Roughly Translated by Matthew Storey

The Council of the Law Society has recently written to the Attorney General seeking information about the establishment by the NT Government of what has been described as an Aboriginal Language Register. Faced with an NT Anti Discrimination Commission report that found the failure to provide an Aboriginal Interpreter Service in the NT was unlawful discrimination under Territory, National and International law the Chief Minister recently announced the establishment of this *Aboriginal Language Register.*

Details of the Register are vague. Apparently three staff are to be employed (2 in Darwin and 1 in Alice Springs). The Register is to focus on the 15 main languages identified in the recent NT Anti Discrimination Commission report on the need for an Aboriginal Interpreter Service and the 1997 Aboriginal Interpreter Service Pilot Study funded by the Commonwealth and run by the Office of Aboriginal Development. Investigation of matters such as interpreter training is also to take place according to the Chief Minister.

There was no reference in the Chief Minister's press release as to infrastructure or operational funds for the new Register. Nor was it clear where the Register was to be administratively located within the Chief Minister's Department (i.e. with Office of Ethnic Affairs or more directly associated with the Chief Minister's office). It was not even clear whether the three staff were additional personnel.

Essentially it would seem the proposal formalises the existing ad hoc arrangements where interpreters (for trials) are arranged through the Victim Support Unit of DPP. A register of Aboriginal language interpreters was established as part of the 1997 Pilot Study. It would seem the idea is to update this and for agencies to be put in contact with relevant interpreters on the Register.

If this is the extent of the proposal then practitioners have some significant grounds for concern. To appreciate this concern it is important to bear in mind the conclusions that can be drawn from the most recent "interpreter authority" stemming from the High Court: Ebatarinja v Deland and Ors

Matthew Storey, Member of the Law Society's Interpreter Services Committee.

Ebatarinja v Deland (1998) 157 ALR 385 (hereinafter "Ebatarinja") and Re East & Ors: Ex parte Nguyen (1998) 159 ALR 108. In both these cases the Court makes it clear that if the accused in criminal proceedings can not speak English then it is necessary for an interpreter to be used.

The following passage from Ebatarinja expresses the Court's contemporary view on this matter:

> On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her. In Kunnath v The State (1) the Judicial Committee of the Privy Council said (2):
>
> "It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant (3). As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case (4)". (5)

If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial (6). (7)

Implications of Ebatarinja

Ebatarinja dealt specifically wi committals under Northern Territo legislation but the scope of the cor ments from a unanimous High Cou bench of five suggests the case has mo broad ranging implications. These ca be summarised as follows:

• The need for the accused to unde stand proceedings stems from both tl specifics of the Act in question (Justic Act NT) and the "nature of the pr ceedings". Thus, the understanding r quirement exists independently of tl statutory requirements and may exte to proceedings similar in nature to committal where individuals may be a versely affected by findings (arguabl coronial inquiry for example);

• The requirement that: "the defen ant by reason of his presence [at t committal proceedings], should be al to understand the proceedings and c cide what witnesses he wishes to ca whether or not to give evidence and so, upon what matters relevant to t case against him" suggests that it is n sufficient that the accused merely u derstand the nature of the proceedir but that this understanding is of sut cient depth that the accused can i struct counsel as to what witnesses shou be called (s.111) cross examined (s. 10 whether the accused should give e dence (s. 110) and in relation to pleadi (s. 109). This would suggest a comp hension of proceedings going beyon simple appreciation of the charge, to t accused having a reasonable grasp the entire proceedings at committal a an ability to communicate effectiv with counsel in respect of those proce ings. This "understanding" requirem could be of particular significance relation to a debate as to whethe speaker of say an Aboriginal Engl dialect needs an interpreter. The quirement that the accused understa the proceedings, would suggest that t speaker of such a dialect may require

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Cyberlex

by Jason Schoolmeester

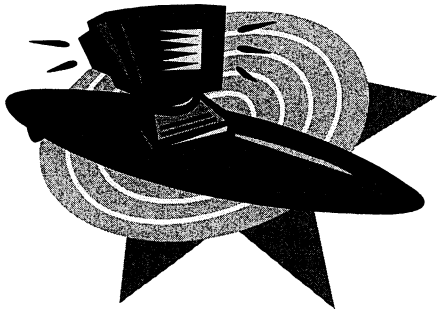
Australian Courts Embracing the Internet

To date, Australian courts have been not unlike most organisations (private and public) in their use of the Internet: a glorified brochure. While the 'brochure" style of Internet presence has its place, Internet users are demanding more functionality from the Internet. Users want the ability to interact with organisations. To a large extent e-mail has filled this role and satisfied Internet users. However, it now time for the next step as organisations find that users again want more interaction. E-commerce is exploding with Internet banking, purchasing items of all descriptions, auctions to name but a few examples of 'greater' interaction between organisations and Internet users.

Australian courts have been providing daily court lists via the Internet for sometime, but still there has been no interaction online (other than e-mail), until now. The Civil Division of the Magistrates Court of South Australia have developed a pre-lodgement system which can be accessed via the Internet.

As part of the Court Process Review, a Pre-Lodgement System was recommended for the Civil Division. This system allows for individuals or organisations to issue a "Final Notice of Claim" pursuant to Rule 20A of the Magistrates Court (Civil) Rules. By way of background, the system aims to encourage parties to resolve their disputes without the need for formal legal action. Failure to make use of this rule carries cost implications in respect of the filing fee for a claim lodged with the Court. Plaintiffs can purchase the Notice over the counter (the traditional way) or online at www.claims.courts.sa.gov.au, at a cost of $10.00.

How does the online system work?
Anybody can visit the web site and make use of this facility, however, they will need to create a username and password to gain entry. This is a simple step which asks for details about you, name, organisation, address, e-mail etc. Nothing that any legitimate user should have a problem in providing. This username and password can then be used for subsequent visits.



Once you have a username you can choose to purchase a notice at which point you are asked for your credit card details. These details are then checked: for the correct amount of numbers and valid expiry date; and then an external check to ensure the card has not been reported stolen. If both checks are passed, the user is told that the transaction was successful, if not, then the transaction will not proceed.

Assuming you are successful, you are then given simple instructions on how to generate the form and the details required. Once the details are complete the form is able to be generated. It is simple a matter of pressing print and you have the necessary document.

While this is certainly a small beginning, it is an example of the type of applications courts can make use of to attempt to alleviate the ever increasing case loads.

While there exists the potential for debate as to the effectiveness of the Pre-Lodgement System itself, the application of Internet technologies is innovative and progressive. Use of the Internet has enabled the system to be available for users of the legal system 24 hours a day 7 days a week. What does this increased availability mean? For small business this means that access to justice (at least initially) is at their own convenience.

Where to from here? I am not privy to the Court's strategic plan, but I have a few ideas of my own. Under the present system (described above) the plaintiff is still responsible for serving the notice. A system could be developed that incorporates Bailiffs. The point being that a plaintiff could create the notice and then instruct a bailiff. The bailiff could then print the notice at his end eliminating the need for the bailiff to attend the clients office or for other more cumbersome methods to be employed (if you view the example provided at the web site, you will notice that there appears to be no place for the plaintiff to sign - therefore the plaintiff never has to actually physically handle the document). Further, the bailiff and the plaintiff could leave messages either on the site or via e-mail about progress or suggestions for locating the alleged debtor.

This example of technology in action just reinforces my opinion that now is a better time than ever to participate in the development of our legal system.

Jason Schoolmeester is a policy analyst with Northern Territory Treasury. He can be reached at jason.schoolmeester@nt.gov.au (for those without email you can call on (08) 8999 6038).

GST START UP ASSISTANCE

Small and medium sized legal firms have been offered the opportunity to access GST start-up assistance to help get their business ready for the GST environment.

The GST Start-Up Assistance Office provides a business helpline run by the Australian Society of Certified Practising Accountants (ASCPA) with information on business skills, practices and processes.

The helpline number is 13 30 88 and is the cost of a local call. It will be open from 9am to 9pm and provides information on:

- whether to register for the GST;
- changes to accounting systems;
- record keeping systems appropriate for the GST;
- planning contracts to take into account GST implications;
- case flow management and the GST;
- timing of capital acquisitions and the GST; and
- creditor and debtor management and the GST.

You can get further information on the GST Start-Up Assistance Office web-site at www.gststartup.gov.au.

MOVEMENT AT THE STATION

Dr William James Jonas AM
Has been appointed: Acting Race Discrimination Commissioner at the Human Rights and Equal Opportunity Commission.

Ms Jennifer Margaret Boland
Has been appointed: Judge of the Family Court of Australia. She took up her appointment on 29 October 1999.

Justice Robert Marsden Hope AC, CMG, 1919 - 1999
Passed away on Tuesday 12 October 1999, aged 80 years. Born and educated in Sydney, NSW, Justice Hope had a distinguished career as a barrister, Queens Counsel and Judge of the NSW Court of Appeal.

Mr Steven Strickland QC
Has been appointed to the Adelaide bench of the Family Court.

CLE Topics for 2000

The Law Society CLE Committee is currently considering topics for CLE seminars in Darwin and Alice Springs in 2000. Any suggestions or comments would be welcome. Contact the Law Society on 8981 5104 or email: lawsocietynt@bigpond.com

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interpreter to understand proceedings taking place in a formal Anglo Australian dialect.

• In the particular context of the instant case it should also be appreciated that the requirement is for the accused to "understand the proceedings". Quite arguably this requirement involves more than the mere provision of an interpreter. Rather, notions similar to Anunga requirements that the prisoner understand the meaning of the caution is required.

• Finally, in relation to trials (as opposed to committals), while strictly obiter, the joint views of five members of the High Court that "[i]f the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial" is a refreshingly clear and explicit statement of the requirement at law.

Implications of Nguyen

The second case that of Nguyen involved a lengthy discussion by six of the bench of procedural matters under the Racial Discrimination Act 1975 (Cth.) and s. 75 (i) of the Constitution. However, the separate judgment of Kirby J contains significant discussion of the interpreter issue. The following summarises the elements of his Honour's judgment relevant to this discussion.

• The whole decision, but particularly the judgment of Kirby J, provides strong reinforcement for the principle espoused in Ebatarinja that there is a common law requirement for an interpreter if the accused cannot understand the proceedings. Justice Kirby's specifically refers to an accused being in a position to instruct counsel and his Honour mentions the translation of documents. Both these references suggest support for a broad meaning to be attributed to the need for the accused to understand proceedings. As noted above this may prove significant to an accused who can communicate only in an Aboriginal English dialect.

• While Nguyen may have weakened the prospects for agitating the interpreter issue by way of discrimination legislation it has greatly strengthened the prospects for judicial review and appeal based on the interpreter point. Justice Kirby's comment that it is the judicial officer's obligation to ensure a fair trial, by affording the accused the services of an interpreter would seem to provide significant scope to develop this avenue. Note also that Kirby J was one of the two judges that did not sit on Ebatarinja (Gleeson CJ being the other). Thus, in the space of a few months six of the High Court justices have been quite explicit about the need for an interpreter.

• Finally, mention should be made of the role of legal practitioners. Justice Kirby comments (at 136-137): "Where the accused is legally represented, the judicial officer can usually rely upon the legal representative to communicate to the court the needs and wishes of the accused."

• This comment has a number of implications. First practitioners must consider themselves under a professional responsibility to determine whether their client requires the services of an interpreter both for appearances and for the purposes of taking instructions. Such a determination of need requires the creation of some form of objective standard. Such a standard is necessary because a client in need of an interpreter (or their legal representatives) will often not be in a position to accurately determine their own language ability in the context of legal proceedings. Further, the employment of an objective language ability assessment would serve to establish the client's language ability in any later proceedings. It should be noted that the NT Legal Aid Commission and NAALAS have jointly produced a set of "Interpreter Need Guidelines" designed for use with Non-English Speaking Aboriginal clients to meet this need for objective language assessment. Contact NTLAC or NAALAS for more information about these.

• The second implication is blunter. Legal representatives performing functions not covered by the scope of the exclusion identified in Gianerelli v Wraith may be negligent if, when faced with a client

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CONFERENCES

9 - 10 December 1999
History of Crime, Policing and Punishment Conference
Canberra
Tel: 02 6292 9000
Fax: 02 6292 9002
Email: confco@dynamite.com.au

8 - 15 January 2000
Australian Lawyers Conference
Aspen, Colorado
Tel: 02 9692 9022
Fax: 02 9660 3446
Email: conference@netinfo.com.au

9 - 16 January 2000
Europe Pacific Legal Conference
Cortina D'Ampezzo, Italy
Tel: 07 3236 2601
Fax: 07 3358 4196

16 - 11 February 2000
The right to know: human rights, censorship and access to information
Oxford, United Kingdom
The British Council
Tel: +44 (0) 1865 316636
Fax: + 44 (0) 1865 557378

19 - 24 March 2000
First Australasian Natural Resources Law and Policy Conference
Canberra, ACT
Tel: 02 6772 8753
Fax: 02 6772 8330
E-mail: country@northnet.com.au

5 - 7 April 2000
The challenges of change - Australian Insurance Law Association National Conference
Sydney, NSW
Tel: 02 9975 7198
Fax: 02 9975 2998

30 April - 4 May 1999
Inter-Pacific Bar Association Annual Conference
Vancover, Canada
Tel: 02 9353 4199
Fax: 02 9251 7832

30 April - 5 May 2000
Britain Pacific Legal Conference
Stratford Upon Avon, United Kingdom
Tel: 07 3236 2601
Fax: 07 3358 4196
Email: boccabella@themis.com.au

14 - 20 May 2000
Environmental Law Conference: special education program for judges and law makers of the Asia Pacific Region.
Darwin and Kakadu National Park, Northern Territory
Contact: LAWASIA
Ph: (61 8) 8946 9500
Fax: (61 8) 8946 9505

2-5 July 2000
The Australian Bar Association Conference
Plaza Hotel, New York
Tel: 07 3236 2070
Fax: 07 3236 1180

3 - 6 July 2000
18th International Federation of Non-Government Organisations Conference for the Prevention of Drug and Substance Abuse
Carlton Crest Hotel, Brisbane
Tel: 07 3832 3798
Fax: 07 3832 2527
Email: dinie@ats.com.au

9 - 13 July 2000
International Family Law 10th World Conference: Processes, practices and pressures
Brisbane Sheraton Hotel, Queensland
Tel: 07 3369 0477
Fax: 07 3369 1512
Email: isfl2000@im.com.au

27 August - 1 September 2000
38th Congress of the International Association of Young Lawyers
Helsinki, Finland
Contact: International Association of Young Lawyers

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facing criminal proceedings who may come from a background where the Anglo-Australian dialect is not the native tongue, they do not take steps to ascertain the need for an interpreter. Having ascertained an interpreter may be necessary, such legal representatives should ensure the need is drawn to the attention of the relevant judicial officer. Again, this second implication points to the need for an objective determinant of language ability in a legal context.

The High Court Cases and the Aboriginal Language Register

It is in the context of this High Court authority that the Aboriginal Language Register proposal should be considered. Practitioners are under an obligation to ensure that Non-English speaking clients have access to interpreters for the purposes of giving instructions and at committals and trials. Clearly in the Northern Territory where significant numbers of those brought before the criminal courts speak an Aboriginal language as their first language this requirement can only be discharged with the support or a suitable infrastructure. The minimalist model proposed by the Chief Minister would not seem able to support the requirements that have been imposed on both judicial officers and practitioners by the High Court.
In these circumstances one can only hope that the clarification of the Aboriginal Language Register proposal sought by the Law Society indicates it is a substantially more significant proposal than it at first appears.

(1) *Kunnath v The State* 1 WLR at 1319 [1993] 4 All ER 30 at 35.
(2) ibid at 1319, at 35.
(3) *Lawrence v R* [1933] AC 699 at 708 per Lord Atkin.
(4) *R v Kwok Leung* [1909] 4 HKLR 161 per Gompertz J; R v Lee Kun [1916] 1 KB 337 at 341 per Lord Reading CJ.
(5) See also R v Tran [1994] 2 SCR 951.
(6) *R v Lee Kun* [1916] 1 KB 337 at 341; *R v Johnson* (1987) 25 A Crim R 433 at 435; *R v Lars* (1994) 73 A Crim R 91 at 115.
(7) *Ebalarinja* at 391 (footnotes in the original).