

Language as a Barrier to Justice

Anna Harley*

The use of language is the foundation of any legal system; courtroom engagement comes down to a battle of words and their form and their function.¹ Of the many barriers to justice experienced by litigants, language is perhaps the most isolating. It is a tangible barrier to accessing the legal system and justice especially where jargon and tradition dictate proceedings. Further, language proficiency is increasingly important to access the legal system in an ever-globalising world. The criminal justice system in New South Wales will be used to explore and illustrate the effect that language can have on participation and access to the justice system.

I. LANGUAGE AS FORMALITY

Language in the law sets boundaries and acceptable forms of conduct through statute, judgment and convention.² As parameters are set by the words used and the systematic classification of certain behaviours is constructed in relation to other aspects of language, either written or oral, it can be difficult for those without the requisite training or knowledge to understand how the system impacts their particular legal problem.³ Lack of knowledge or understanding is a significant barrier to engagement and participation in the legal process, as it becomes exclusive and the domain of experts.⁴

Language used within the criminal justice process is pervasive and operative at every point of access to the system itself. It dictates and communicates the proceedings and rules of the game based on the broader

assumption that all those involved have full knowledge of the process.⁵ As law is normative and guides the community on behaviours that are acceptable or criminalised, it is ‘power-conferring and duty-imposing’.⁶

Further, laws are validated by reference to each other and in that way work in tandem.⁷ Without expertise as to how the legal system works as a whole in conjunction with each of its limbs, it is difficult to understand the process as it evolves and the requisite steps needed for dispute resolution.⁸ It is inevitable therefore that a lack of knowledge or understanding of the courtroom’s formal language, format and structure of a defence, or understanding of rights is disadvantageous to those who lack the skills or knowledge assumed by the law.⁹

The most salient example is that of an unrepresented accused. Whilst the criminal justice system is supposed to aim to balance the relationship of inequality between State agencies and citizens, it is evident that an adherence to due process – coupled with a need for efficiency – often means unrepresented accused are afforded very little time to advocate for themselves.¹⁰ Often judges in Local or District Courts need to balance the desired efficiency of proceedings with ensuring that unrepresented parties receive adequate legal advice and understand the consequences of the charges against them.

The language of law has become the domain of experts and courts appear reluctant to allow the same level of engagement with those who lack the requisite knowledge or communication skills.¹¹ This is true for any

profession and could be seen as a form of nepotism. However, the reluctance of courts to engage directly with unrepresented defendants can also be seen as an indication of the complexity of the legal process and the need to aid people in their engagement with the law.¹² Self represented litigants are increasingly engaging with courts at all levels, and how the courts respond is recognised as a significant challenge in case management and procedure.¹³

Representation by a legal professional with language training and communication skills offers much needed expertise.¹⁴ Paradoxically, however, representation also raises other barriers to access.¹⁵ There are costs and time constraints involved with seeking legal advice and despite programs like Legal Aid there are systemic pressures on the resources of services to provide adequately and fairly for all who wish to seek legal advice.¹⁶

II. LANGUAGE PROFICIENCY

Access to adequate and appropriate language services where English is a second language is vital in order to ensure sufficient engagement with and access to the legal process.¹⁷ Language proficiency and understanding is requisite in order to have the capacity to take and give advice, and to ensure understanding of the consequences of decisions.¹⁸

New South Wales (NSW) is ‘the most culturally and linguistically diverse community in Australia with a complex range of people from numerous cultural, ethnic, linguistic and religious backgrounds.’¹⁹ Approximately one quarter of the population speak a language other than English at home.²⁰ 16.1 per cent of people in NSW were born in a non-English speaking country.²¹

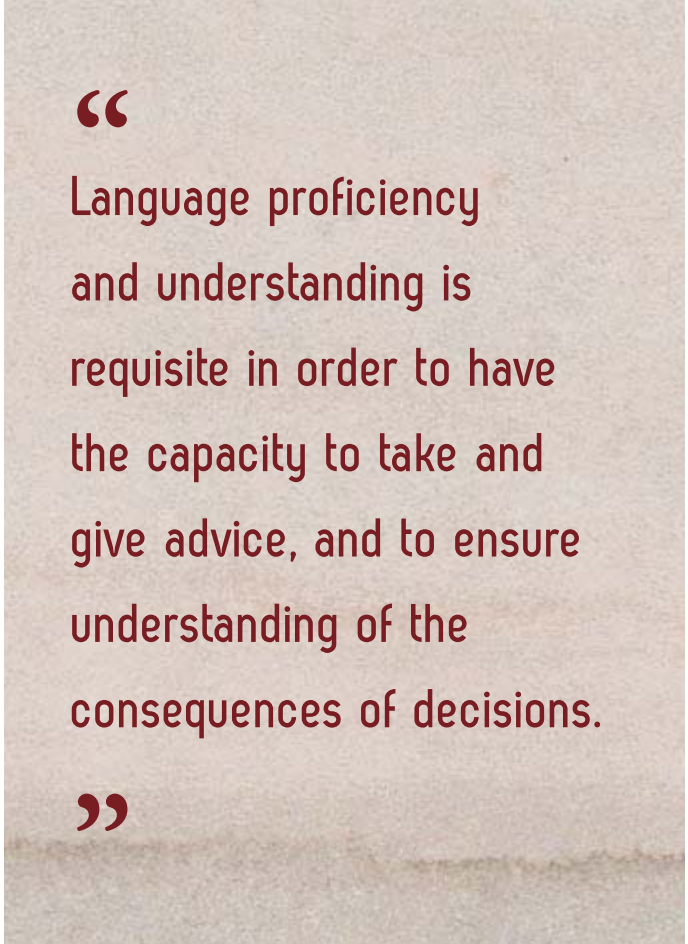
The NSW justice system has increasing demands to accommodate non-English speaking witnesses, suspects and accused without compromising due process.²² The pressure to implement technocratic justice processes impacts on the ability of participants to adequately understand their position and the options afforded to them.²³ There is a greater amount of time needed when language is a barrier.²⁴ Efficiency quantifies time as a commodity – the greater time taken to access the appropriate interpreter, the more expensive the process becomes.²⁵

It is argued that due process is the only protection

afforded to those with language difficulties.²⁶ However, the relationship between adequate command of English so as to understand rights, be able to receive advice and give instructions is becoming ever more tenuous as drives for efficiency become key performance variables.²⁷ Language proficiency is a pivotal issue in the evaluation of voluntariness in terms of consent to searches, admissions of guilt, understandings of rights and the ability to give and receive advice.²⁸

It is often noted that the use of interpreters causes considerable delay in proceedings. This is despite increasing uses of technology and utilising translators over the phone. There are still considerable delays and this affects the large volume of proceedings in lower courts and the time in which they are dealt with.

Correspondingly, language is contested; this is the very foundation for submissions. Opposing views are pitted against one and other and this often becomes more complicated where one party has interpreted a defined term or word in a different manner, or if there is more than one possible meaning.²⁹ Semantic levels change the meaning of individual words or the context within which these occur.³⁰ Furthermore, cultural implications



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around particular words and their meanings can compromise technical semantics.³¹ If there is found to be an error in the interpretation of particular documents or testimony, this has tangible consequences on time and money spent on a trial and also the evidence that has been previously tendered.³²

The contentious nature of translation is evident in two ways. The first is in relation to the translation of particular words in documents or transcripts and the impacts particular meanings may have had. As words and their subsequent meanings can greatly affect the impact certain evidence has, establishing the intended meaning is a vital part of the adversarial process.

The second is the interpretation of a word that does not translate literally from one language into another. In many languages there are words that do not translate adequately into English. Further, there are cultural and social connotations that cannot be adequately expressed and are often lost in translation.

Judges and counsel often misunderstand the role of interpreters.³³ Regularly interpreters are not regarded or treated as experts, and whilst the judicial system demands a high standard of interpreting skill it does not support or incentivise the development of such a system through remuneration or professional recognition.³⁴ There are tensions between what does and what does not get interpreted or translated.³⁵ While there is a

general right to a fair trial, there is no automatic right to an interpreter.³⁶ This raises the question: is it possible to have a fair trial if the accused is not 'linguistically present' or divorced from proceedings due to a language barrier?³⁷

The pressures on the legal system are numerous and in a period of budgetary constraints it is understandable that some aspects of the system are prioritised over others. However, that is not to say that budgetary pressures do not have significant impacts on those trying to access the system with English as a second language, or with little or no experience of the formality and structure of the language used within the system itself. Systemic pressures alienate and isolate defendants and those trying to gain access to the legal system. Barriers to access are not merely physical and language has real impact on people's experience of their place and space within the legal system. Further, the ability of the person to actively engage with the legal system is inhibited by language barriers that have the possibility, without the protection of due process measures, to lead to a miscarriage of justice.

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Anna Harley* Juris Doctor Candidate, UNSW

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