NORTHERN TERRITORY INTERPRETER AND TRANSLATOR SERVICE

SYMPOSIUM – AUGUST 2003

Justice Trevor Riley

THE LEGAL STATUS OF COURT INTERPRETERS

The language of the legal system in Australia is English. As we welcome more people to this country from an ever-expanding range of nations and language groups, the proportion of people who find themselves in the courts and who either do not speak English or are not fluent in English will inevitably increase.

The need for court interpreters has long been recognised. Over many years that need has translated into a requirement that the presence of an interpreter is, in many cases, necessary to ensure a fair trial. As the High Court recently observed in *Ebatarinja v Deland*,[1] it is now well established that the defendant in a criminal trial 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. The court concluded that 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".

The obligation to ensure a fair trial rests with the court. As early as 1915 the Court of Criminal Appeal in England when dealing with an accused person who did not understand the English language said that[2]:

> "It is for the court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the Court. The reason is that the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law."

The involvement of an interpreter in particular proceedings will be a matter for the exercise of a judicial discretion. Ultimately the exercise of that discretion will be informed by the requirement that the judicial officer must ensure that an accused person receives a fair trial. A fair trial involves the accused and the tribunal being able to hear and understand the evidence of each witness.[3]

In many cases the need for an interpreter will be obvious. For example, if an accused person does not speak the English language at all, that person is unlikely to be able to receive a fair trial in the absence of an appropriately qualified interpreter. Similarly, in circumstances where a witness called in proceedings is unable to be effectively examined or cross-examined because of difficulties in understanding the English language, the services of an interpreter will be required.[4]

In other cases the need for the assistance will not be so clear. If a witness has some English but is not proficient in that language an exercise of judgment is required of the judicial officer. The fact that simpler language may be required in questioning such a witness or that some questions may have to be repeated or restructured does not necessarily mean that an interpreter is required. It may be argued that

the tribunal of fact, be it magistrate, judge, jury or other tribunal, is able to make a better assessment of the credibility and reliability of a witness without the intervention of an interpreter. In such a case the court may determine that an interpreter is not required at all or is required for only part of the evidence of the witness.

In the case of *Filios v Morland*[5] the Full Court of the Supreme Court of New South Wales noted that the primary consideration in resolving an application to use the services of an interpreter is that "what the witness has to say should be put before the court as fully and accurately, and as fairly and effectively, as all the circumstances permit". The court noted that it is not always the case that this aim will be better achieved by the use of an interpreter. It was observed that evidence given through an interpreter loses much of its impact, even where expert interpretation is readily available. Brereton J (with whom Manning and Else-Mitchell JJ agreed) said (332-333):

> "The jury do not really hear the witness, nor are they fully able to appreciate, for instance, the degree of conviction or uncertainty with which his evidence is given; they cannot wholly follow the nuances, inflections, quickness or hesitancy of the witness; all they have is the dispassionate and unexpressive tone of the interpreter."

The court went on to observe that where a witness has some knowledge of English a cross-examiner is placed at a disadvantage. The witness is able to gain time to consider his answers while the interpreter is undertaking his or her task.

In a case where the witness has some capacity with the English language a difficult problem may be posed for the trial judge in determining whether to allow the use of an interpreter in the circumstances. Often

that decision will have to be made on the basis of incomplete and inadequate material. It will be a decision made in the early stages of the proceeding where the court has no, or very little, familiarity with the person concerned. In many cases the only assistance the court will have is to be informed that the person uses English in everyday situations and is able to respond to some simple questions posed by the court. Any decision made is likely to have to be revisited during the course of the evidence.

The authorities warn that the decision should be made bearing in mind that English is not the first language of the witness and that the difficulty the witness may experience in understanding and/or speaking English may lead to misunderstanding of the evidence. As Kirby P pointed out in *Cucu v District Court (NSW)*[6] "the linguistic skills adequate for work and social intercourse frequently evaporate in stressful, formal and important situations". That is even more so if the environment is hostile as is often the case in a courtroom. In an earlier case[7] Kirby P expressed the view that courts should strive to ensure that no person is disadvantaged by the want of an interpreter if that person's first language is not English and he urged a view that such persons should have access to an interpreter in court proceedings where justified. He acknowledged that the matter was one for the discretion of the trial judge.

The discretion to be exercised by the trial judge is to be exercised according to law. It is not a discretion, which may be exercised "on the basis of idiosyncratic opinions"[8]. It is to be exercised with the object of obtaining a fair trial for the parties in court.

In circumstances where the judicial officer determines that the intervention of an interpreter is not required or is required only for part of the evidence, it will be incumbent upon the court to ensure that the evidence given is carefully assessed.

As I have observed, whether the services of an interpreter will be permitted will be a matter for the trial judge to determine in the exercise of his or her discretion. The exercise of that discretion is not at large. The discretion must be exercised according to law. Regrettably, the law that informs the exercise of the discretion will differ in different jurisdictions. The required approach will vary from State to State to Territory. It may also differ from court to court within the respective States and Territories. In some parts of Australia the issue is to be addressed in accordance with the common law and in other parts of Australia the relevant legislatures have intervened. Where there has been legislative intervention, unfortunately, there has not always been consistency in the terms of the intervention. The state of the law in this regard is quite unsatisfactory.

The Common Law

In those jurisdictions where the common law continues to guide the exercise of the discretion there is no presumption in favour of allowing the use of an interpreter.

In *Dairy Farmers Co-operative Milk Co Ltd v Acquilina*[9] the High Court made it clear that in circumstances where there has been no statutory intervention there is no rule that a witness is entitled, as of right, to give evidence in his or her native tongue through an interpreter. The court confirmed that the need for an interpreter will be a matter for the

exercise of the discretion of the trial judge and that the exercise of the discretion should not be the subject of interference by a court on appeal except for "extremely cogent reasons".

It has been argued that in those jurisdictions that continue to be guided by the common law:

> "…considerable weight has been given to the need to ensure that a witness with some English does not obtain an unfair advantage, and to difficulties in assessing the veracity of evidence given where an interpreter is interposed between the cross-examiner and the witness. Less attention has been given to the real risk that, if a witness has some, albeit minimal, knowledge of English, he or she may not be able to adequately understand the questions or convey the meanings he or she wishes to express".[10]

Statutory Intervention

There has been haphazard intervention in this area by various legislatures around Australia. In proceeding as they did, the Parliaments that have chosen to interfere with the common law approach had available various options, including providing for:

> (a) an unfettered right to an interpreter;
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> (b) prima facie entitlement to an interpreter which ensures that a witness is entitled to an interpreter unless the court is satisfied that the witness has sufficient understanding of the English language;
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> (c) entitlement to an interpreter if language skills are insufficient but without reversal of the onus; and
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> (d) continuation of the exercise of judicial discretion at common law.[11]

The most significant of the interventions have been those by the Federal Parliament in the Evidence Act (Cth) 1995, the New South Wales

Parliament in the Evidence Act (NSW) 1995 and by the Tasmanian Parliament in the Evidence Act (Tas). The relevant provisions in each of those Acts are in the same terms and follow the recommendations of the Australian Law Reform Commission in its 1987 Report on Evidence and the further recommendations in reports in April 1991[12] and March 1992[13].

Where the legislatures have sought to intervene in relation to this issue, the approach to the exercise of the discretion has shifted away from the position that prevails at common law. For example, s 30 of the Evidence Act (Cth) 1995 provides that:

> "A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact".[14]

In effect, the section provides that a witness should be able to give evidence through an interpreter unless the court otherwise orders. Under this legislative regime the court retains its discretion to determine whether an interpreter should be used in a particular case, but the discretion is exercised in a different context. The presumption that a witness is not entitled to an interpreter is reversed. In order to deny access to an interpreter the court would need to be satisfied that the witness can understand and speak the English language sufficiently well to enable the witness to be able to understand and make adequate reply to questions regarding a particular matter. Judicial difficulties in assessing whether or not a witness needs an interpreter will be resolved in favour of the witness.[15]

In the Northern Territory and other jurisdictions where there has been no relevant legislative activity the common law approach continues to

apply. However, in this jurisdiction the Evidence Act (Cth) has application in limited circumstances. It applies in relation to proceedings in Federal courts but will not apply to most Federal prosecutions because these are conducted in State and Territory courts in accordance with local rules of evidence.

The arguments for rejecting an unfettered right to an interpreter included that such a proposal would lead to unnecessary costs, delays and inconvenience. It was also suggested that such a provision would constitute an undue interference with the discharge by the courts of their responsibility. In relation to the option of a continuation of the exercise of judicial discretion at common law, such as continues to be the case in the Northern Territory, it was argued that it has worked injustice in some particular cases. That, of course, is a highly subjective assessment.

Whilst the relevant provisions in the Evidence Act (Cth), Evidence Act (NSW) and Evidence Act (Tas) are uniform, that is not the case with other legislation in other States and Territories. The issue has been addressed in South Australia in s 14 of the Evidence Act (SA), in Queensland in s 131A of the Evidence Act (Qld) and in Victoria in s 40 of the Magistrates Court Act (Vic)[16]. In each of these jurisdictions the guiding principles have been addressed in differing terms. It is unnecessary, for present purposes, to set out the terms of each of the provisions. It is enough to note that they are quite different from each other in form, if not effect.

To my mind the differences that now exist and to which I have drawn attention are both unfortunate and unnecessary. The matter has been the subject of detailed consideration in a number of inquiries conducted over a substantial period of time.[17] The result of these inquiries is the

formulation found in s 30 of the uniform evidence legislation which I have set out above. That approach was recommended following a detailed consideration of each of the arguments in favour of each of the differing approaches. They have been applied over a number of years and, so far as I am aware, have worked effectively. In the absence of compelling reason to the contrary, the approach to this issue should be the same throughout Australia and in the various courts and tribunals within each jurisdiction. In particular, it should be the approach provided for in the Northern Territory.

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[1] (1998) 194 CLR 446 at 454 per Gaudron, McHugh, Gummow, Hayne and Callinan JJ
[2] The King v Lee Kun (1916) 1 KB 337 at 341
[3] Johnson (1986) 25 A Crim R 433
[4] Johnson (supra) at 440
[5] (1963) 63 SR(NSW) 331 at 332-334
[6] (1994) 73 A Crim R 240 at 243
[7] Adamopoulos v Olympic Airways SA (1991) 25 NSWLR 75 at 78
[8] Gradidge v Grace Bros Pty Ltd (1988) 93 FLR 414 at 423 per Kirby P
[9] (1963) 109 CLR 459 per McTiernan, Kitto, Menzies, Windeyer and Owen JJ at 464
[10] Access to Interpreters in the Australian Legal System AGPS Canberra April 1991 at para 3.11.3
[11] Access to Interpreters (supra) at 3.10.1
[12] Access to Interpreters (supra)
[13] Australian Law Reform Commission Report No 57: Multiculturalism and the Law
[14] See also Evidence Act (NSW) 1995 s 30 and the Evidence Act (Tas) s 30
[15] Multiculturalism and the Law (supra) at 3.26
[16] I have been unable to locate any more general provision in Victoria. The issue has also been addressed in specific pieces of legislation such as the Migration Act (Cth), the Crimes (Family Violence) Act (Vic) 1987, Crimes (Custody and Investigation) Act (Vic) 1988, Children and Young Persons Act (Vic) 1989 and others
[17] Access to Interpreters (supra); Multiculturalism and the Law (supra) New South Wales Law Reform Commission 1982, Australian Law Reform Commission Report on Evidence 1987