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"Communication Strategies in a Cross-cultural Context"

Let me begin by asking some basic questions:

- What is interpreting/translating; and
- Who or what is an interpreter/translator?

Firstly, interpreting is the precise transfer by an interpreter of the content of a message received from Person A in their first language, to Person B in their first language. Broadly, it is the achievement of effective communication between language groups.

Translating is essentially the same, although dealing with the written, as opposed to the spoken, word.

Secondly, an interpreter is someone who:

- At minimum, is bilingual;
- Understands the specialized language of their workplace;
- Is confident;
- Is able to switch quickly between languages;
- Has appropriate accreditation; and
- Acknowledges and follows their Code of Ethics.

Importantly, interpreting is NOT the *explanation* by an interpreter to Person B of the interpreter's understanding of the message conveyed by Person A. Further, an interpreter is NOT merely someone whose capacity is that of conversational English.

A translator is someone able to apply similar skills to the written word.

These definitions are important because throughout Australia, people and cultures clash daily. A major reason for this is misunderstanding at a social and cultural level. A great part of this misunderstanding is inability to communicate effectively.

Communication Links

For us to create an effective communication link with another there must be a means that we each comprehend and use equally well so that a meeting of minds occurs. This means is 'language'. What does this word mean for you? Perhaps Indonesian,

Braille or HTML. You may have even thought of 'bad or 'sign language'!

In addition, there are languages described as 'specialty' languages, or languages within languages: Medicine; Engineering; and Law (our own: "legalese"). Even when these are discussed in your native tongue, they have an aura about them, so that I may ask of you:

> "Do you understand *all* that is discussed in medicine; in anthropological texts; or when an accountant explains a profit and loss or balance sheet? If not, why not? You speak the *same language*, don't you? Or do you?"

So what is 'language'? Language is our means of communication, discovery of each other and participation within the world around us. It is the phraseology peculiar to a profession. It is the basis of creating a link with another and understanding them and their world. Language is created by and contains within it history, social values and a contextual background upon which the world is judged. Without some form of language, one cannot access the world we live in or that of another fully, nor make decisions based on properly understood knowledge or information obtained.

In short, language is CRUCIAL.

As language is so crucial, every effort must be made to ensure the correct transferral, and subsequent understanding, of information. The arena of the legal system then, with its court structure, specialised knowledge, obscure legalese, commercial requirements and administrative burdens poses its own unique difficulties.

The understandable inability of the system's personnel, including court orderlies, field officers and administrative staff to speak the multitude of differing languages of multi-cultural Australia, and the corresponding difficulties of multi-cultural Australia to speak English, requires assistance of a unique kind. Such assistance is found in the abilities of interpreters and translators. For the purposes of this presentation, I will focus on interpreters.

An Explanation of the Need for Indigenous Interpreters

With respect to the Indigenous population of the Northern Territory generally, the need to use interpreters is easily highlighted. Critically, the majority of Australian – that is, Indigenous – languages are spoken in the Northern Territory, totalling some 59%. Western Australia has the next highest proportion with 9%. This is exemplified by the following quote from the 1999 *Learning Lessons Report* upon Indigenous Education:

> "Within the Northern Territory, only around 30% of Aboriginal people used English as a first language. The corresponding figure for non- Aboriginal Territorians is close to 90%. It is noteworthy that the corresponding figure for *Aboriginal people throughout the rest of Australia* is around 80%. [Only] around 4% of Aboriginal people in the East Arnhem region use English as a first language, which effectively relegates English to the position of being *a minor language* for Aboriginal people in that region. It is probable that this situation is not duplicated outside the Territory"[i]. (Emphasis added).

At that time, the 2001 Australian Bureau of Statistics Census data confirmed these figures[ii]. They also demonstrated that Indigenous peoples comprised approximately 25% of the Territory's population[iii]. The 2011 Census data indicated that Indigenous peoples now comprise some 27% of the Territory's population[iv]. In all other jurisdictions, 4% or less of the population were of Aboriginal and/or Torres Strait Islander origin. Steadily then, this population is increasing in number.

Of this Aboriginal population, only 3 in 10 speak English as a first language - not even one third. The figure of 4% in the East Arnhem region is particularly illuminating - as stated, in that entire region, English is considered a 'minor' language. At a bare minimum then, 70% of Indigenous people that Northern Territory lawyers are required to work with will not be able to converse in English as a first language.

How adequate their knowledge is of English as a second, third or even more further-removed language is for lawyers to attempt to ascertain, and this has its difficulties which are also applicable to wider, multi-cultural Australia:

- Some, knowing a little English, will be too embarrassed to admit that they don't know English adequately, and will continue conversing in an attempt to save face;
- Others will be able to converse readily in a fluent, conversational style, while not comprehending the technical vagaries of legalese. Remember, fluency of speech does not equal adequate specialized knowledge, therefore mis-communication may occur in two ways:
    - Not knowing the terminology being utilized at all; or
    - While having heard the words being used and in fact using them, the conceptual understanding required is not held. An example is the word: "Bail" - many Indigenous people, trainee interpreters included, understand this word to mean: "You are free to go", unaware that it is conditional liberty, requiring the defendant to in fact return!

The Northern Territory then, with its widely multi-cultural society, is indeed a challenging jurisdiction within which to practice law!

Ensuring effective communication

So how do you address such difficulties as a lawyer in a multi-cultural society? One rule, well known though unwritten, is that of CYA. Nicely put, this requires that, in the circumstances, you do all that you can in ***your own*** best interests to ensure proper and effective communication so that when questions are later asked of you, answers are immediately forthcoming that all possible avenues were explored and utilised.

The requirements for counsel (particularly defence counsel, though applicable to practitioners generally) are best summed up by His Honour, Justice Muirhead, who stated in the case of *Putti v Simpson* (1975) 6 ALR 47, at 50-51 that:

"…it is absolutely vital that counsel remember their function and obligations, not the least of which is to ensure they are adequately instructed before appearing for clients - especially when the liberty of those clients may be in jeopardy - and that the clients are

properly advised. These matters are basic. Half-baked instructions which may come from unreliable sources are, as a rule, just not good enough.

The practice of appearing with only hurriedly-gained instructions, especially where language or cultural differences jeopardise understanding, may result in substantial injustice to individuals.
…

If counsel requires an adjournment for a given purpose surely it is his responsibility to make a firm application in unambiguous terms. If the grounds have merit such an application will seldom be refused. If counsel does not understand his client's instructions then he should not proceed until he does.
…
I am not unaware of the difficulties faced by all involved in the administration of justice in remote areas, of poor communications, of the problems encountered in obtaining instructions, in arranging legal representation, of arranging for interpreters and for the attendance of witnesses. There are many problems such as distance and weather which jeopardise transport arrangements. Yet neither these matters, nor crowded lists to be coped with on hurried court itineraries, should be allowed to jeopardise an individuals right to the most careful presentation and consideration of his case".

The question remains - how do you go about satisfying your obligations sufficiently?

Anunga Guidelines

While dated, the following is an excellent illustration of how seriously the courts view the need for effective communication with suspects and accused. While the reference is to an Aboriginal setting, it is equally applicable to all non-English speaking persons:

In *R v. Angus ANUNGA and Others* (1976) ALR 412, His Honour, Chief Justice Forster, handed down reasons for rejecting the typewritten records of conversation. Three specific sections are most applicable and an excellent guide:

1. When an Aboriginal person is being interrogated as a suspect (or questioned in court proceedings), **unless he is as fluent in English as the average white man of English descent**, an interpreter able to interpret in and from the Aboriginal person's language should be present, and his assistance should be utilised whenever necessary to ensure complete and mutual understanding;

2. Great care should be taken in administering the caution … . It is simply not adequate to administer it in the usual terms and say, "Do you understand that?" or "Do you understand you do not have to answer questions?" **Interrogating Police Officers, having explained the caution in simple terms, should ask the Aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal has apparent understanding of his right to remain silent** …;

3. Great care should be taken in formulating questions so that so far as possible **the answer which is wanted or expected is not suggested in any way**. … It should be borne in mind that **it is not only the wording of the question which may suggest the answer, but also the manner and tone of voice which are used**.

Having in a measured way examined the capabilities of your victim or witness, and made the decision to utilize the services of an appropriate interpreter, what are the steps required in order to gain the most from using such a resource?

Effective Use of an Interpreter in Court Proceedings etc.

The effective use of an interpreter can be broken down into three areas:

1. Pre-Hearing;
2. During the Court Hearing; and
3. Post-Hearing.

(NB: These are also applicable to interviews with victims and/or witnesses prior to your case commencing, or indeed commercial interactions).

1) PRE- HEARING:

a) Introduction between interpreter / lawyer - begin to build rapport;

b) Interpreter to be advised about case and what is hoped to be achieved - briefing. Here is where the most positive impact can be made. Explain the nature of your task and the role the interpreter will play in assisting you to achieve it.

For instance, interpreters need to be aware they are in a contest during a committal or trial proceeding. This means they are going to be required to interpret two types of questions: non-leading during examination in chief, which can be difficult to convey, and then the potentially vicious nature of questions during cross-examination. Further, they must also be aware that, on many occasions, the subject matter of the interview or proceedings will not be at all pleasant - sexual assaults, violent attacks and the like. Lastly, all may occur before a judge and jury;

c) Interpreter checks if Prosecutor has used interpreters before;

d) If has not, explains:

1) Code of Ethics:

i) Accuracy;
ii) Impartiality; and
iii) Confidentiality.

2) Potential areas of difficulty:

i) Seating – Lawyer and client face each other, interpreter at side;
ii) Establish mode of interpreting – Consecutive/Simultaneous;
iii) Speak directly to the client, clearly, slowly, keeping sentences short;
iv) Cultural issues
   A) Potential relationship to the victim/witness;
   B) Eye contact and shyness;
   C) Time to reply.

e) Explanation to the victim/witness – interpreter requires time to meet and talk to the client about their role as interpreter, including confidentiality. Will need to assess their manner of speech, what level of language they communicate in, and potential other issues E.g. Petrol sniffer.

2) <u>DURING COURT HEARING - Evidence in Chief:</u>

- YOU as the questioner are IN CHARGE.

  The interpreter is not to say anything unless you do, or as otherwise agreed. Once you join the client/witness, the interpreter is required to commence interpreting – BEWARE!

- Use the FIRST PERSON – most commonly broken rule, leading to confusion;

- Establish any ground rules necessary through the interpreter to your witness;

- Speak slowly and clearly although naturally, attempting to avoid jargon. Depending on culture, you may also need to avoid numerals, dates and sizes. When possible use diagrams to assist.

- There is also no need to raise your voice - incredibly, no matter how loudly you speak in English, a non-English speaker will be unable to understand you. Be guided by the interpreter as to what volume is sufficient;

- Allow for more TIME - this will probably take longer than normal!

- If your control slips stop asking questions immediately and re-state ground rules;

- You may find it useful to summarise your discussions periodically;

- Remember, what the interpreter is doing is:

  a) listening to you speak in English;
  b) understanding what you say;
  c) storing the information within their memory bank;

d) finding the corresponding language in correct context; and
e) verbalising that language to your witness;
f) The process is then repeated in the reverse.

If there is difficulty at any of these points, the interpretation will fail.

3) POST-COURT HEARING:

Having used the services of an interpreter you will find it of great assistance at this point to conduct a de-brief. Discuss difficulties which arose, improvements either or both parties can make and any queries.

In other words, a general evaluation of the working relationship between lawyer and the interpreter should be conducted. By doing so, both lawyer and interpreter are able to assist and educate the other as to the operation of their respective professions, leading to a more effective working relationship.

What are the Benefits of engaging Interpreters?

There are three primary benefits capable of being gained through usage of interpreters:

1. Effective communication between language groups;
2. A gradual growth in understanding by multi-cultural Australia of the concepts underpinning the wider Australian legal framework; and
3. Reduction of costs.

With respect to the **first**, I consider it obvious that if one uses bilingual assistance in circumstances where Persons A and B have different first languages, effective communication has a far greater chance of being achieved than if Person A merely speaks in broken English, or uses sign language, with Person B.

The **second**, growth in understanding, is a long term benefit and highlights the importance of legal personnel as unintended (and perhaps unwilling) teachers of those who are yet to comprehend a foreign legal system. It is my view that the more regularly legal personnel take the time to provide an interpreted explanation to multi-cultural persons of the legal concepts which form the framework of the Australian legal system, the greater will be their understanding of it.

I have been involved with interpreting training groups, prison clients, witnesses, victims and members of the general public who, once terms such as "bail" had been interpreted to them, suddenly found themselves possessing a whole new appreciation of circumstances which they had either seen or found themselves involved in. Understanding had been gained, with subsequent mental links made between their actions/actions of another, the events which had then unfolded, and the circumstances in which they had later found themselves or seen another caught within.

Armed with this new contextual understanding, they were adamant it would be passed on to family and friends. So take the time to explain properly and ensure understanding because, strangely enough, people talk to each other, assisting to make links and foster understanding.

The **third** benefit requires forward thinking - reduction of costs (and perhaps also reclamation of some time!). Although costs will be involved initially, instructions with the aid of an interpreter *must* be taken at the earliest possible opportunity. In most cases, this must be at the coal face with Police. This is fundamentally important due to the impact it will have on progression of matters through the court system. Proper instructions taken at the earliest time will lead to a truer understanding of the case, a properly directed investigation and either opportunity to place well informed pressure upon a defendant to plead guilty, or greater ability to negotiate more fully with defence counsel.

What Challenges does the Legal Arena Currently Experience in Using Interpreters?

There are a number of extremely difficult challenges which confront lawyers at present when using or attempting to use interpreters. The following are by no means exhaustive, nor in any specific order:

1) Time;
2) Transferal of concepts;
3) Reliability and Quality; and
4) Lack of English.

The challenge of **TIME** – we face it in all aspects of our daily lives. Yet for the lawyer, and particularly the court-based lawyer, this seems to be magnified by a factor of at least a hundred, particularly where court lists and Judges timetables are involved. The pressures of performing in this charged atmosphere are great - conforming to the wishes of the presiding Judge, completing research, attending conferences, taking instructions, proofing witnesses - the list is endless.

The question then is - what place does the interpreter have upon that endless list? How do you view them? Are they an integral part of what you do? What are your own legal obligations? How valuable is effective communication to your case? Can you dispense with the REAL answers?

As stated above, my view is that proper instructions taken at the earliest opportunity lead to a truer understanding of the case, an informed investigation, full statements being provided by victims and witnesses, and proper opportunity to either place well informed pressure upon a defendant to plead guilty, or negotiate more fully with defence counsel. Where, and in what manner you choose to spend your time, is your challenge. In meeting that challenge, remember the words of His Honour, Justice Muirhead, in the case of *Putti v Simpson*: that such challenges should not be allowed to jeopardise an individual's right to the most careful presentation and consideration of their case.

The second aspect, **transferal of concepts**, can be most frustrating. What is guilty and not guilty? What are the benefits of one commercial offer as opposed to another? What is the difference between grievous bodily harm and bodily harm? What is a circumstance of aggravation? Third party comprehensive insurance contribution? Such terms, and a myriad of others, are not capable of direct interpretation, and thus require careful explanation by the lawyer in order for the interpreter to interpret their precise meaning for the benefit of the Aboriginal person concerned.

For such matters, you may wish to consider formulating a personal "Plain English Legal Glossary" containing verbatim plain English definitions of such terminology for use when working with interpreters. This would eliminate the need to construct and de construct legalese on a regular basis, always wondering if you would do it as well on this occasion as you did on the last.

A parallel example of this is the Murrinhpatha – English Legal Glossary which can be found at http://www.bowden-mccormack.com.au/WebsiteContent/articles-papers/murrinhpatha-legal-glossary.pdf.

Examples of back translations herein include:

- Judge - The big boss for the meeting in court;
- Prosecutor - The big boss for the police in court;
- Suspended Sentence - now this becomes a story, and must be told using examples:

> "I am the Judge and I am going to give you a three month jail term. But I will lock you up for only two months if you be good for one year when you get out. One month is continually hanging over your head during that year. If during that year you were to get into trouble again, the police will arrest you and you will come back into court. I may lock you up again for that one month from the first trouble, and give you more months/years for the new trouble".

Reliability poses unique challenges. I am keenly aware that the Aboriginal Interpreter Service can, after a request from a lawyer, contact a range of interpreters, secure agreement from one to attend a job, arrange travel (whether that be by taxi or aeroplane), arrange accommodation, confirm their arrival, and attend to a myriad of other matters. Then, at the designated time and place, the interpreter fails to attend.

For the parties caught on either side, embarrassment, anger, frustration and a sense of futility are common reactions. Reasons provided for non-attendance can range from “busy” or “slept in” to urgent family obligations. Unspoken reasons include fear of attendance at court, lack of confidence, being unaware of the system’s mechanics and ramifications, and alcohol abuse. None of these help when a Supreme Court trial has had to be vacated or adjourned, or witnesses were only available for a particular period.

As with any workplace, interpreter services generally must work hard to identify those who are going to conduct themselves professionally and reliably. Those who can’t are not to have a place on the interpreters register. Second best is not good enough, particularly when a person’s liberty is at stake, so if a suitable interpreter is not available, then it is for the court to ultimately decide how a person is to be dealt with in the interests of justice and fairness.

With respect to **quality**, plainly, persons used as interpreters are at different levels of expertise - some very good, others poor. All professional interpreting organizations should constantly be taking active steps to improve this situation and standardize the quality of interpreters being provided to client agencies.

However, an aspect not often considered is the lack of understanding by the questioner – YOU – of the role of the interpreter, and the manner in which they are required to undertake their unique task. Parallel to this is the inability or poor ability of the

questioner to utilize an interpreter, causing frustration on all fronts. I trust that today is a small positive step toward answering queries and providing an insight into the process required to use an interpreter correctly.

Lastly - **a lack of English**: A professional interpreting organization should never provide you with an interpreter whose bilingual ability is inadequate for the task at hand. Of course, the greatest challenges arise in the area of adequate English oracy. Should such organizations fulfill their tasks correctly, the only time you will have to face a lack of English in your interpreter is when YOU choose to utilize a family member, community spokesperson or the nearest available person who speaks the required language and a smattering of English.

My firm response to such a choice is - DON'T. The person chosen is nothing short of dangerous - their English is inadequate, they have received no formal training, have not practiced as an interpreter, are unaware of the ethics involved and do not comprehend their role fully. Access the best possible person through the appropriate organization or, if personnel are unavailable, seek their advice as to the next best option. Your victim, witness or other client deserves to have the best communication with you, and not be subjected to a situation of confusion with a lack of accuracy, confidentiality and impartiality that you may be unaware of.

CONCLUSION

Good interpreting, then, is important. Not explanation, but interpretation - ensuring an effective communication link with another so that a meeting of minds occurs. Within the Territory, at a bare minimum 70% of Indigenous people will not be able to converse in English as a first language – again, good interpreting is important.

When using an interpreter, employ the three steps - Prior to the Hearing, During the Hearing and After the Hearing. Take note of the points made via the Anunga Guidelines and adapt these for court usage, particularly when asking questions - get them to explain their understanding, and don't suggest answers – even through body language.

While remaining ever alert to the difficulties, consider the benefits:

- Effective communication between language groups;
- A gradual growth in understanding by multiple cultures of the concepts underpinning the wider Australian legal framework; and
- Reduction of costs (and perhaps also time spent!)

In the end, remember compounding – each time you utilise the services of an interpreter when explaining the process of a commercial transaction, committal hearing, probate application, what will occur during cross examination or the purpose of a Victim Impact Statement, your message filters out through a network of families and friends. As a result, you are a major contributor to understanding and education with respect to the legal system in Australia.

I urge you: don't shirk your responsibility nor miss the opportunity.

References:

[i] p. 127 - "*Learning Lessons - An Independent Review of Indigenous Education in the Northern Territory*", Northern Territory Department of Education, Darwin, 1999;

[ii] Part 106, "Language Spoken at Home and Proficiency in Spoken English by Sex", Community Profile Series, Catalogue No. 2002.0, Indigenous Profile, 2001 Census, Commonwealth of Australia, 2002;

[iii] Community Profile Series, Catalogue No. 2002.0, Indigenous Profile, 2001 Census, Commonwealth of Australia, 2002; and

[iv] http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2075.0main+features32011