CROSS CULTURAL ISSUES IMPLICATIONS FOR PROCEDURAL FAIRNESS

*Lesley Hunt**

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Introduction

This paper is shaped by my experiences in working with non-English speaking background communities, both as an advocate and community worker in various agencies in Brisbane, full-time Member of the Refugee Review Tribunal in Sydney (1993-97) and part-time Member of the Social Security Appeals Tribunal since late 1997. The approach taken combines a sociological and legal perspective.

Post-war migration has significantly reshaped the socio-cultural, economic and political character of Australian society. Presently there are in excess of 100 different ethnic groups speaking over 80 different languages living in Australia and these figures do not include Australian Aboriginal and Torres Strait Islander communities or languages. Figures from the Australian Bureau of Statistics indicate that over 20% of Australians were born overseas and over half these came from non-English speaking countries. 14% of Australians do not speak English at home and 19% of Australians born in non-English speaking countries speak little or no English. In addition a significant number of Australians speak Aboriginal and Torres Strait Islander languages.

The question which this paper addresses is: how cognisant is the law and our legal and administrative structures of the cultural diversity of Australian society? In recent years numerous reports have documented the issues arising from the multicultural nature of our society. These reports have emphasised the particular disadvantages experienced by people from differing cultural and linguistic backgrounds in the context of our legal and administrative processes. The Administrative Review Council's 1991 *Report to the Attorney-General: Access to Administrative Review by Members of Australia's Ethnic Communities*; the 1991 Report from the Commonwealth Attorney-General's Department entitled *Access to Interpreters in the Australian Legal System*; the 1992 Report of the Australian Law Reform Commission entitled *Multiculturalism and the Law*; and the Commission's 1994 Report entitled *Equality Before the Law: Justice for Women* all serve as an indictment of the way in which our legal and administrative systems reflect and perpetuate the marginalisation of people of non-English speaking backgrounds.

Those who talk of a "level playing field" are not generally those who are members of marginalised groups in our society. We live in an inherently unequal society and the law cannot allocate equal rights in an unequal society. It can only protect the rights that society chooses to bestow. In fact our legal and administrative processes tend to mirror this inequality and are therefore often ineffective in ensuring equal rights and access to

* *Lesley Hunt is a part time member of the Social Security Appeals Tribunal, and also works at the Immigrant Women's Support Service.*

justice. The notion of treating people in a manner which will afford them equality before the law does not equate with treating everyone in the same manner irrespective of race, gender, ethnicity, socio-economic status and disability. It means actively taking into account their race, gender, ethnicity, socio-economic status and disability. Procedural fairness for members of disadvantaged population groups in our society must incorporate knowledge and understanding of their reality and include strategies to minimise the disadvantage they will experience in engaging with the legal system.

Ensuring fairness where relationships are fundamentally unequal

Sociology is essentially the study of society and the structures and relationships occurring within a society. Hence a central thrust of this paper is a critical, though by no means detailed, analysis of the structure of legal and administrative proceedings and the impact of this on the relationship between applicants and decision makers. The relationship between the tribunal member or judge and the applicant is a fundamentally unequal one. The decision being made is often a most significant life decision for an applicant whereas for the member or judge it is all in a day's work. The inequality is further reflected in the manner in which most hearings are conducted. Many strategies are employed to convey and reinforce this inequality. Having the applicant stand when the decision maker enters the room, the raised level at which the member or judge sits, the comparative height of the chair and so on, all convey the very high regard the dominant world of the judiciary and quasi-judiciary has for itself. In fact the purpose of these structures and behaviours is to remind applicants and witnesses of their relative powerlessness and it is often these very factors which can generate communication difficulties during the proceedings.

The physical setting of the tribunal or court have considerable impact on an applicant's ability to fully convey calmly and clearly the vital facts needing to be communicated to the decision maker who may be making one of the most critical decisions of the applicant's life. This is particularly so when they are combined with the disadvantages inherent in speaking a language and coming from a culture which is generally vastly different to that of the member or judge.

Judges and tribunal members often, though not always, share a very specific and privileged social sphere. As Canadian Professor Kathryn Mahoney states, our social sphere leads to our having a certain set of ideas to the extent that when we have to deal with other ideas we are not as able to perceive them accurately and without bias. Access to "justice" involves the notion that ones experience of life is going to be heard and understood. Access to justice in a diverse society therefore requires understanding of an extensive range of experiences, values, and beliefs relating to gender, race, ethnicity and class.

A fair and just legal system incorporates "natural justice" principles. The right to be heard and be treated equally before the law irrespective of one's race, gender, socio-economic status, age or ability are fundamental to the notion of "natural justice". "Irrespective" in this sense should not translate to "without regard to": rather due regard should be paid to an applicant's race, gender, ethnicity and socio-economic background to ensure barriers are removed and relevant issues are incorporated in the taking of evidence. That our prisons continue to hold disproportionate numbers of Aboriginal people; the quality of the representation afforded by self-representation as a result of cuts to legal aid; and the lived experiences of women in court as victims of sexual assault, all serve to belie the rhetoric of natural justice. Justice simply does not occur naturally, it requires

unrelenting struggle and vigilant scrutiny of our legal and administrative processes.

The requirements of natural justice depend on the circumstances of the case, the nature of the matter being heard, the rules under which the tribunal or court is acting, the subject matter being dealt with and so forth. Whilst there are no words of universal application which will ensure procedural fairness for every applicant in every situation, procedural fairness generally requires that the parties concerned be given information regarding their right of review, notice of the issues to be dealt with and adequate notice of the time and place of the hearing. It requires that witnesses be called and examined on oath, that the decision be based on the evidence presented at the hearing; that applicants be given the opportunity to respond to any adverse material relevant to their application; and that an applicant be given reasons for the decision made.

What are the implications for procedural fairness in these processes when an applicant speaks a language other than English and comes from a race or culture which is not Anglo-Saxon or Anglo-Celtic? Many, although by no means all, such applicants coming before tribunals are amongst the most disempowered people in our community, often having no or limited English, limited knowledge of our legal system, lack of familiarity with our Anglo-Australian cultural practices much less the written and unwritten rules of that sub-culture of the quasi-judiciary. In addition, they are in many instances unrepresented, or, as is the case with a significant number of applicants represented by migration agents who lack knowledge, skills and professional ethics, poorly represented.

So, whilst neither the law nor the tribunals can alter these facts, they underline the overriding obligation of ensuring procedural fairness: ensuring that applicants be given an adequate opportunity of presenting their case and that the member determining the application be unbiased. This is a difficult enough task in any legal setting much less one which is compounded by linguistic and cultural differences. Bias in decision making is very much a live issue today. I refer you to *Sun Zhan Qui v MIEA*,[1] where the Court found that actual bias was evident and called for concerns in this regard to be brought to its attention by other applicants.

Given the circumstances of many applicants of non-English speaking backgrounds it is imperative that linguistic and cultural factors be considered in determining what is procedurally fair, and explored in some depth throughout the reasoning of the decision maker.

Pre-hearing processes

In this climate of economic rationalism is it unashamedly utopian or is it the first step in ensuring procedural fairness to provide information in community languages regarding an applicant's right of review, leaflets explaining various tribunals and courts, the specific criteria to be met for an application to be successful?

What steps are taken to ensure an applicant is aware of the specific issues to be dealt with at a hearing? What steps are taken to ensure an applicant has understood the reasoning on which the primary decision was based? Where an applicant is asked to respond to adverse material in writing, is consideration given to language differences, access to translation services and the costs involved, particularly where an applicant is unrepresented and, as is the case for many refugee applicants, in receipt of a subsistence sum of money or with no income at all?

On this point I can recall one applicant who had not been interviewed by the Determination of Refugee Status officer, the primary decision maker, but had been posted a draft decision to respond to. This

practice was known at the time as the "natural justice process". However the applicant thought the draft decision he received was the decision on his refugee application. He was surprised when he received a second copy of it a few weeks later. How easy it would be for the tribunal member reviewing this application to make adverse assumptions about the seriousness with which the applicant took his application for protection in Australia as he had not responded to the draft primary decision in writing. How easy to assume the applicant was abusing the whole process to gain additional time in Australia, particularly given the negative media coverage of on-shore refugee applicants at the time. However it was language differences and the applicant's lack of access to translating services which were the issue. This example reinforces the necessity of going through with an applicant the whole process of the application as well as the claims it contains before proceeding further. Who filled out the initial application; was it read to him in a language he understood before signing; why did he not respond to the draft decision? These considerations are essential to providing an adequate opportunity for applicants to present their case, and to decision makers remaining unbiased.

When there are language and cultural differences, do Tribunals have a role to play in encouraging applicants, particularly unrepresented ones, to provide additional evidence, or to assist them in making a better or more focussed case?

Applicants' expectations of a hearing will be affected by their experiences of the legal system in their country of origin. The law, legal and administrative processes differ considerably in different countries.

At hearings, is consideration given to the fact that applicants from countries where there is state terrorism or significant political interference in judicial processes may be fearful and confused about the role of the hearing and the role and authority of the tribunal member or judge? While for some applicants before the Refugee Review Tribunal, a non-appearance may be indicative of a false claim, for others this will not be the case. It is not uncommon for an applicant to fear arrest following a decision being made on the spot. To arrive at a shared expectation of the hearing, it is vital that the purpose of the hearing, the independence of the tribunal or court, and the manner in which the hearing is to be conducted, is conveyed to the applicant prior to the hearing. This must be done in a manner which can be understood by the applicant to ensure that the chance of miscommunication is minimised and the applicant is provided with an adequate opportunity of presenting their case.

Where applicants are from non-English speaking backgrounds, consideration should also be given to the role of a pre-hearing conference in allaying an applicant's fears regarding the hearing, explaining the procedures, the specific criteria to be met and matters at issue. This procedure is particularly relevant to torture and trauma survivors.

For tribunals such as the RRT where the number of decisions made is directly linked to the funding level of the Tribunal, members and staff face significant pressure to produce quantities of decisions. However, decision making which is economical and quick should not occur at the expense of decision making which is procedurally fair, particularly where applicants are disadvantaged by language and cultural differences.

Language issues

An integral part of procedural fairness is the process of effective communication. There is still no statutory right to an interpreter under Australian law, yet the fundamental principle of equality before the law surely requires that people be provided with a means of communicating

in a language they can speak and understand. Where we speak different languages the obvious mechanism for overcoming these differences is through working with an interpreter. Currently it is the practice of most tribunals to provide an interpreter on request by the applicant; however, in many Australian courts, the provision of an interpreter is at the discretion of the sitting magistrate or judge, or by the police, none of whom is qualified to assess language skills. Consequently, many injustices occur.

Interpreting is a complex process. It seldom involves word for word translation but requires distilling the meaning of what is being said by the speaker; understanding the logical relationship between what is being said and the rest of the text, and from within the context; and recognising the various stylistic devices employed by the speaker. Interpreters are primarily concerned with the meaning and impact of utterances, rather than specific word translations.[2] Herein lies enormous scope for miscommunication and misunderstanding, and reasonable allowances must be made, particularly where a finding regarding a witness's credibility is at stake.

A simple illustration of this was given by Kirby J at a conference in Sydney in 1988, entitled "Interpreting and the Law". He recalled an interpreter translating the phrase "out of sight, out of mind" as "invisible idiot" in the witness's first language.

He went on to refer to a case where a defendant was committed to a psychiatric institution for observation, because when the magistrate had asked the defendant how he felt, he used an expression which when translated literally meant "I am the God of Gods". However this expression in his first language was a colloquialism for "I am on top of the world".

It is impossible to translate concepts in one language into "equivalent" concepts in another language, as "language is intimately connected to culture and thought, and without a knowledge of culture, it is impossible to understand fully the utterances of another person".[3] The view that what one has said can be restated exactly in another language is simply an ignorant one. In hearings where questions and answers are given through an interpreter, it is always possible that the applicant or witness will not receive the exact question that was asked, and that the decision maker will not receive the answer exactly as it was intended.

In this area, so crucial to the work of many tribunals, the provision of training has been insufficient. A 1991 report entitled *Cross Cultural Communication Issues and Solutions in the Delivery of Legal Services* commissioned by the Victorian Law Foundation and written by Michael D'Argaville indicates that although solicitors generally are aware of some communication problems, and of some strategies to overcome those problems, the practice of most did not reflect their perception. This gap between perception and practice was fairly consistent across solicitors with a wide variety of experience. D'Argaville concludes that practical experience was not sufficient to develop adequate communication skills, and that the need for training was evident.

Cultural bias

Language cannot be separated from its cultural context, and it is imperative that decision makers are aware of the pitfalls involved in having a limited knowledge of the cultures they may be confronting. D'Argaville's report indicates a significant frequency of broad, unqualified generalisations among statements by lawyers commenting on their perception of cross cultural barriers to communication. D'Argaville concludes that overgeneralisations of a perceived cultural difference may affect communication as adversely as not being aware that such differences may exist.

There is a tendency for all people to have a monocultural view of the world and the people who inhabit it. How then can decision makers ensure an unbiased interpretation of the evidence before them? The following example comes not from the area of administrative law but nonetheless it illustrates the point. The case involved a Filipino woman who was pressing charges of rape. However when she spoke of her ordeal she smiled, and even laughed. For her, this was a culturally appropriate behaviour necessary for overcoming embarrassment and for maintaining self-esteem and dignity. It was only when she was at home alone that her true feelings surfaced. For the police and the courts however it was interpreted as an indication of the diminished significance of the rape.

Another example is cited in the Australian Law Reform Commission Report regarding gender bias in the Australian legal system.[4] A Croatian woman seeking a domestic violence order was mistakenly provided with a Serbian interpreter. The woman refused to speak to the interpreter as she strongly believed this would compromise her in the eyes of her Croatian community. The magistrate responded by stating that "international conflicts should not be brought into the arena of the Australian courts". He suggested that if she could not use the services of an interpreter, then quite clearly this indicated that she was not in desperate need of an order.[5]

Another example cited by the Australian Law Reform Commission is that of a Muslim woman who had her case for a domestic violence intervention order dismissed because her complaint that she had been spat in the face was not considered serious. The magistrate, coming from an Anglo-Saxon cultural perspective, failed to recognise that to be spat on for this woman is considered a gross violation and extremely frightening in its suggestion of future violence.[6]

The task of achieving some sort of unbiased state is exceedingly difficult, yet it is integral to the notion of procedural fairness. Given that we are all biased, in that we all perceive the world and interpret our communication in that world from our own narrow experience of it, how do we ensure an unbiased approach to decision making? Every individual makes assumptions based on his or her history, class, gender, political leanings, cultural and religious values, and a lot of other factors. At the very least decision makers must be constantly alert to their own particular biases in order to minimise their impact on decision making. Whilst decision makers, like anyone else, can never be free of personal bias, they can develop a heightened awareness of personal biases, and an awareness that each claim must be assessed in accordance with the specifics of the applicant's localised cultural context, rather than that of the decision maker.

A difficulty with the problem of culturally-based assumptions, or cultural bias, is that decision makers are not generally required to alert the applicant to their process of reasoning. Without this, how can an applicant possibly respond, or alert the decision maker to cultural factors significant to the reasoning process? It is necessary for decision makers to have a great degree of self-awareness regarding their own cultural values and biases, and in some instances to engage the applicant in discussion around these matters in order to ensure an accurate and unbiased reasoning process. It is also useful for a decision maker to regularly check an applicant's understanding, as well as their own, of particular matters which have been stated and/or translated during a hearing to ensure the correct message has been conveyed and understood.

Of course, applicants are operating on culturally based assumptions also. For example, in an application for a protection visa or refugee status, a woman, perhaps a member of the principal applicant's

family unit, may well assume that the decision maker is aware of the kind of treatment she will face within the context of her family or her community if she breaches certain rules of behaviour, because for her such treatment is a culturally entrenched norm. Depending on her education or awareness of systems other than her own, she may assume that the same or similar rules apply here in Australia. Therefore she may not even mention specifically the nature of the treatment she can expect, or if it is referred to it may be downplayed as a common occurrence rather than as a breach of her fundamental human rights.

Linguistic and cultural differences also incorporate differences in thought processes, differences in how information is structured, differences in discourse or the ordering of a conversation, the level of background information provided, the repetition of statements, and the targeting of the sensitivities of the listener.

Linear thinking, where every cause has an effect, and every effect has a cause, is perhaps most common in Western settings. Eastern thought, for instance, is said to be more contextual and cyclical than the Western approach. How does this difference impact on communication in a hearing, particularly given that logic is the foundation of proof in our legal system?

A greater appreciation of the fact that discourse is culturally structured and conveyed may ease some of the frustration which often arises in hearings when an applicant does not state the information sought in the manner or order it is expected. It is not uncommon for judges and tribunal members to become impatient when a witness does not come straight to the point. The manner of questioning by the decision maker may also inadvertently give rise to frustration, if not offence, in many instances.

Sometimes both members and applicants will be tempted to alternate between using the interpreter and having the applicant speak in English. Certainly it is more difficult to attain a sense of the character of the person when working through an interpreter. The mood or emotional content may be lost, the meaning of intonation, the meaning or context of the non-verbal indicators, etc may be lost. However as Justice Gobbo stated at a conference in 1990 entitled "Law in a Multicultural Society", the practice of moving in and out of communicating via an interpreter can give rise to the view that the applicant is using the interpreter to evade, or gain time in which to think. To avoid this, it is preferable to be consistent in the use of the interpreter.

One of the problems which can arise through inconsistent use of a interpreter is illustrated by the following case of a Filipino woman who was assisted by South Brisbane Immigration and Community Legal Service to obtain permanent residence to press charges against her Australian resident fiance, relating to the sexual assault of their two year old daughter. The perpetrator was convicted in the District Court for indecently dealing with the two year old. However the conviction was subsequently quashed by the Court of Appeal on the grounds that the trial judge failed to make correct direction to the jury, and that the woman's evidence was of poor quality, characterised by prevarication and inconsistency.

Although an interpreter was used during the trial in the District Court, he was not used uniformly, neither was the interpreting at the required level three proficiency. On reading the court transcript it is apparent that this was the cause of the supposedly poor quality of the evidence provided by the woman. It was evident from her evidence in English that she was not completely fluent in English. The criticism made at the appeal regarding "prevarication" has been

described by those with a fuller appreciation of cross-cultural communication as being an Anglo-determined norm based on consistency requirements in English discourse which is not the normal practice for example for Tagalog speakers, or for some other language speakers such as Indian speakers of Hindi who are also not proficient in English.

The other more obvious area for misunderstanding is that of interpreting non-verbal language. This is mostly done subconsciously and so involves inherent dangers and non-verbal communication is also specific to cultural groups. Looking a person in the eye may indicate honesty and straightforwardness in one culture, but be seen as challenging and disrespectful in another. Similarly, shaking one's head from side to side can indicate understanding or agreement in one culture, but the complete opposite in another. The judging of a person's demeanour is thought by cross-cultural communication experts and many psychologists to be particularly unreliable in determining the value of a person's evidence. Again it is essential to be aware of cultural bias in assessing demeanour.[7]

Common practices generally born out of conditions of poverty, repression and fear, such as lying and bribery, must also be understood in their cultural context, rather than being judged from a misplaced notion of cultural or moral superiority. To say what others want to hear is internalised as a means of survival for many people, particularly people in powerless positions. It is not procedurally fair to jump to the conclusion that manipulative opportunism underlies the lie, or that one lie means that all statements have been lies. Experiences in an applicant's home country often lead to the applicant internalising lying as a means of survival and understandably this carries over to survival in Australia. This is not to suggest by any means that all applicants from developing countries lie or that all liars are misunderstood innocents; rather it is to suggest that decision makers have an obligation to view lies in a cultural and environmental context, rather than a moral one. The weight accorded such practices in assessing an applicant's credibility must be determined in the light of the socio-political conditions experienced by the applicant, rather than those experienced by decision makers. Knowledge and awareness of that context will enable decision makers to obtain accurate evidence and test the veracity of claims more effectively.

I am aware of two Immigration Review Tribunal (IRT) cases[8] which illustrate well these points. In both cases the issue in question was whether or not there existed a genuine marriage. The Department of Immigration and Multicultural Affairs had rejected the applications on the basis that the marriages were contrived to obtain residence in Australia. In one case, the IRT affirmed the decision not to grant the visa on the basis that the Tribunal members were unable to believe anything said by the applicant at the hearing as all statements made by the applicant were completely contradictory. However the marriage was indeed genuine. Both parties to the marriage returned to the applicant's home country where they lived together for three years before eventually returning together to live in Australia.

In the second case the Department had doubted the genuineness of the marriage and one of the central issues was that the marriage had not been consummated. The questions and answers in the hearing did not succeed in clarifying this issue to the satisfaction of the presiding member. After some time, as no progress was being made and the applicant was becoming distressed, the hearing was adjourned for a short break. When it was resumed the applicant was simply asked to tell the whole story from his perspective, uninterrupted by questions from the Tribunal. It turned out that the wedding had been arranged by the

applicant's parents in the traditional manner. It also became apparent that in the applicant's parent's household, where the applicant lived with his wife, the whole family slept in one bed - there was only one bed in the house - for this reason the marriage had not been consummated as the applicant had been too terrified to touch his wife, while in the same bed as his parents. This was not an uncommon situation in the applicant's home country. It highlights the need for decision makers to inform themselves with general background information before proceeding with hearings where applicants and witnesses are from a culture which is different to that of the decision maker.

These issues and illustrations are merely the tip of the iceberg in the myriad of complexities involved in cross-cultural communication. In summary, simply providing the same treatment for everyone does not ensure procedural fairness or "just' treatment. Allowances must be made to compensate for the disadvantages and barriers which go hand in hand with being a member of a linguistic and cultural minority proceeding through a predominantly ethnocentric system. Such allowances however should not be at the expense of human rights. Another problem in the legal area has been where judges have used so-called cultural traditions, or common cultural practices. to justify violence against women for example, or at last as a mitigating factor in sentencing. This is inappropriate use of cultural factors. Where there is a tension between cultural practices and human rights, the protection of an individual's human rights must surely be accorded greater weight.

Culturally determined features of communication merit wide exploration and great care if decision makers are to proceed with fairness. In short, there is a responsibility on tribunal members and judges to be cross-culturally competent.

Endnotes

1 (1997) 151 ALR 547
2 Ton-That Quynh-Du, "Legal Interpreting" in A Pauwels (ed) *Cross Cultural Communication in Legal Settings*, (1992), pp 58-61.
3 Bird, G, *The Process of Law in Australia: Intercultural Perspectives*, 1993, 216.
4 Australian Law Reform Commission, *Equality Before the Law: Women's Access to the Legal System*, 1994.
5 Ibid, 143.
6 Ibid, 35.
7 Australian Law Reform Commission, *Evidence Research Paper 8*, 1982, 61.
8 Thanks to Bruce Henry, former member of the Immigration Review Tribunal, for these two case examples.