BALANCE

APRIL 1999

The Official Publication of the Law Society of the Northern Territory

INTERPRETING THE LAW

The public inquiry into the provision of interpreter services in Aboriginal languages by the Northern Territory anti-discrimination commissioner has re-ignited calls for a government funded central register of trained interpreters. In supporting this course, *Dominic McCormack* of De Silva Hebron writes in his paper *"Language and The System"* that the time has come for lawyers and the judiciary to uphold the rule of law and ensure language poses no barrier to participation in our legal system.

Aboriginal interpreters may be available in a raw and untrained sense but they are not readily accessible to the general public, particularly our key service providers in the areas of law and health. And yet they are without question needed. With minor exceptions there is no comprehensive list of people who have the necessary skills to carry out the type of work required in fields such as legal and medical practice.

In my view it is obvious that many, many cases, both legal and medical, have clearly proceeded over the years, in fact decades, without Aboriginal people actually knowing their position or their rights.

Cost as usual seems to be the bottom line. However it remains my firm view that should a central register of interpreters be provided, the cost of administration and the length of court lists involving Aboriginal persons would decrease considerably. The same could be said for hospital waiting lists and treatment of the injured and sick.

In recent times a number of important events have occurred and shall continue to occur. There has been a change in leadership of both the Country Liberal Party and the Labor Party here in the Northern Territory, the Federal Coalition has been restored to power, defence numbers in the Top End continue to grow, legal services to the Northern Territory government have been almost completely privatised and the change of the millennium draws nearer bringing with it all its inherent bugs - and a GST.

But has the ability of Aboriginal people of the Top End of Australia to meet the challenges been enhanced in any way? Have we drawn any nearer to ensuring that those who do not have English as a first language will be able to participate in "the system"?

Evaluating the 1997 trial

An analysis of two reports - one publicly available, the other unpublished and prepared first - on a 1997 trial of an Aboriginal interpreter service reveals two different interpretations of the results.

During the six month trial, 32 interpreters were accredited, 61 Aboriginal languages were catered for and 236 bookings were made by the legal and medical sectors.

The published report, *Trial Aboriginal Languages Interpreter Service - Evaluation Report,* by the Northern Territory Attorney General's Department, found it was not possible to quantify any cost savings by providing the service.

In stark contrast the unpublished report, *Executive Summary - the Northern Territory Sets a National Precedent: Objective and Principle Findings of the Trial,* states a permanent service with a comprehensive register is feasible and its cost effectiveness would be evident.

In fact the unpublished report states that the potential cost to the Northern Territory Government of not having such a service far exceed the cost of providing it.

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It calculates the annual cost of running an interpreting service at $370,000 in the Top End and $140,000 in the Centre.
The published report also found it is "possible to provide an effective service without using accredited interpreters." Despite this observation the report goes on to recognise the need for more in-depth and specialist training for a successful service.

In my opinion, the use of non-accredited interpreters would be much the same as using the "dreaded backyard boys" with your V8 Holden - they would gain a great deal of practice each time, learn a bit more as they go, but at whose cost?

The fact I think are obvious - if we wish to have competent interpreters within our courts, interview rooms and hospital wards, training is absolutely essential and there can be no justifiable argument to the contrary. (I may know a little about the workings of a twin engine Cessna 402, but until I have officially gained my pilots licence, would you fly with me?).

Given that 70.3 per cent of Aboriginal people speak an Aboriginal language at home and 27.8 per cent do not speak English well and 5.3 per cent do not speak English at all (1991 Census), the lines of communication for legal services need to be urgently considered.

This is particularly so when, for example; an Aboriginal victim reports a crime to police, an Aboriginal witness is interviewed by police or presents evidence in court, an Aboriginal defendant makes admissions, counsel is instructed or proceedings in court need to be listened to and understood.

It is my view that the need for a register of interpreters for Aboriginal languages in the Northern Territory is beyond question. Think about it. On the one hand $410,000 to run an interpreting service against negligence or wrongful imprisonment claims fought in the Supreme Court, then on appeal, perhaps to the High Court and awards of costs against the Northern Territory government. Which makes more legal, economic and humanitarian sense?

And what of the obligations of the legal practitioner?

It is obvious that we are required to work within a system - rules, regulations, guidelines, time frames, monetary constraints, administrative procedures and process. We may desire in our heart to "do the right thing" but it is often difficult to work within that system and achieve those aims.

So, does the current system conflict with our own rules and the legal obligations imposed upon us where language is concerned?

In the Northern Territory all practitioners have taken an oath or affirmation to serve honestly and to the best of knowledge and ability.

Judges and magistrates swear to serve and to do right to all manner of people without fear or favour, affection or ill will. The Professional Conduct Rules (PCR) and the Legal Practitioners Act (LPA) also place obligations on practitioners, as does the rule of law.

In fact rule 9.6 of the PCR specifically provides that if instructions prevent the proper performance by a practitioner of their duties, the practitioner should decline to act further and should so advise the client. I assume that this would include the inability to take instructions, and therefore if a practitioner, due to lack of instructions, is unable to perform, they should also decline to act. Further, rule 9.4 of the PCR states that we are also required to "keep a client apprised of all significant developments."

With respect to both those rules, how does the practitioner comply if they are unable to communicate effectively, let alone at all, with the client?

What are practitioners doing now - guessing? I would say in many instances the answer to that question is "yes". Surely such a situation contravenes section 45(9)(a)(ii) of the LPA and are, I would argue both wilfully and recklessly fails to comply with both rules 9.4 and 9.6 of the PCR.

However, I do not for a moment lay the blame at the feet of practitioners. This situation is entertained, and has been entertained for some time, every day in our courts. Matters are taken on, brought before judges and magistrates, and the Aboriginal defendant concerned is oblivious to what is happening - but that is administratively acceptable because the court list is full, we all have deadlines and must comply with the process. Why should a little thing such as the rule of law bother any of us?

In my view a practitioner is not only bound by the PCR and the LPA to ensure that an interpreter is available in all instances where necessary and to apply for an adjournment on each and every occasion an interpreter is required but is not available, the court is bound to entertain such an application and grant the adjournment on the basis of the principles enunciated by the High Court in *Dietrich v Queen (1992) 177 CLR 292*.

The next step

Section 357 of the Criminal Code provides that if it appears to the court to be uncertain whether the defendant is capable of understanding the proceedings at trial so as to be able to make a proper response, the court may determine that, by reason of abnormality of mind *or for some other reason,* the defendant be discharged. Without an interpreter, many Aboriginal defendants are not capable of understanding proceedings to the extent of being able to effectively instruct counsel and accordingly ought to be discharged. However, to my knowledge such a submission has never been made in a Northern Territory court.

There is also a strong presumption at common law in favour of permitting the defendant to have the assistance of an interpreter to translate all proceedings in court.

Justice Kirby in *Gradidge v Grace Brothers Pty Ltd (1988) 93 FLR 414 at 417* states: "Due process includes an entitlement to a fair trial which is normally conducted in the open. It also normally includes an entitlement to be informed, in *a language which the litigant understands*, of the nature of the case. Where the litigant cannot communicate orally in English it also normally includes, in my opinion, the entitlement to the assistance of an interpreter...The principle of an open trial in public, which is the hallmark of our system of justice, is

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not shibboleth. It exists for a purpose. That purpose is publicly to demonstrate to all who may be concerned, the correctness and the justice of the courts determination according to law. That demonstration must extend to the parties themselves, for they are most affected by the outcome of the case. *Such demonstration, day by day in the courts, reinforces respect for the rule of law in our society.*" (Emphasis mine).

Such demonstrations have been seriously lacking in our courts for some time now, and it is high time to remedy the situation. Currently, we as a profession are not in a position to "reinforce" respect for the rule of law when this particular issue is raised - we must gain it in the eyes of all in our society - Aboriginal and non-Aboriginal.

Perhaps if the situation is not remedied immediately by the state the "next step" is for the practice to be questioned.

Currently the system we are all bound to operate within does not ensure that all men and women are equal before the law when matters of language and understanding are concerned. In my view both the PCR and the LPA are being breached on a regular basis.

Unfortunately such a situation continues to be entertained by our courts. No longer are the rumblings of "cost savings", "demands", "failure" and "under-utilisation" good enough - the loss of one limb or the acceptance of an incorrect guilty plea is one too many.

In such circumstances cost savings are irrelevant and demand had long ago reached a critical level. The NT government must allocate suitable resources, and must allocate them now.

Our judges and magistrates too have a special and powerful place within the system and I urge them to use it to do right to all manner of people according to the law with all the positive strength that they have, regardless of what the initial consequences might be. They are the buffer between Government and the citizen and in this case the Aboriginal citizen - they are independent and capable of making decisions which will force the government to take action.

The time has come for the legal system in the Northern Territory - practitioners, magistrates and judges alike - to uphold and reinforce the rule of the law without fear or favour, affection or ill-will, and ensure that when Aboriginal people come within the legal system they understand it and are able to participate fully in it by the proper exercise of their rights in accordance with their instructions.

Dominic McCormack's full paper, "Language and The System" is available from the Law Society.

Interpreters and the DPP

Director of Public Prosecutions *Rex Wild QC* discusses Aboriginal language interpreters from the DPP's perspective.

My office was provided with an advance copy of Dominic McCormack's excellent paper titled "Language and the System".

It is fair to say not a lot has changed in the 65 years since Tuckiar's trial in the Northern Territory. There is, I think however a new interest and determination to improve the lot of the Aboriginal witness and defendant in relation to their understanding of the criminal justice system. This is demonstrated by, amongst other things:

1. The Trial Aboriginal Language Interpreters Service of 1997.
2. The work of an informal sub-committee formed and chaired by Justice Mildren of the Supreme Court to promote improvement of Aboriginal interpreter services.
3. The pending (at the time of writing) inquiry by the NT Anti-Discrimination Commissioner.

It will be appreciated that the interests of this Office are more towards the improvement of the presentation of the prosecution case; hence the comments of this Office in describing its response to the Trial Service, and quoted in Dominic's full paper which are worth repeating here:

(i) Interpreters are used more often;

(ii) The process of finding interpreters is now simple and efficient. It requires one (1) telephone call to the service as against six (6) - ten (10) calls to the various communities in an attempt to locate a particular interpreter;

(iii) The office is saving a lot of money because it is not financing interpreter fees, travel and accommodation; and

(iv) When interpreters are used the witnesses are more confident, informed and better able to give their evidence.

These remarks were relevant to the pilot service of 1997. The comment in item (iii) would not apply to other than the pilot service which operated, by reason of Commonwealth funding, free of charge. Since then, costs incurred have been substantial.

This Office is very aware of the problems confronting the Aboriginal person who becomes involved in the criminal justice system. Within a month of taking up my permanent appointment as Director, a new position of Aboriginal Support Co-ordinator was filled. I said in my first Annual Report of 1995-96 that this *brings to the Office an awareness of the special needs of Aboriginal persons presenting before the criminal justice system.* I continued, in respect of Aboriginal persons, victims and witnesses to say that *due to the vast differences in their cultural background these persons experience significant language and other cultural problems. The issue of promotion of effective communication ... remain(s) a major challenge to this Office* (pg 45).

This theme was revisited in the 1996-97 Annual Report when under the heading "Use of Aboriginal Interpreters" it was noted:

A large number of witnesses require the assistance of interpreters. The Office is committed to addressing the issue of

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