

"Crime and Language: Legal ... Ease?"

*A Paper
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at the

*Office of the Director of Public Prosecutions'
Bi-Annual Conference*

20 March 2004

Gagadju Crocodile Holiday Inn

Jabiru, Kakadu

"Crime and Language: Legal ... Ease?"

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.

Conversely, 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 their 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, as you would all be aware, throughout the Northern Territory 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 called 'language'. What does this word mean for you? Perhaps English, Indonesian, Braille or Kriol, or even 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 (your 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 language, one cannot access the world we live in or the world 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 transferal, and subsequent understanding, of information. The arena of the legal system, then - with its court structure, specialised knowledge, obscure legalese 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 ethnic and Indigenous Australia, and the corresponding difficulties of ethnic and Indigenous Australia to speak English, requires assistance of a unique kind. Such assistance is found in the abilities of an interpreter.

The Need for Indigenous Interpreters

With respect to the Indigenous population of the Northern Territory, the need to use interpreters is easily highlighted. Critically, the majority of Australian - that is, Indigenous - languages are spoken in the Northern Territory, totaling some 59%. Western Australia has the next highest proportion with 19%. 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" **(1)**. (Emphasis added).

The 2001 Australian Bureau of Statistics Census data confirmed this, demonstrating that approximately 31% of Aboriginal people use English as a first language **(2)**.

The 2001 ABS data also demonstrated that Indigenous peoples comprise approximately 25% of the Territory's population **(3)**. Therefore, at least 1 in every 4 of the people you are required to deal with in the criminal justice system will be Indigenous. Of those people, only 3 in 10 speak English as a first language – not even one third of the

Indigenous population. 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 you are required to work with as a prosecutor 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 you to ascertain, and this has its difficulties:-

- Some, knowing a little English, will be too embarrassed to admit that they don’t know English adequately, and will continue on in an attempt to save face;
- Others will be able to converse readily with you 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 using them during discussions with you and other non-Indigenous personnel, the conceptual understanding required is not held. An example is the word: “Bail” – many Indigenous people, first time interpreters included, understand this word to mean: “You are free to go”, unaware that it is actually conditional liberty, requiring the defendant to in fact return!

Again, the potential exists for the interviewee to continue on, nodding their agreement.

Ensuring effective communication

How do you address such difficulties as a prosecutor? One rule, well-known though unwritten, is that of CYA. Simply 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 asked of you, answers are immediately forthcoming that all possible avenues were covered.

The requirements for counsel (particularly defence counsel, though applicable to practitioners generally) is 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 individual's 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

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 of those words are most applicable and an excellent guide:-

1. When an Aboriginal person is being interrogated as a suspect, **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;
 - This is an area where, as the ODPP and Summary Prosecutions, you need to encourage Police to operate correctly;
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 . . .;**

EXAMPLE:-

- This should also occur when interviewing with an interpreter;
 - Personal interviews at Peter Macauley Centre – police have been excellent;
 - Lessons to be learnt for questions being asked in a courtroom scenario;
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**.

EXAMPLE - Police Interview re. Body/facial language

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

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

1. Pre-Interview;
2. Interview; and
3. Post-Interview.

Part 2 – Interview – will need to be re-assessed when utilized for a court appearance, however the basic principles remain.

1) PRE-INTERVIEW:

- a) Introduction between interpreter and Prosecutor – begin to build a 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 - Prosecutor and client face each other, interpreter at side;
- ii) Establish mode of interpreting - **Consecutive**/Simultaneous;
- iii) Speak directly to victim/witness, clearly, slowly, short sentences;

- 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 & talk to the person about role as interpreter, including confidentiality. Will need to assess their manner of speech, what level of language they communicate in, other - eg. Petrol sniffer, marijuana smoker.

2) INTERVIEW:

YOU as the interviewer are IN CHARGE.

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

- Use the FIRST PERSON - most commonly broken rule, leading to confusion;
- Arrange seating to facilitate communication between yourself and the V/W;
- Introduce everyone, establish roles and ground rules speaking through the interpreter to your V/W;
- Speak slowly and clearly although naturally, attempting to avoid jargon, numerals, dates and sizes. At all possible times use diagrams to assist. 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 V/W;
 - f) The process is then repeated in the reverse.

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

- There is no need to raise your voice – 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 take longer than a normal interview!
- If control slips in the interview stop it immediately and re-state ground rules;
- Summarise your discussions periodically through the interview;

3) POST-INTERVIEW:

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 Prosecutor and the interpreter should be conducted - by doing so, each is able to assist and educate the other as to the operation of their respective worlds.

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 Indigenous people 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 or pidgin English, or uses sign language, with Person B.

The **second**, growth in understanding, is a long-term benefit and highlights the importance of Prosecutors as unintended (and perhaps unwilling) teachers of those who are yet to comprehend a foreign legal system. It is my view that the more legal personnel take the time to explain, with the aid of an interpreter, the legal concepts which form the framework of our wider Australian legal system to Indigenous persons who have come within it, the greater will be their understanding of it.

I have been involved with interpreting training groups, prison clients, witnesses and victims 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 understanding, they were adamant that this would be passed on to family and friends in the Indigenous way – orally. So you must take the time to explain properly and ensure understanding, because they will discuss the matters with others when able, assisting to make links and foster understanding.

The **third** benefit requires forward thinking – reduction of costs (and perhaps also a 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 your circumstances, 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.

I have no concrete costings nor pool of savings by which to prove my assertion; merely an example of one occurrence of many that I have witnessed over time:-

I was fortunate enough to be involved in a case where a young man had been charged with the serious offences of sexual assault, indecent assault and deprivation of liberty. On the morning of the committal hearing in Katherine, the Aboriginal Legal Aid Service defence lawyer was for the first time able to take proper instructions from his client with my assistance. Along with important clarification of evidence from the complainant with the aid of a separate interpreter, the two more serious charges were dropped and the matter proceeded as a plea to the single charge of deprivation of liberty.

The Aboriginal client was pleased with this result and the defence delighted at being able to gain clear and reliable instructions which assisted resolution of the matter. The lawyer concerned also utilised my services to interpret his explanation of the court process and sentence to his client. He later commented that this was a rare occasion where he was confident his client had a good understanding of what had actually taken place and the result gained.

It is interesting to note what occurred “behind the scenes”. Quite a number of witnesses for the prosecution had been flown in from both Wadeye (Port Keats) (NT) and Kununurra (WA). The expense involved in such an exercise is obvious - staff required to travel to Katherine, aircraft chartered from Darwin to both Wadeye and Kununurra to transport witnesses from their communities to Katherine and then returned - and the court time.

However, for the whole morning, two things occurred - the prosecution utilised an interpreter to interview the complainant, and the defence utilised an interpreter to interview the defendant. At 2:00pm, the matter proceeded as a plea. Witnesses were then flown back to their respective communities without having been required.

The message in terms of finance, administration and justice, I think, is clear - but for two interpreters, this matter was to have proceeded as a Supreme Court trial at a cost of thousands of dollars per day for some three days. Instead, the cost to secure two interpreters for one whole day was approximately \$600. If this had occurred earlier, the cost of hiring aircraft and bringing extra people may also have been averted, not to mention the saving in time of the various legal personnel and court staff involved.

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

There are a number of extremely difficult challenges which confront legal practitioners 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 Prosecutor, this seems to be magnified by a factor of at least a hundred, particularly where court lists and Judges or Magistrates timetables are involved. The pressures of performing in this charged atmosphere are great – conforming to the wishes of the presiding Judge or Magistrate, 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 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 a matter for you.

The **second** aspect, transferal of concepts, can be most frustrating. What is guilty and not guilty? 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 Prosecutor in order for the interpreter to interpret correctly.

For such matters, you may wish to consider formulating a personal “Plain English Legal Glossary” containing verbatim explanations 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 a Legal Glossary Project upon which I have been working with senior *Murrinh-patha* men and women, and a trained linguist, at the community of Wadeye utilizing funding through AIATSIS and the Law Society of the NT. This

glossary takes legal words in English, translates them into *Murrinh-patha*, then back-translates them into English.

Examples of the back-translations from the current draft document include:-

Magistrate – 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 magistrate 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 and Quality:

Reliability poses unique challenges. The AIS can, after a request from you, 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 two parties caught on either side – the DPP or Summary Prosecutions on one, the AIS on the other, 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, the AIS 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 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. Again, the AIS is taking active steps to improve this situation and standardize the quality of interpreters being provided to client agencies.

Another aspect not often considered is the lack of understanding by the interviewer – 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 interviewer 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**: The AIS should not ever 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 the AIS fulfill its task correctly, the only time when 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 Indigenous person who speaks the Indigenous language required 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 AIS or, if unavailable, seek their advice as to the next best option. Your victim or witness deserves to have the best communication with you, and not be subjected to a situation of confusion with a lack of confidentiality, accuracy 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 that you are required to work with as a prosecutor will not be able to converse in English as a first language – again, good interpreting is important.

Your obligations, even if only as low as the *Anunga Guidelines* or the Rule of CYA, indicate to you that the witness or victim with whom you are working must be able to communicate with you and provide proper information, and vice versa. It is worth repeating what Justice Muirhead said in *Putti v. Simpson*:-

"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".

In discharging your obligations, have regard to the *Anunga Guidelines* – do they speak English as well as the average English speaker? If you decide to use an interpreter, employ the three steps – Pre-Interview, Interview and Post-Interview. Adapt these for court usage. Again, follow the *Anunga Guidelines* when asking questions – get them to explain their understanding, and don't suggest answers.

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

- i. Effective communication between language groups;
- ii. A gradual growth in understanding by Indigenous people of the concepts underpinning the wider Australian legal framework; and
- iii. Reduction of costs (and perhaps also time!)

In the end, remember compounding - each time you utilise the services of an interpreter to explain the process of a committal hearing, the ramification of a bond or impact of a domestic violence order, your message filters out through a network of families and friends. As a result, you are a major contributor to Indigenous understanding and education with respect to the criminal justice system in Australia.

Please, don't miss the opportunity nor shirk that responsibility.

References:

1. p. 127 - "*Learning Lessons - An Independent Review of Indigenous Education in the Northern Territory*", Northern Territory Department of Education, Darwin, 1999;
2. 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; and
3. Community Profile Series, Catalogue No. 2002.0, Indigenous Profile, 2001 Census, Commonwealth of Australia, 2002.

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