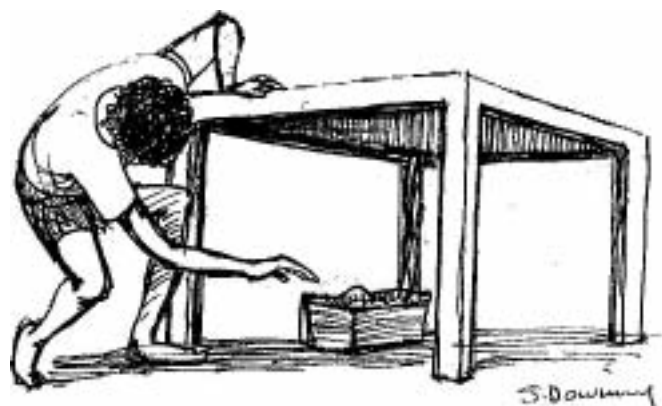
¹² 'International Covenant on Civil and Political Rights,' New York, 16 December 1966. Reprinted 1980 No. 23 in 'Australian Treaty Series' by Australian Government Publishing Service Canberra www.austlii.edu.au/au/other/dfat/treaties/1980/23.html

Signing Court Documents

When people are required to sign court documents, such as bail undertakings or bail guarantor agreements, these must be signed in the presence of one of the court staff who is a Justice of the Peace (JP) or a Commissioner of Oaths.

During the period of this research, ARDS observed many of these documents being signed, yet only twice was an interpreter used and then only at the suggestion of an ARDS community educator.

In many cases the lawyer involved was busy with other cases and was unable to explain the requirements of the document being signed. A number of lawyers stated that they did not feel they had to explain these requirements as they were confident that the court staff would explain the undertaking or agreement to their clients.



This drawing gives a picture of the mental image some Yolŋu people had when hearing the word “Undertaking”

The court staff usually ran through the document very quickly, in English. Only on a few occasions was the Aboriginal person signing the document asked if they understood or if they had any questions. Not once did we observe the client being asked to give feedback in their own words as a way of ensuring that they understood what they were signing, what was required of them and the ramifications of any failure to comply.

This represents a serious failure on the part of the courts to follow very basic, good communication principles.

In the course of this project, ARDS sat with Yolŋu people who had just signed a court document to determine their level of understanding of the document they had just signed. On every occasion serious misunderstandings existed. In many of these cases, these misunderstandings set the Yolŋu person on a course to slide further into trouble with the Balanda legal system.

It should be noted that lawyers working for Aboriginal Legal Aid Services often have a heavy case file load and many, for whom this is their first job as a practising lawyer, are inexperienced.

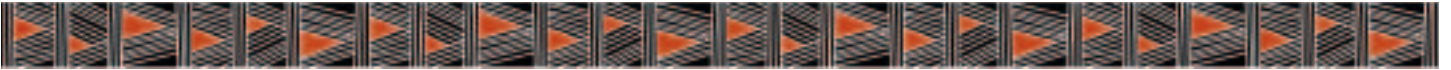
There was also observed to be a very high turnover of lawyers through the Aboriginal Legal Aid Services. This is very concerning.

Balanda Prison

Many senior Yolŋu people expressed grave concerns about the Balanda Correctional Services or, more specifically, the prisons. The following comments are a sample:

“We see many of our Yolŋu young men go into prison and they come out worse than when they went in. They learn a lot of bad things inside.”

“Can the walls of the cells teach, instruct and rehabilitate those people inside? Why don't the Balanda send those Yolŋu back to their *yirralka wāŋa* (clan's estate) and we can give *raypirri* (instruction). The country will also speak to them and remind them of who they are and what their responsibilities are.”



Many Yolŋu people who had been into Darwin's Berrimah Prison (as prisoner or visitor) commented to us on the high proportion of Aboriginal prisoners.

The NT has a jail rate of 580 per 100,000, compared with the national rate of 154 per 100,000.¹³ Around 80% of these are Aboriginal.

This situation was seen as proof that the Balanda justice system does not deliver justice to Yolŋu people, or in fact, to any Aboriginal people.

Reasons for Crime - Yolŋu Views

When asked for their views on why there was increasing crime in communities, Yolŋu gave the following responses:

'There is no mentoring like in the old days, like from *ŋäpipi* to *waku* (mother's brother to nephew).'

'These days there is a lot of unemployment and boredom here, not like before when everyone had a role.'

'Balanda do not understand our *Madayin Rom* (complete system of law) and they do not respect it. This is what we call *ŋayaŋu-wuŋthunnamirr rom* (assaulting the deep feelings and soul).'



'Balanda TV and videos bring a lot bad things into our community.'

'There are only a few *worruŋu mala* (elders) left and many of those are weak and tired.'

'Yolŋu leaders have their own personal problems and they are not thinking about their clans like the leaders in the past.'

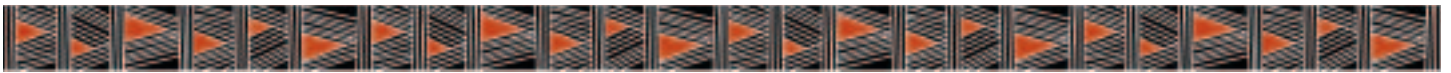
'The council is *yan nyäl, nhakun wakal, yaka yuwalk* (false, like playing/joking, not true or real).'

'A lot of people run away from problems here, like family problems or problems with Yolŋu law. They go to Darwin and get into trouble there too.'

'The *worruŋu mala* are blaming the *yuŋa mala* (young people) and vice versa.'

Having many clans in one place or community is making us *ganydjarmiriw* (disempowered). On our homeland it is different.'

¹³ NT News, 24 October 2005.



'The way the police act many times breeds ṇayaṇu-moṇukthirr, ṇoy-dhungur'yun, mǎrr-djuḷkthun (contempt, anger, suspicions and resentments).'

'Drug dealing is a big temptation. There are not many other opportunities to make a business in these communities. It is hard to live on CDEP (Community Development Employment Program) payments in these communities.'

'There are a lot of young boys in court, Balanda courts, but they do not understand what the police or the lawyer is saying to them. The family usually does not understand what is going on so they cannot help the young boys.'

'The police *dhā-warku'yun* and *gur'kuryun* (tease and provoke) some of the young boys. They (police) know their law very well, but we do not understand it. They tease and provoke the young boys until they react and then bang, they have got them. This is not right!'

'Nearly every time I go to court there is a different lawyer. So I have to tell them the whole story again. Why do they do that?'

'Drugs like marijuana have only come into our communities in the last few years. They are just a new thing for us. You have to experience it to see if it is good or bad. Until today I did not know that the Balanda had laws about marijuana (making it illegal to possess or deal marijuana).'

'Your Balanda prisons teach Yolṇu men a lot of bad things. They (the ex-prisoners) come out thinking they are real tough. "Look at me. I have been in prison." They threaten their family to buy things for them, if not they will kill them or belt them. They come out worse, really bad! They also teach these bad habits to some of the other young men in our community.'

'In the council in our community we should be the *yindi* (owners) and the Balanda should be the *yothu* (managers or workers). But the Balanda turn it upside down and makethemselves powerful. Balanda always do this.'



'Substance abuse does help to cause crime. But it is not the *dhūḍi dhāwu* (root cause). I had problems here in my community and I went to Nhulunbuy, in the long grass. After a while my wife came and picked me up. The problems were still waiting for me here when I got back. Drinking or smoking just makes the problems bigger, but sometimes you think maybe they will go away.'

'The lawyers and magistrates do not understand about living in remote communities. Often it is very hard to travel and costs a lot of money. Why do they just keep on adjourning and adjourning the courts? They are just trying to make it harder and harder.'

Many other Yolṇu people made similar comments, so we have not duplicated them here.



Problem Words and Concepts

The main object of this project is to identify 'knowledge gaps' that Yolŋu people have in relation to the Balanda criminal justice system.

One of the ways we have done this is to look at specific English legal words, assess the Yolŋu person's understandings or misunderstandings and then record and analyse this data.

English Legal Terms Data

We based this part of our research around the following 30 words which are commonly used in the legal context in the NT:

Accuse/Accused	Alleged	Appear	Arrest	Assault
Bail	Charge	Commit	Comply	Conditions
Consent	Directly/Indirectly	Fail/Failure	Fine	Forfeit
Guarantee	Guilty	Lawful/Unlawful	Legal/Illegal	Liberty
Obligated/Not obliged	Offend/Breach	Remand	Reside	Security
Sentence	Summons	Surety	Undertake	Warrant



These are regularly encountered in any of the following contexts in:



verbal communications between legal professionals and their clients



legal documents such as letters from legal professionals to clients



court documents such as summons, bail undertakings, bail guarantor agreements

police interviews with suspects

This list of words is by no means a complete list of problematic English legal words. ARDS is continuing to work on a much larger list of English legal words.

Group Analysis

We have categorised the responses into 5 groups:

- Correct
- Partially Correct
- Incorrect Meaning for the Context
- Incorrect
- Nil - no idea at all

For example ...

Charge can have the following meanings in different contexts:

- * to charge - wild bull chasing/charging
- * to charge \$3.00 for loaf of bread
- * to charge out or up to an account
- * an electrical charge
- * to charge a flat battery
- * an explosive charge
- * to be charged with an important duty
- * to formally accuse a suspect in court

The Yolŋu people that we engaged with came from a wide cross-section of the community. We have divided them into four groups:

1. Language professionals (interpreters, translators)
2. Community leaders (including chairpersons, teachers and ACPOs)
3. Other community members born before 1965
4. Other community members born after 1965

From the 30 commonly used English legal words we have recorded 647 'word responses', from 200 Yolŋu people. This represents a sample size of approximately 2.5% of the total Yolŋu population (for the complete data table see Appendix Two).

Overall Results for All Groups (Total Responses - 647)

The extent of the problems facing Yolŋu people when they have to interact with the Balanda legal system show clearly in the overall results below, with over 95% of Yolŋu surveyed unable to correctly identify the meaning of the 30 commonly used English legal terms.

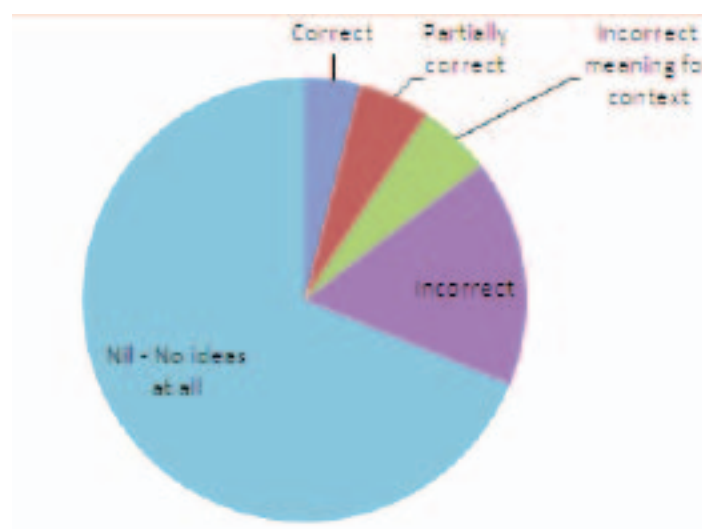
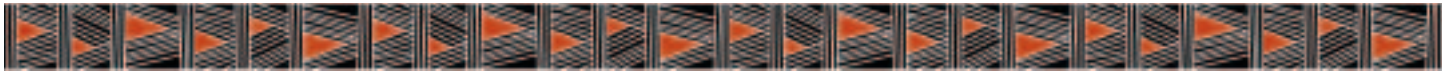


Figure 1 - overall results for all groups



We now look at a breakdown of the responses in the four groups: (1) Language professionals; (2) Community leaders; (3) Community members born before 1965; and (4) Community members born after 1965.

1. *Language Professionals (Total Responses - 66)*

Most of these responses came from Aboriginal Interpreter Service (AIS) interpreters.

Note: ARDS requests that nothing in this publication be construed as being critical of individual interpreters. ARDS staff members work closely with Yolŋu interpreters and seek to support and resource them and the AIS. This is much more a systemic problem where interpreters are expected to perform tasks that they are not properly trained for or qualified to do. This will be further discussed later.

Only 17% of responses from language professionals were correct and 15% partially correct. Language professionals are the people whom the criminal justice system depends on to facilitate communication and therefore justice in court processes.

Based on this research, justice can only be deemed to have been genuinely served in less than one third of cases involving Yolŋu.

Nearly two thirds of responses were either *Incorrect* or *Nil - no idea at all*. This means that for Yolŋu, achieving justice is more a matter of luck (as to which interpreter is assigned to their court hearing) than an expectation or citizen's right.

These results are alarming, but should not be surprising when considered in the context of a lack of interpreter qualifications and training, and the fact that interpreters are currently being asked to perform tasks for which they are not trained or qualified.

We observed lawyers having to make assessments of the competency of Aboriginal interpreters yet they had no Aboriginal language skills. The comments below by a legal professional highlight this:

Legal professional:	Interpreter X is a really good interpreter.
ARDS:	How did you make that assessment?
Legal professional:	She is very punctual, always presents well and is confident.
ARDS:	Yes, but there is more to interpreting than presentation, isn't there?
Legal professional:	Yes, I guess you're right. Not having any Yolŋu Matha language skills myself, I am not in a position to make any assessment regarding an interpreter's performance, am I?

During discussions with the above Interpreter X, she stated that she felt she was not properly trained and needed much more training. At times she found the Balanda legal system very unfriendly. She shared an account of when she noticed a prosecutor using the incorrect name when addressing an accused Yolŋu person. She pointed this out to the court only to be later given a reprimand by the prosecutor for 'embarrassing' him.



Another incident that ARDS observed in the Supreme Court will show how easily good communications can break down. An ARDS staff member was sitting with a lawyer, an interpreter, the Yolŋu client and his father. The client had pleaded guilty. The group were about to go into the Supreme Court for final sentencing submissions. The lawyer wished to gain an understanding of his client's interests, sports and hobbies. Via the interpreter the Yolŋu client told the lawyer that he played in a band and really enjoyed this. He had earned some money from playing in the band. The conversation continued:

Lawyer: How many gigs have you had?
Interpreter (after a short hesitation): *Nhämunha gurrumattji nhe märraŋal*
 (How many magpie geese have you had)?
Client (with puzzled expression): *Dharrwa.*
Interpreter: Lots.

Lawyer begins to ask the next question, but ARDS staff member intervenes.

ARDS: Excuse me. You are talking about bands and they are now talking about magpie geese.
Lawyer: How did that happen?

The interpreter was not familiar with the term 'gigs' so went to the closest English word she knew, which was 'geese'. On this occasion no serious ramifications resulted, but this incident shows how easily communication can fail - even in simple conversations. Complex and intangible legal concepts require a much higher level of language skills. The likelihood of communication problems occurring are greatly increased.

2. *Community Leaders (Total Responses - 154)*

This group includes Council chairpersons and other similar community organisational leaders, such as Northern Land Council (NLC) and Aboriginal and Torres Strait Islander Council (ATSIC) council representatives, Yolŋu school teachers and ACPOs. Yolŋu from this group would regularly interact with Balanda and the Balanda world in a leadership capacity.

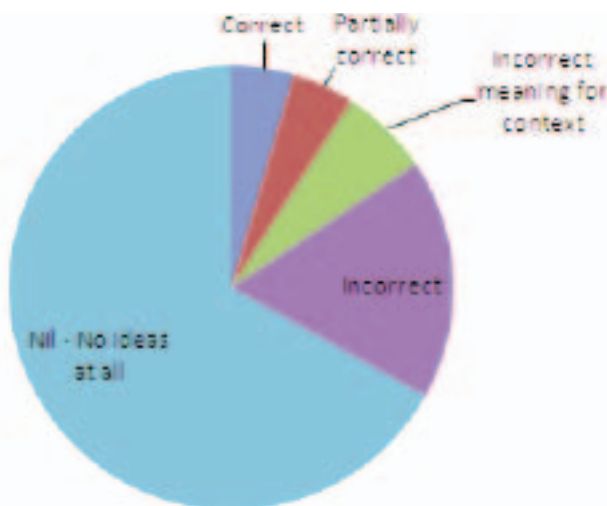


Figure 3 - community leaders

Again, the results are alarming. People from this group are regularly called upon to facilitate communication between their communities and a whole range of outside bodies and individuals involving a wide range of topics. With 90% not understanding the commonly used English legal terms, how can Balanda expect these communities to be able to support their members through the Balanda legal system?

3. *Community Members - born BEFORE 1965 (Total Responses - 212)*

This group represents the remainder of respondents who had access to mission schooling. It was not determined whether the respondents regularly attended school.



Figure 4 - community members (born before 1965)

We observed that very old members of this group were likely to have significant problems with English and often displayed problems signing their name. They still had good Yolŋu Matha skills and a much better general understanding of laws and legal processes than community members born after 1965. We found it much easier to explain Balanda legal concepts to this group compared with the younger group.

4. *Community Members - born AFTER 1965 (Total Responses - 215)*

This group represents the remainder of respondents who had access to government schooling. Again, it was not determined whether the respondents regularly attended school.

We observed that this group were likely to have significant problems with English and also often displayed problems signing their name.

For this group, 97% of responses were either incorrect or 'nil'. Again, very alarming, as most of the Yolŋu people who are currently becoming caught up in the Balanda legal system come from this group.

The younger group spoke a 'baby' Yolŋu Matha as their first language with some poor English. Many displayed a poor understanding of their own legal systems as well as a poor understanding of Balanda legal systems. Many seemed to be stuck in a confused 'no man's land' between the two cultures.

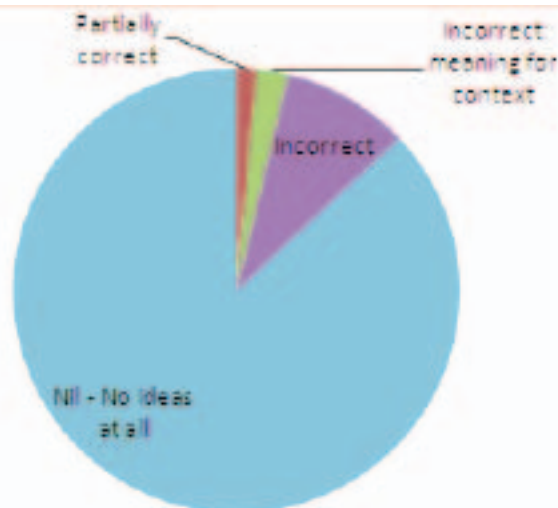


Figure 5 - community members (born after 1965)

During the research for this project we observed a number of young male Yolŋu people having great difficulties in simply signing a legal document. Two Yolŋu (16 and 19 years of age) were unable to sign and had to write an 'X'. On other occasions people printed a name very slowly. Often the letters were back to front or unrecognisable. This was usually a very embarrassing process for the young men concerned. During the dialogues that followed, it often emerged that many of the young men from this group had little or no idea what they had just signed, what was required of them and the ramifications if they failed to do what was required. Even worse, many had erroneous understandings which unknowingly set them on a course to slide deeper into trouble with the Balanda legal system.



A very typical case study highlights this issue:

ARDS was contacted by the family of a young Yolŋu man. The family had reason to believe the young man was in Berrimah prison. This was confirmed and a visit arranged.

As a result of the dialogue in prison and some phone calls to the courts and NAALAS, it became clear that a warrant for this man's arrest had been active for some time due to a breach of bail - he had failed to return to court. He came to the notice of police and they exercised the warrant.

His understanding of 'bail' was that he had been 'bailed out' of trouble and that was the end of the matter. He was adamant that he was not required to return to court. To make matters worse for him, when the police did exercise the arrest warrant, the Yolŋu man, who felt that he was being very unfairly dealt with, resisted arrest and punched the police officer. As a result, additional to the original charges, he now had some more charges, all due to serious communication failures between the courts and this Yolŋu man.

This is not an isolated event. Later in this report we talk further about 'bail'.

Word Analysis

The 30 legal words examined in this research are all heard regularly in court. They are also key words which, when taken out of their sentences or paragraphs, remove much, if not all, of the meaning of the sentences or paragraphs.

Nil - No idea

For 25 of the 30 commonly used English legal terms the majority response was *Nil - no idea at all*. For 21 of these problematic words, the proportion of responses that were *Nil - no idea at all* was 75% or more. This represents a massive gulf in understanding between Yolŋu and Balanda legal systems.

Another problem identified during the research was English words with a prefix. Words like in-direct, un-lawful and il-legal are all examples of English prefix words where the prefix changes the meaning to the complete opposite. Yolŋu Matha is a suffixing language and does not use prefixes, so many Yolŋu people did not hear the prefix, or if they did, did not understand its function in altering the meaning of the word. This is a classic example of language differences causing a total misunderstanding, which, in a legal context, can have serious consequences.

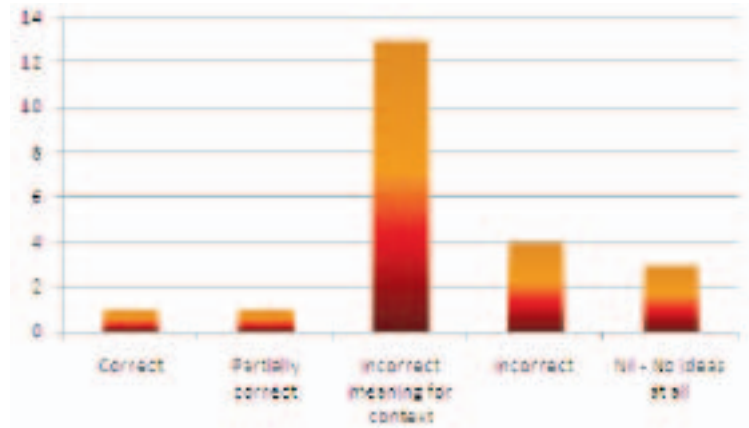


Incorrect Meaning for Context

The words 'charge' and 'bail' appeared problematic as these words had multiple meanings. In the course of this research, they were identified as known words, but the incorrect meaning was applied in the legal context.

Charge - Formally Accuse (Total Responses - 22)

We observed frequent misunderstanding in relation to the word 'charge'. During all interactions the context was clearly set as the legal or court context. Many Yolŋu people used the word *ŋupan* (to chase, to relentlessly pursue). This is the word that would be used if a wild pig was charging or chasing someone. ARDS has observed AIS interpreters using the word *ŋupan* in the legal context.



The following is an example:

Nunhi prosecutor, ŋayi ga ŋupan nhuna
 ('The prosecutor is relentlessly pursuing you.')

On a number of occasions the word 'persecutor' was used as a synonym for prosecutor. When this was raised later, the senior AIS interpreter said they thought that these two words were in fact the same word and that this was simply a variation in pronunciation.

A few short case studies will highlight this further:

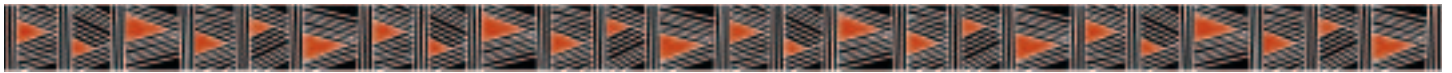
Whilst talking with a Council Chairperson about court issues, an ARDS staff member asked how to say 'charge' in Yolŋu Matha.

The Council Chairperson replied with the word *wuŋjili'yun* (to buy something in a shop and to be charged a certain amount of money for it). The Chairperson knew a meaning of 'charge', but it was the wrong context meaning.



A Yolŋu school principal was talking to an ARDS staff member about a court matter relating to a family member. The word 'charge' came up in the conversation. Asked what it meant, the principal knew of a few different meanings of 'charge', like the wild bull chasing you, buying something at the shop and having a flat battery charged.

This person had heard police use the word 'charge' many times in the past, but was still confused about what it meant. This principal is very intelligent and is also one of the most proficient English speakers in north-east Arnhem Land. If such a person is having problems with English legal words, then how are other Yolŋu people getting on?



A concerned Yolju father (whom we have known for 20 years) rang ARDS requesting assistance in understanding what the situation was with three of his sons who he thought were in trouble with the 'white man law'.

Upon investigation it was found that one had been subpoenaed as a witness and the other two had been charged with assault. When we rang the father back and stated in English that 'your two sons have been charged with assault', he was confused.

Two words were causing problems, 'charged' and 'assault'. This man had worked on cattle stations and he knew very well what 'charged' meant. Many wild bulls had 'charged' him in the past.

He knew a meaning of 'charge', but it was the wrong one for the court context. The word 'assault' meant nothing to him - complete blank. So to the confused father this English sentence sounded like, 'Your two sons have been chased with —'. The sentence was then successfully explained in Yolju Matha.



English-first-language speakers are rarely troubled by English words that have different context meanings. The context is very important in applying the correct meaning. Often this is done unconsciously.

Bail (Total Responses - 25)

'Bail' proved to be another problematic word. This is both concerning and surprising as 'bail' is one of the most commonly used words when interacting with the Balanda legal system.

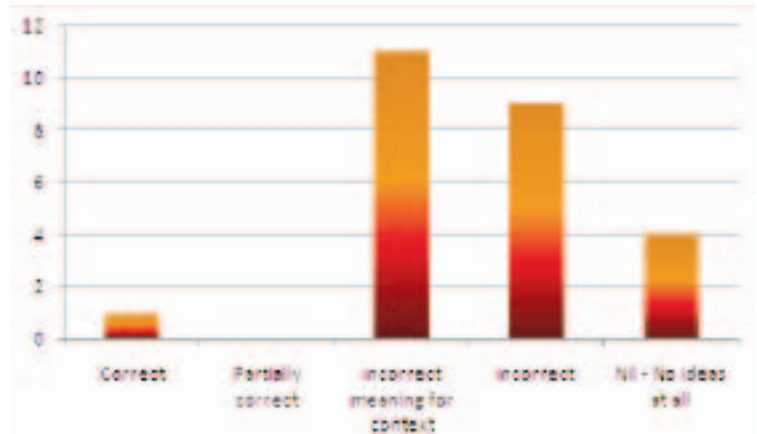
Why is there so much misunderstanding?

In the Balanda legal system, the 'presumption of bail' is linked to the 'presumption of innocence'. This means, unless it can be shown that there is a real risk of re-offending or absconding or both, one can expect to be granted bail while awaiting further court proceedings as opposed to being 'remanded in custody'.

Legal aid lawyers are regularly making bail applications for their clients.

Our research shows that 80% of responses relating to 'bail' were either incorrect or gave the incorrect context meaning. Two very common understandings emerged:

1. The bailed person has been 'bailed out of trouble' and that was the end of the matter. There was no requirement to return to court and no requirement to pay money or a fine. In many cases when the ARDS researcher questioned this position, the respondent was adamant that their time in court was finished.





2. A variation of the 'bailed out of trouble' response was that the Own Recognisance (OR) bail security set by the judge or magistrate was thought to be a fine. If this amount of money was brought to the court, that would be the end of the matter. In one case it was believed that there was no requirement to even return to court. The money could just be sent to the court and that would be the end of the matter.

Our research revealed that misunderstandings relating to the meaning of 'bail' often led to the accused breaching their bail undertaking by not returning to court, as demonstrated in the following case study:

A young Yolḷu man had been charged with a very serious sexual assault and had been granted bail. When asked by an ARDS staff member when his next court date was, he replied that his court was all finished. 'No more court. I am bailed out.' He was adamant. A phone call to the courts and the Legal Aid Service found that he had made full and frank admissions to police regarding the serious charges and that his committal hearing was due in a few months. This would almost certainly result in the matter going to the Supreme Court. Typically, sentences for the offence the young man had been charged with were in the range of six to eight years. The young man was adamant the matter was finished, yet it actually was only just beginning.

Another concerning aspect of this case was that, when questioned about what he said to the police, he said that he had been accompanied to the record of interview by a relative who had told him to tell everything to the police. This relative had stated that 'the truth will set you free'. Both he and his family were sure that if he told everything to the police, he would be excused or forgiven. The young man had not sought legal advice prior to the police interview; indeed, he was unaware that he could or should.

On a number of occasions, ARDS observed magistrates actually use the following words when granting bail:

- You are bailed to appear in court on.....
- Bail is granted on your own recognisance
- Bail Security is \$.....
- Bail Conditions are
- Be sure to sign your bail undertaking before you leave
- You are free to go*



The words 'bailed', 'appear', 'recognisance', 'bail security', 'bail conditions' and 'bail undertaking' are often problematic, but for many Yolḷu people in court, the words 'you are free to go' stand out above all the other foreign language legal 'blurb'.

As mentioned earlier in this report, our observations indicate that the explanation of 'bail' to Aboriginal accused persons regularly fails to communicate what bail is, its requirements and the results of any breach of bail.



Breach of bail usually leads to an arrest warrant being issued. When the police do exercise the arrest warrant the accused person feels unfairly dealt with and often resists arrest, resulting in further charges. These experiences further reinforce pre-existing views that police and the Balanda legal system are unfair.

On 24 April 2005, in an article in the Sunday Territorian titled 'Hundreds on the Run', Superintendent Gordon of the NT Police stated that there were 10,724 active warrants in the NT. Of these, 5451 (more than half) were Mesne Warrants which were related to people who were on bail and who had failed to return to court. Superintendent Gordon went on to say that the reason for the high number of warrants was the NT's transient population. Based on our research, it seems there is at least one other, perhaps more significant reason for this: ineffective communication.

In recent years the NT Government has spent considerable funds on increasing police numbers and expanding our prisons. The cost to the NT taxpayers of exercising and processing mesne warrants, the extra demands on the prisons and the extra time in courts is considerable. Based on our findings, it would appear that some of these funds could have been more effectively invested in improving communication in legal contexts.

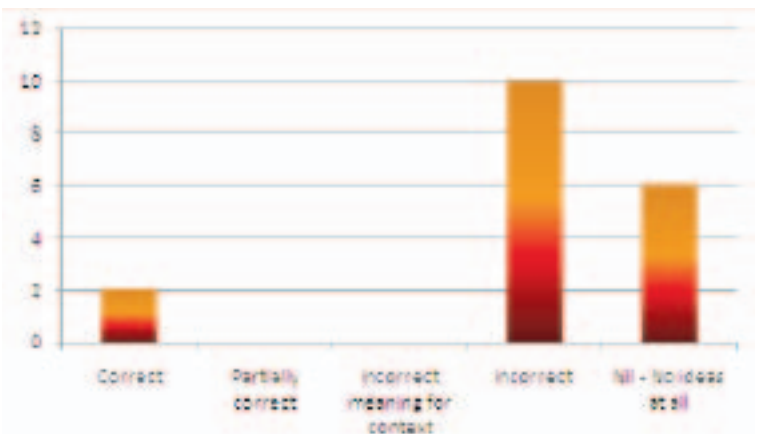
Incorrect Meanings

The words 'guilty', 'not guilty', 'summons' and 'warrant' were seriously misunderstood by Yolñu surveyed. The majority of respondents believed they knew the meanings, however further inquiry revealed that they did not. These misunderstandings can, and often do, have serious ramifications, as highlighted in the case studies in this report.

Guilty, Not Guilty (Total Responses - 18)

Half the *Incorrect* responses to the term 'guilty' said that their understanding was that if they pleaded 'guilty' they would get out of prison, but if they pleaded 'not guilty' they would be put into prison.

It seems that the confusion relating to guilty/not guilty may, in part, stem from the usual practice of granting a 25% discount to a head sentence where an early guilty plea is made. The poor communication around this leads to this confusion.



ARDS observed one senior police officer put his arm around the accused and say, 'If you plead guilty early, we will look after you and put in a good word to the judge'. When the accused was sentenced to three months, he was surprised that he had received a jail sentence and was very upset, perceiving that the policeman had misled him. Another police officer said that if the accused pleaded guilty early, 'The judge will go easy on you'.

In more minor matters, an early guilty plea may contribute to the offender being given a custodial sentence which is fully suspended.



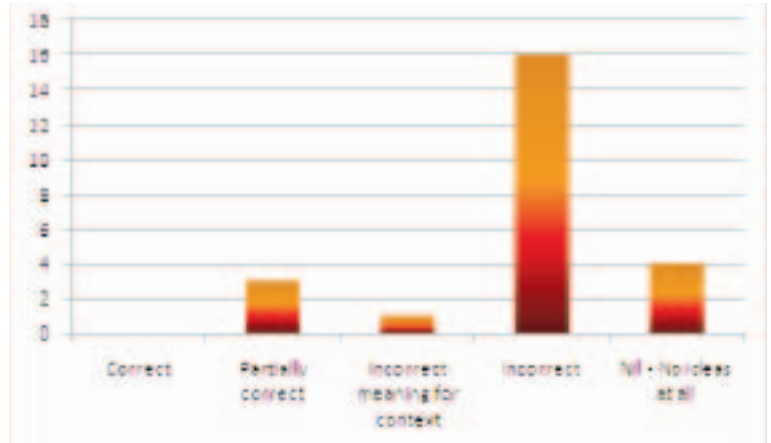
Two of the Yolŋu who had incorrectly understood the term ‘guilty’ and who had already pleaded guilty, stated that they just said ‘guilty’ because that is what the lawyer told them to say. During dialogue with them, they displayed no understanding of the meaning of the words ‘guilty’ or ‘not guilty’.

Summons (Total Responses - 24)

Most of the 16 *Incorrect* responses to ‘summons’ felt that a summons meant that someone was putting them into trouble.

In some cases, the respondent said that they were being put into prison.

The following case study highlights some common misunderstandings relating to the word ‘summons’:



Whilst ARDS was helping a Yolŋu family with a tenancy issue, the senior male resident of the house stated he was in trouble with Balanda law but he had no idea why. He had received a summons letter from the Supreme Court. He had been losing sleep, trying to think what he may have done wrong. His wife and sister, who both had better English skills, agreed that he was in trouble but none of them had any idea why.

It turned out that the summons was a ‘Summons to Juror’ - he had been summoned for jury duty. This man and his family had never been in a Balanda court. They had no idea what a jury was. ARDS took this man to the Darwin Supreme Court and sat in on a live trial and observed what a jury does. The Yolŋu man’s English skills were not to a sufficient standard so ARDS assisted the man to apply for an exemption from jury service. This was successful.

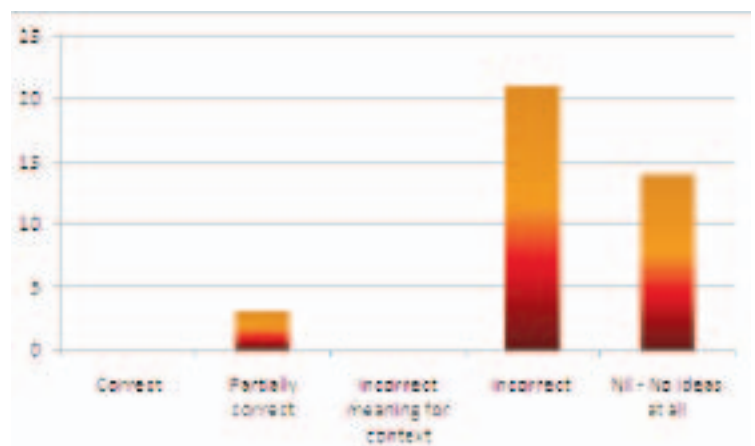
A considerable amount of confusion was observed between the words ‘summons’ and ‘warrant’.

In all but one case, the respondents had no idea that the summons was a process of law. Most thought that it was simply the police yet again acting in a lawless fashion, treating Aboriginal people in an unjust manner.

Warrant (Total Responses - 38)

As with ‘summons’, most respondents believed that a ‘warrant’ meant that they were being put into trouble or prison by the police. Again, few had any concept of ‘warrant’ being a process of law which gave police special powers.

During discussions around the word ‘warrant’, many Yolŋu expressed outrage at the way police came into houses and searched, often looking into bags which contain sacred objects and articles of law which should not have been seen by them. This was seen as being a gross violation of *maḏayin rom* (the Yolŋu system of law) which should be punished severely. ARDS was asked on numerous occasions to investigate what could be done to stop this offensive behaviour on the part of the NT Police.





Use of Interpreters in Courts - Interpreter Training and Qualifications

In May 1996, a project funded by the NT Employment and Training Authority (as it was then known) to develop a strategy for interpreter training in Indigenous Australian languages reported:

“There is a dearth of qualified interpreters in Indigenous Australian languages. Within the NT, those who are qualified are accredited at paraprofessional level, whereas the requirement for interpreters, in courts and specialised areas of medicine, for example, would elsewhere demand an interpreter accredited at professional level. In many instances the role of the interpreter is not well understood, either by the Aboriginal clients and their communities or by some of the agencies and professionals who use or should use interpreter services.”¹⁴

At the moment in Australia, a body called the National Accreditation Authority for Translators and Interpreters (NAATI) oversees the accreditation of interpreters. They have five levels of accreditation:¹⁵

1. **Language Aide**
2. **Paraprofessional Interpreter** - general conversation and non-specialist dialogues
3. **Interpreter** - minimum level for professional interpreters, involving dialogues at specialist consultations
4. **Conference Interpreter** - competent to handle complex, technical and sophisticated interpreting...including conferences, high level negotiations and court proceedings
5. **Conference Interpreter (Senior)** - excellence in their field, recognised through demonstrated extensive experience and leadership

As per the NAATI levels of accreditation, it can be seen that the 'Interpreter' level is the minimum level for professional interpreting in a specialist context. For more complicated matters, such as court proceedings, the 'Conference Interpreter' level is required.

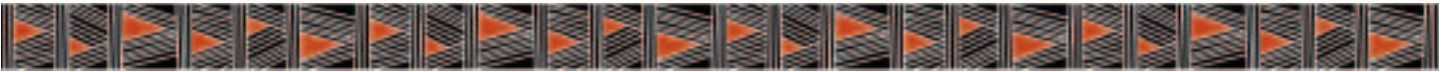
In the NT, the Aboriginal Interpreter Service (AIS) oversees Aboriginal interpreting. They are currently only able to offer interpreters at paraprofessional level. The AIS has only been in existence since 2000 and it takes many years of training and experience to reach the higher levels. While some progress has been made since the report into interpreter training in Indigenous Australian languages in 1996, there is still a long way to go.

During the course of this research we came across three Yolṇu Matha AIS interpreters who told us that their first interpreting job in court was in fact the first time they had ever been inside a Balanda courtroom. One of these cases was a Supreme Court trial with a jury. After four-and-a-half days of the trial, the jury had to be discharged and the matter adjourned for a new trial due to inappropriate actions by the interpreter. Again, we stress that this is no fault of the inexperienced interpreter.

On one occasion we observed a sexual assault victim commence giving her evidence via an interpreter. After one hour she requested that she be allowed to give her evidence directly in English. It was obvious to all in the court room that the interpreter was struggling. This particular interpreter had considerable experience in medical interpreting, but very little legal interpreting experience. The request was granted. This arrangement,





¹⁴ Phelan, K., 'A Project to Develop a Strategy for Interpreter Training in Indigenous Australian Languages', NTETA, 1997

¹⁵ 'Concise Guide for Working with Translators and Interpreters in Australia', NAATI, 2003, pp. 3-4, 11, www.naati.com.au/.





without an interpreter, was also far from satisfactory, as many of the questions had to be repeated and/or rephrased - sometimes up to 4 times.



We have become aware of an increasing number of legal professionals who are becoming reluctant to use interpreters, stating that they feel they can provide a better service to their client without the interpreter. This is disquieting because:

-  It indicates that some legal professionals do not recognise or fully appreciate the extent of communication problems between themselves and their clients.
-  The current arrangement is setting interpreters and the AIS up to fail.
-  Aboriginal people in Balanda courts continue to be disadvantaged due to the fact that they do not happen to have English as their first language.
-  In many cases, this could be in direct contravention of Article 14 of the United Nations International Covenant on Civil and Political Rights.

ARDS has grave concerns for the AIS interpreters in the following areas:

-  Miscarriages of justice could occur due to sub-standard interpreting.
-  Interpreters could be open to litigation if a miscarriage of justice is proven to have occurred due to sub-standard interpreting (AIS interpreters are NT Public Servants and as such cannot be litigated against individually, however interpreters who gain work independently of the AIS could be vulnerable).

Furthermore, ARDS has observed some resistance from Yolŋu people relating to Yolŋu interpreters. This resistance falls into two areas:

-  Complaints or concerns about the competency or skills of the interpreter
-  Complaints that the interpreter should have been taking more of an advocacy role. (Many Yolŋu people saw the interpreter's role as being that of an advocate. We observed interpreters being strongly criticised by Yolŋu community members for being impartial)

ARDS staff members are involved in some training and mentoring of Yolŋu Matha-speaking interpreters. We regularly receive requests from these interpreters - at times pleas - for more training and resources.

Legal professionals would never think of sending a partially trained law student to run a complex Supreme Court trial, but this is essentially what is happening to Aboriginal interpreters working in the NT courts.

The first resident Supreme Court judge commenced work in the NT in 1884. Some 120 years later we still do not have properly trained and qualified Aboriginal interpreters.



When is an Interpreter Required?

During this research we observed many situations where interpreters should have been used, but were not.

“He seemed to speak good English” - Police

A senior Yolŋu man contacted us. This man was a former council chairman. He had been charged with shop lifting - theft. The charges were later withdrawn. He came to us just before his first court appearance with the summons and the cassette containing the record of interview with the police. He was accompanied by his wife, a former school principal.

We loaded the record of interview onto an audio editing program and played it back to him and his wife. The interview went for only nine minutes and had to be stopped after the police caution could not be administered due to serious communication problems.

Whilst replaying the interview we slowed the replay speed and put some sections on loop replay. Both the man and his wife still experienced great difficulty in understanding what the police were saying. Phrases like 'not obliged' and 'used in evidence against you' meant nothing to them.

The record of interview revealed serious yet (on the part of the police) unrecognised communication problems.

Not once during the record of interview did the police ask whether the man needed or would like an interpreter. Later he stated that he could only understand parts of what the police were saying to him. He knew he needed someone to help him, but did not know the phone numbers of anyone who may have been able to help him, so he felt he had no other option but to battle on alone.

A complaint was lodged with the NT Ombudsman regarding this matter. The police in their defence, stated that the man seemed to speak good English and be able to communicate satisfactorily, despite glaring communication problems and their inability to administer the caution. The Ombudsman found that the police failed to follow the Anunga Rules.¹⁶

“I do not need an Interpreter, I speak good English” - Yolŋu man

The following comments came from a middle-aged Yolŋu man about his experiences in court. He worked at his local community's school as a liaison officer. His conversational English skills would be rated as good.

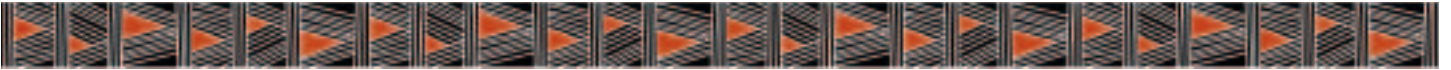
This man contacted an ARDS staff member whom he had known for about 20 years and requested assistance as he did not understand where his legal process was up to and why it was taking so long. When asked if an interpreter had been used, he quickly responded that he did not need an interpreter: 'I speak good English'.

After many phone calls to the legal aid service lawyers (to date he had had three lawyers) and about three hours of dialogue about his situation, he made the following comment:





“Nunhi lawyer ŋayi lakaraŋal yan nyumukuniny dhäwu, ganydjarryu ŋayi lakaraŋal ŋarrakal ga bilin. Yaka ŋarra dharagan ŋuruku dhäwuw. Bala ŋarra roñiyirr wäŋalil ga nhinan ga guyaŋan ŋarra ga bala ŋarra waryuyurr.”

('That lawyer just told me a little bit of information, very quickly, that is all. I did not understand. Then I went home and was thinking which led to me worrying about this.')

¹⁶ The Anunga Rules - guidelines for police when questioning an Aboriginal suspect. They were enunciated by Justice Forster to remove or obviate some of the disadvantages from which Aboriginal people suffer in their dealings with police.



This man had made at least five appearances in court to that point, yet he was unaware that:

-  he could end up in the Supreme Court
-  he had been charged with eight offences
-  after receiving a Notice of Fine from the Fines Recovery Unit he had to pay a fine. The due date had already passed
-  he could have his matter heard in a court much closer to him. He had been paying \$1400 each court day for aircraft charters

The three lawyers had all assessed him as not needing an interpreter. The Yolŋu man himself had stated he did not need an interpreter. Serious miscommunication existed yet went undetected. Why?

To answer this question fully goes well beyond the scope of this project. Excerpts from Dr Michael Cooke's paper, 'Indigenous Interpreting Issues for Courts', may help, in part, to explain this phenomenon:

“The tendency to overestimate the English language proficiency of Aboriginal witnesses who speak some English results in their struggling to cope with the demands of courtroom questioning. Even when such witnesses do understand sentence meaning, it cannot automatically be assumed that they understand a question's intent or that they are aware of nuance, idiom and cultural values which colour meaning. Conversely it cannot be assumed that counsel is hearing a witness's message when they themselves have minimal familiarity with indigenous culture or are unaware of the distinctive features of Aboriginal Learner's English.”¹⁷

“It would be apparent that few lawyers have the expertise to anticipate and analyse the range of factors which combine to determine the English proficiency required for an impending courtroom examination such that the NESB (Non-English Speaking Background) indigenous witness would not be handicapped relative to an Anglo-Australian witness in the same circumstance. And few lawyers would have the skill to assess the witness' own level of English proficiency. There is a danger that some level of conversational command of English on the part of the witness may mislead the lawyer into assuming that the person can then conduct themselves without disadvantage in a courtroom interview.”¹⁸

“With regard to the courtroom context, a distinction needs to be made between witness and defendant, in that the witness' role is restricted to giving evidence - while the defendant needs to understand the proceedings, may also give evidence (or a police interview may be used as evidence), and needs to instruct their lawyer and to understand explanations or advice that the lawyer gives. Thus, the English language demands placed upon the defendant will tend to be greater than for a witness.”¹⁹

Regularly ARDS staff members observed communication failures in the legal system. Of greatest concern is the fact that many of these failures were of a serious nature yet often went unrecognised, in many cases by both parties.

¹⁷ Michael Cooke, 'Indigenous Interpreting Issues for Courts', Australian Institute of Judicial Administration Inc, 2002, p. 28.

¹⁸ *ibid.*, p. 30.

¹⁹ *ibid.*, p. 28.



As Dr Cooke argues, few lawyers have the expertise to assess an Indigenous client's English skills in a legal context, yet they are regularly required to make these assessments.

Many lawyers, when they did become aware of communication problems, had no hesitation in requesting assistance and/or an adjournment. However, ARDS encountered some lawyers who steadfastly maintained that they could communicate satisfactorily with their client despite having been alerted to the existence of problems and glaring evidence of communication problems.

Also, from listening to police records of interview, observing court proceedings and working with Yolŋu people who had just had dealings with police, ARDS observed serious communications problems which were not recognised by the police. This would suggest that few police have the skills to make these assessments either.

During this research, many Yolŋu people expressed to us that they felt extremely uncomfortable and disempowered whilst in the Balanda legal system. Some felt deep down that they were out of their depth, but were not going to admit this and risk further embarrassment. Others did not know that they had rights to an interpreter. Some Yolŋu people, when asked to reflect on their court experiences, stated that they felt they were initially managing fine, but part way through became increasingly aware that this was not the case - they had misunderstood much. This caused them considerable worry.

Communication failures in the legal system can and regularly do have serious legal ramifications for Yolŋu people. These communication failures continue to add to the widespread poor perceptions, distrust and misunderstandings that Yolŋu people have of the Balanda legal system.

Consider this ...

In the 2001 census, 85% of Indigenous people in East Arnhem (as distinct from North East Arnhem Land) indicated that they spoke a language other than English at home. This compares to 62% of Indigenous people in the NT as a whole speaking a language other than English at home.

Australia-wide the 2001 census revealed that 15.8% of the population spoke a language other than English at home, with only 0.3% of the Australian population speaking an Indigenous language at home.

This raises the question:

How are Yolŋu people managing when it comes to interacting with the English first-language speaking, Balanda legal system?



Conclusion

This research has revealed *serious communication issues*, as well as the existence of *widespread misunderstanding* between Aboriginal English second-language people and English first-language people in the area of Balanda legal principles and processes.

This situation remains widely unrecognised or not fully understood by English first-language Australians. This leaves many Aboriginal people in a disempowered position when they are required to interact with the Balanda legal system.

Repeatedly during this research Yolñu people used the word *mayali' miriw* (meaningless) when referring to the Balanda legal system.

Repeatedly Yolñu people talked about the lack of respect from Balanda in relation to them and their legal and cultural ways - significant cultural change on the part of Balanda is what they are hoping for.

Repeatedly Yolñu people spoke of the lack of *ñayañu-Ḍapmaranhamirr rom* (deep mutual respect) between Balanda and themselves.

We all have much to learn. With improved awareness, a significant cultural change and more resources being put into seriously addressing the problems identified in this report, *ñayañu-Ḍapmaranhamirr rom* (deep mutual respect) can grow.

ARDS hopes that this report will improve understanding and relations between Balanda and Yolñu in the Balanda legal system and thereby contribute to reducing unnecessary stress and anguish experienced by Yolñu in the Balanda legal system.

This can only lead to the Northern Territory being a much better place.



Recommendations

Language Centres

ARDS believes that more ***language centres should be established*** throughout the NT. These centres need to be properly funded to develop and provide training, mentoring and support resources for interpreters and other professionals expected to bridge language gaps between Indigenous and Balanda. These resources would include further education material and two-way dictionary development to facilitate ongoing professional development training. Language centres would provide an environment where Aboriginal interpreters wanting to improve their skills could do so.

Team Interpreting

Until interpreters' skills are improved, ***team interpreting*** must be used, especially in situations where interpreters are required to be competent handling complex, technical and sophisticated interpreting, including conferences, high level negotiations and court proceedings. Team interpreting is where an Aboriginal first language speaker and an English first language speaker, who both have reasonable skills in the other person's language, team together to provide the level of interpreting required.

Better Awareness

It is hoped that this report will help to ***create better awareness*** within the wider community of the significant issues facing Yolṅu people when they are required to interact with the Balanda legal system.

Education Material

This research is intended to inform the future ***development of education material*** about the Balanda legal system targeted at Yolṅu people.

It has already resulted in the development of some audio educational programs rich in Yolṅu Matha which were broadcast on Yolṅu Radio. Legal professionals, language professionals and community educators were involved in creating this material. This material is now available online at

www.ards.com.au/hear_programs.htm.



Appendix One

ARDS Methodology

Communicating in language makes learning quicker and more meaningful to Indigenous learners

Working with adults in the community reinforces the role of Indigenous adults as teachers of both traditional and contemporary information and knowledge

Research is vital to developing relevant and successful education solutions.

Communicating in Indigenous languages is vital to genuine understanding and empowerment.

Language

Communicate in language of people

Aim education at adults in whole community or clan



Participate as equals in learning process

Respecting traditional Indigenous ways of doing things

Education

Develop educational resources based on up-to-date research

Develop culturally appropriate education resources

Resources

Discover and use culturally appropriate terms and concepts which generate understanding within Indigenous cultural worldview



Research

Discover 'knowledge gaps'

Discover any areas of mystification or confusion

Working together with Indigenous people ensures that these resources are used and actively contribute to learning

Discovering knowledge gaps helps to target education programs to directly improve lives



Appendix Two

A - Correct

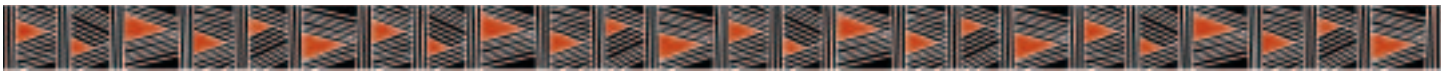
B - Partially Correct

C - Incorrect Meaning for the Context

D - Incorrect

E - Nil - no idea at all

Problem Word or Concept Results	Language Professional					Community Leader, ACPO, Teachers					Other Community Members - DOB Before 1965					Other Community Members - DOB After 1965					Individual Word Results									
	A	B	C	D	E	A	B	C	D	E	A	B	C	D	E	A	B	C	D	E	A	B	C	D	E					
	Accuse, Accused (20)		1			2					5				1	5					6					6	0	1	0	1
Alleged (14)					3					4					2					5					5	0	0	0	0	14
Appear (21)	1					1				1	2				6					1	9	4	0	0	1	19%	0	0	5%	16
Arrest (12)	1										2				4					5	3	0	0	0	0	25%	0	0	0	9
Assault (20)											1	1		2	7					9	1	1	0	2	16	5%	5%	0	10%	80%
Bail (25)					1			2	4	1			7	4	1	1		2	1	1	1	1	0	11	9	4%	0	44%	36%	4
Charge (22)		1				1		2	1				8	1	1			3	2	2	1	1	13	4	3	5%	5%	52%	16%	12%
Commit (12)					1					4					2					5	0	0	1	0	11			8%	0	92%
Comply (26)		1		1	4				3	2					7					8	0	1	0	4	21		4%	0	15%	81%
Conditions (14)	1	1			4			1		2				1			1			3	1	2	1	1	9	7%	14%	7%	7%	68%
Consent (35)	3	1			1				2	3				3	10					2	10	3	1	0	7	9%	3%	0	20%	68%
Direct-Indirectly					4					10					2					6	0	0	0	0	22					100%
Fail -Failure (18)	1				2				1		2			4	2					1	5	3	0	0	6	17%	0	0	33%	50%
Fine (19)												9		5	1					3	1	0	9	0	8		47%	0	42%	11%
Forfeit (21)	1				1					6					7					6	1	0	0	0	20	5%	0	0	0	95%
Guarantee (7)															5					2	0	0	0	0	7					100%
Guilty (18)					2	1				1	1			7	1					3	2	2	0	0	10	11%	0	0	58%	34%
Lawful - Unlawful(19)					1		1			6					5					6	0	1	0	0	18		5%	0	0	95%
Legal - illegal (29)					1	1	3	2		6					9					9	3	2	0	1	23	10%	7%	0	3%	80%
Liberty (13)	1	1			1					4					2					5	1	2	0	0	12	7%	13%	0	0	80%
Obliged-Not Obligated(25)					1	1				10				1	3					9	0	0	0	2	23				8%	92%
Offend - Breach (28)	1				2		2	1		2					8					11	1	2	3	0	22	4%	7%	11%	0	78%
Remand (24)		1			1					6					9					7	0	1	0	0	23		4%	0	0	96%
Reside (13)	1					1				4			1		2					4	2	0	1	0	10	15%	0	8%	0	77%
Security (27)					1			2		11				1	5					2	5	0	0	2	22			7%	11%	82%
Sentence (53)		1			2			1	5	7			1	1	17					18	0	1	2	6	44		2%	4%	11%	83%
Summons (24)		1			3		1	1	5			1		5	3					3	1	0	3	1	16		12%	4%	67%	17%
Surety (21)					1	1				5		3			5					6	0	3	0	1	17		14%	0	5%	81%
Undertake (26)					1				1	3				2	6					1	12	0	0	0	4				15%	85%
Warrant (38)		1					1			5				15	4		1			1	10	0	3	0	21		8%	0	55%	37%
Total No. Total % (Each Groups Results)	11	10	3	7	35	7	7	10	27	103	8	4	14	7	17	8	3	1	5	2	10	187	0	3	1	5	2	20	10	87



Acronyms

AIS	Aboriginal Interpreter Service
ACPO	Aboriginal Community Police Officer
ARDS	Aboriginal Resource Development Services Inc.
ATSIC	Aboriginal and Torres Strait Islander Commission
CDEP	Community Development Employment Program
EFL	English First Language
NAAJA	North Australian Aboriginal Justice Agency
NAATI	National Authority for the Accreditation of Translators and Interpreters
NCCPP	National Community Crime Prevention Program
NESB	Non-English Speaking Background
NLC	Northern Land Council