

Coronial Inquest into a death in custody on Palm Island (2005)

Aboriginal Witnesses

1. These submissions seek to address an issue which became apparent on the first day of evidence-taking at this inquest (28 February 2005) and which is affecting the capacity of this inquest to discharge its primary function, namely to “inquire” into the facts that surround this death in custody.
2. It is submitted that an order under either section 21 or 21A of the *Evidence Act* is necessary to attempt to address or at least ameliorate this issue.
3. It has been difficult and on occasions impossible for counsel assisting the inquiry and some of the other counsel appearing to communicate with a number of the witnesses who have been called to give oral evidence in the inquest. This was evident in both examination and cross-examination. The witnesses were all Aboriginal and residents of Palm Island. Some of the obvious examples include:
 - 3.1. Patrick Nugent/Bramwell was thought by most of the counsel at the bar table to be adopting his first statement when in fact he was adopting his second. The difference between the two statements was stark. He was then taken to task for using the term “shy” when explaining his reason for not having given a fuller account on the first occasion when that word has a very complex meaning in the community use of that word. He then became quite confused in his evidence.
 - 3.2. Verna Snyder became distressed and confused, clearly needed an interpreter and then became overwhelmed and distressed out of frustration at not being understood. She then effectively ‘shut down’ near the end of her examination by counsel assisting. It was then thought that it was too difficult to continue and a decision, in effect, was made by the coroner and counsel assisting to place less weight on her account because of these communication difficulties.

- 3.3. Edna Coolburra was forced to make a distinction between what was the “white fella’s” interpretation of the description “drunk” from what she had meant, as she had sensed that she was being misinterpreted. She was cross-examined about her use of the word “drunk” without any clarification of what she meant by that term. Her explanation was met with incredulity under cross-examination. She later clarified that when she used the word “drunk” she meant to describe a person that was “tipsy” and a “happy drunk” as distinct from being heavily intoxicated, which had been the literal meaning taken by the examiners.
 - 3.4. Roy Bramwell counted the pages of his statement when he was asked how many “statements” he had in his hand. He had 4 pages but only 2 statements. He was also taken to task about why he used the term “knocked down” in his verbal account when the words “knocked out” had been attributed to him in an earlier statement that he had signed. He cannot read, although the level of his proficiency was not the subject of any evidence. It was then sought to attack his reliability and impugn his credibility by virtue of differences in his spoken words from written words attributed to him. (See more details below).
4. There were, it is submitted, many more instances of miscommunication, however the transcript has not yet been made available in order to be complete in this submission. Inquiries yesterday with the State Coroner’s office suggest that the transcript will not be available for up to 2 weeks.
5. Oral submissions about these apparent (at least to some) miscommunications were made by lawyers for the Council and counsel for HREOC at various stages, however upon reflection, it is submitted by all who advance these submissions that much more care, and indeed significant changes need to be taken by the Coroner (and all those assisting) with Aboriginal witnesses whose “bi-cultural” competence in the formal setting of giving evidence is obviously below an acceptable level.

6. It is not just the language differences and the mode of communication which is hindering the proper taking of evidence, it is of course the whole setting in which this process is being undertaken.
7. It is an understatement to observe that it is an intimidating arena, being questioned in a court. The inquest is being held in a large hall, the witnesses are placed in front of a large audience including about 16 non-Aboriginal lawyers and assistants sitting at the bar table, with recording equipment amplifying voices throughout the hall. Scores of members in the community including the family of the man whose death is being inquired into and at times, more than a dozen media personnel were in attendance.
8. Section 21A (1) relevantly provides that a:
 - a “special witness means a person who, in the court’s opinion would, as a result of a relevant matter, be likely to be disadvantaged as a witness or would be likely to be so intimidated as to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practices of the court.”
9. Section 21A(2) provides
 - “Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon the application made by a party to the proceeding, make one or more of the following orders or directions -

(...)

(f) another order or direction the court considers appropriate about the giving of evidence by the special witness, including, for example, any of the following –
 - (i) A direction about rest breaks for the special witness;
 - (ii) A direction that questions for the special witness be kept simple;
 - (iii) A direction that questions for the special witness be limited by time;
 - (iv) A direction that the number of questions for a special witness on a particular issue be limited.”
10. Section 21 is also of relevance in this context. It provides:
 - (1) The court may disallow a question put to a witness in cross-examination or inform a witness a question need not be answered, if the court considers the question is an improper question.

(2) In deciding whether a question is an improper question, the court must take into account-

(b) any other matter about the witness the court considers relevant including, for example, (...) cultural background or relationship to any party to the proceeding.

“improper question” means a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.”

11. The issue sought to be raised is not novel. It has been the subject of cases where miscarriages of justice have been found as a result of this miscommunication: e.g. *R v Kina* CA No 221 of 1993.¹ The Queensland Court of Appeal in *Kina*² relevantly observed:

“In this matter there were insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (1) her Aboriginality (2) the ‘battered woman syndrome’ and (3) shameful (to her) nature of the events which characterised her relationship with the deceased.

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.”

12. The issue has also been embraced by linguists, anthropologists and other professional non-Aboriginal people who have worked in Aboriginal communities. The work of experts in this area such as Dr Diana Eades have been embraced by the Courts, the Department of Justice and professional bodies such as the Queensland Law Society and the Legal Aid Commission. (Attachment 1).
13. Importantly, this breakdown does not need to involve an assessment of the legal skill, forensic ability or intention of the questioner or cross-examiner or indeed of the Court itself. However the present ill-appreciation of the difficulties being experienced by some witnesses is either not being sufficiently noticed, causing

¹ Also see *R v Condren* [1991] 1 Qd R 574.

² Fitzgerald P and Davies and McPherson JJA.

frustrations on the part of both the witness and the examiner or being ignored. Words like “addendum statement” and other legal terminology have been used. One on occasion, counsel assisting the coroner used the facetious proposition that “well the filing cabinet wasn’t see through was it?” to a witness. He and other counsel frequently used double negatives and rolled several propositions were into one question. It was clear that the witnesses were confused. There have been expressions by counsel of frustration when a witness has obviously been confused by virtue of not understanding what is being asked. These expressions have on occasions bordered on being overbearing and aggressive.

14. The gathering of evidence in a coronial inquiry and the eliciting of evidence at an inquest should not be adversarial; rather the proceedings are supposed to be making a careful inquiry into the truth.
15. The rights of any party who might face other civil or criminal proceedings will not be abridged in any respect if the nature of questioning of the Aboriginal witness is made the subject of some specific directions under 21A(2)(f) of the *Evidence Act* such as:
 - 15.1. That simple language be used e.g. “then what happened?” instead of “what occurred after that?”
 - 15.2. Giving a witness a clear and informed choice of accepting or rejecting a proposition.
 - 15.3. Recognition that nods, raised eyebrows and movement of head and eyes are significant modes of communication in this community.
 - 15.4. Facetious or sarcastic comments or questioning should be disallowed.
 - 15.5. Reference to and clarification of temporal issues must be appropriate having proper regard to how time is viewed in a community where many, if not most people do not use watches. It would be unfair to use gradients of minutes and hours in questions when that is not how time is assessed in daily life. Phrases like “a short time”, “a long time” or “after lunch” etc should be used instead.
 - 15.6. Examination should be limited to that which is necessary for the coroner to ascertain the evidence of the witnesses. Counsel for the parties who

have been granted leave should identify what aspect of the evidence is sought to be clarified before cross-examination is permitted.

- 15.7. Limits must be placed on the time under which witnesses have to endure cross-examination and frequent breaks must be given.
 - 15.8. Appropriate interpreters should be utilised. They should be asked to make sure he/she understands the question and be given time to explain that question, on the record, to the witness and thereafter communicate the witness' answers to the Court.
16. If the court or any of those at the bar table remain unconvinced as to the level of miscommunication that occurred yesterday, it is submitted that evidence on the issue should be called from experts in this area or at least from 'qualified' people in the community who are more bi-culturally competent (than the lawyers who are appearing) e.g. a local school teacher or a linguist who has worked in the community. The Coroner has the power under s.15(1) of the *Coroners Act* to "seek the help of a person (...) who the coroner reasonably believes can help the coroner investigate the death".
17. Specifically, in respect of the witness Roy Bramwell it is submitted that his examination be given special attention due to his obvious bi-cultural limitations and the importance of his evidence to this inquiry. There needs to be some consideration given to whether the process of ascertaining his evidence should start again. In addition to the matters suggested in the preceding paragraphs, the following approach should be taken:
- 17.1. He should be allowed to firstly give an uninterrupted narrative of what he saw, prompted with leading questions where necessary and appropriate. He should be told where he used different expressions about the same subject matter.
 - 17.2. He should also be told that in the written statement that bears his signature there are words used which are not the same as expressions which are attributed to his voice on the transcript of an interview he had had with the police earlier or in his evidence at the first inquest.
 - 17.3. A careful identification of the process that was undertaken in the production of the statement he signed should be undertaken before it is

sought to be used as an evidentiary basis to suggest inconsistency under section 101 of the *Evidence Act*.

- 17.4. He should be asked to explain if he can, and with an interpreter/linguist assisting, what he meant in the words he used and whether he used words with different connotations than when used in ordinary English.
 - 17.5. He should not be put into a situation where he is embarrassed about his communication limitations or that of those who are asking questions.
18. The ideal situation would be to have counsel assisting the coroner undertake this task, sensitively and with appropriate assistance in a video-taped procedure which is less intimidating overall than the present, before he is required to give evidence in a court setting.
19. If Mr Bramwell's integrity - or indeed that of anyone else from the community - is to be impugned or his reliability challenged in these proceedings, it should only be done after a fair process that takes into proper account the communication issues that are set out above:
- 19.1. There must be a proper foundation laid for the proposition that his statement to police in fact reflects his actual account. He has stated that he cannot read very well. The words "This statement has been read to me" within the statement is not sufficient.
 - 19.2. There is presently no other evidence in the brief that satisfactorily suggests that this statement in fact accurately records the version of events that he gave on a prior occasion.
 - 19.3. It should be ascertained why he sought the assistance of the Aboriginal Legal Service to prepare a second statement.
 - 19.4. The lawyer from the ALS should be asked why and the circumstances under which he took that statement.
 - 19.5. The police officer who took the police statement should be called to establish this fact before relying on it as a possible forensic device under section 101 of the *Evidence Act*.
20. It would be quite improper for counsel assisting to suggest that the witness is "lying" or "not telling the truth" unless he has properly understood and been

given a proper opportunity to explain any inconsistencies in earlier statements in the manner set out above.

21. Otherwise, it is respectfully submitted, this coronial process will not get to the truth of what happened, rather, it will fall on the relative degree of communication or miscommunication that is tolerated and which can be forensically taken advantage of by the skilful advocates appearing for the parties with their competing interests.
22. It is re-iterated that taking a sensitive approach to this process - which might include curtailment of cross-examination of some of the parties - will not prejudice anyone who might ultimately face criminal proceedings.

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