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ASSOCIATION OF TRANSLATORS AND INTERPRETERS OF AUSTRALIA

ANNUAL GENERAL MEETING

HILTON HOTEL, SYDNEY, THURSDAY 11 NOVEMBER 1982

INTERPRETERS AND LAW REFORM

The Hon. Mr. Justice M.D. Kirby
Chairman of the Australian Law Reform Commission
Member of the Australian Institute of Multicultural Affairs*

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INTERPRETERS AND THE LAW

Interpreters and lawyers are old friends and sparring partners. Interpretation is nothing new in the law. Val Menart has recently reminded us that, save for a short period during Cromwell's Commonwealth, for hundreds of years and until 250 years ago, two languages were used in the courts of the common law. Neither was English. Latin was used for court paperwork. French was spoken in all the higher courts. It is only since 1731 that court rolls of our system have been kept in English.

As a measure of the occasional ineffectiveness of law reform, it should be recorded that in 1362 an Act of the English Parliament stipulated that pleading should henceforth be in the English language. The Act complained that the French tongue 'is much unknown in the Realm'. Perhaps it was because the Act was itself in Latin, that it was ignored by the legal profession with impunity.[1]

Some people say that, even today, the law needs translators to be understood by the ordinary Australian man and woman. This is not just a reference to your 'res ipsa loquiturs' or your 'ejusdem generis', nor is it a reference only to your 'C.A.V.s.', or the occasional 'res inter alios acta'. Even when ostensibly expressed in English, many lawyers have difficulty in communicating simply. I have previously ventured the thought that this may be because of the marriage in our legal language of a Germanic vernacular and a Norman French professional tongue. Centuries of Norman French pleaders die hard. Even for Australians, fully literate in the English language, the expressions of the lawyer are

often a mystery. Law Reform Commissions exist, in part, to endeavour to simplify the law. It is a task which the Australian Law Reform Commission takes most seriously. You will search long and hard amongst our reports for Latin phrases and legal cliches.

I am a member of the Australian Institute of Multicultural Affairs. I am not a member of the Council of the Institute which exercises the executive and policy function of the Institute. I have noted in the journal of your organisation the rather vivid expression that the Institute's recent Evaluation of Post Arrival Migrant Programs 'failed to do its homework and, at least where translating and interpreting are concerned, has produced a set of proposals that is unfit to line a decent, self-respecting garbage tin'.[2] No trouble with the English language there! I will be interested to explore this criticism. Although not responsible for the Evaluation, I will be keen to report your views the meeting of Members of the Institute which is to take place in Sydney on 25 November.

One recommendation of the Evaluation with which I hope you do not disagree, was a proposal that a reference be made to the Australian Law Reform Commission to undertake a study of interpreter usage in the Australian legal system. The Commission was to formulate principles as a basis for Federal legislation and a model for uniform practice in relation to interpreters throughout Australia. This recommendation has been adopted by the Federal Government, although the reference to the Law Reform Commission has not yet been given. When the reference is received, it will obviously be essential for the Commission to work closely with your Association together with the ten other associations that exist in Australia concerned with legal translation and interpretation.

The Law Reform Commission is no stranger to the problems of adapting a legal system developed for a mono-lingual and largely mono-cultural community to one appropriate to the multi-cultural fact of present day Australia. Those of you who are interested in our efforts in adapting the legal system may have access to earlier speeches by me.[3] Perhaps the most notable achievement is the recognition in the Criminal Investigation Bill 1981, presently before Federal Parliament, of the need for interpretation services during interrogations by Federal Police. The proposals put forward here by the Commission have been modified by the Government, apparently because of criticism by the police. As recently as last week, the Bill was once again scathingly criticised by the President of the Police Federation of Australia.[4] The Institute of Multicultural Affairs urged a return to the more rigorous interpretation requirement proposed by the Law Reform Commission and reflected in an earlier version of the Bill. However, the Government has stood firm on this.

THE RIGHT TO AN INTERPRETER

I want to spend the remaining moments of this talk, considering another matter. I want to inform you of a project in which the Law Reform Commission is involved. It is one which has so far attracted little general publicity. But it is one critical for the future of the trial process in Australia. It is relevant to interpreters and translators. I refer to the current project of the Commission on reform of the laws of evidence in Federal and Territory courts. The project is a massive one, involving re-examination of such complex matters as:

* reform of the hearsay rule;
* the right of the judge to call evidence or documents where the parties fail to do so;
* the admission of computer, videotape, photocopy and other technologically produced evidence;
* the scope of the privileges against having to give evidence;
* limits on the use of character evidence;
* modification of the laws of evidence by reference to modern psychological knowledge and experiments.

For present purposes, the most relevant aspects of the enquiry is that which deals with the manner in which evidence is taken in our courts. In a research paper, which is circulated throughout Australia, the Commission examined such matters as:

* oral, written and videotaped presentation of evidence;
* the adversary system and the competing investigatory system typically used in non-English speaking countries;
* procedures for refreshing the memory;
* the role and limitations on examination in chief;
* cross-examination of an unfavourable witness;
* limits on leading questions in cross-examinations; and
* the tendering of prior consistent and inconsistent statements during evidence.

One section of this research paper is of interest to your Association. It deals with the 'right' to an interpreter. At common law, a court has a discretion to permit a witness to give evidence through an interpreter. The witness does not have a legal 'right' to do so. That this position is so is made clear by a decision of the High Court of Australia:

'There is no rule that a witness is entitled as of right to give evidence in his native tongue through an interpreter and...it is a matter in exercise of the discretion of the trial judge to determine on the material which is put before him whether he will allow the use of an interpreter...'.[5]

Courts in Australia have argued that the use of interpreters does not always achieve full, accurate and fair presentation of the evidence. Mr. Justice Brereton, for example, complained:

'Even today it is all too common an experience to hear the interpreter giving the effect instead of giving the literal translation of the questions and answers and of his own accord interpolating questions and illiciting explanations'.[6]

Special rules have been laid down in England in the case of criminal trial. It has been suggested that it is safer and wiser to ensure the availability of translation, particularly for an unrepresented accused.[7] Should this principle be extended?

The Law Reform Commission has received a number of complaints that courts in Australia are 'unduly reluctant' to permit the use of interpreters. We have been told:

'Some judges and magistrates are very reluctant to allow the evidence to be given through an interpreter. Apparently they fear that a person giving evidence through an interpreter has some advantage over other people. Nothing is further from the truth. Even a good interpreter, and there are few and they are few and far between, can only give an approximate meaning, without the nuances and without the stress contained in the original. ...In reality, a person who has to use an interpreter is extremely handicapped'.[8]

Apart from the problems of judicial attitude, and the misconception about interpreters offering an advantage to witnesses, two other basic problems arise. These are:

* Variable capacity: An assumption that a person with some knowledge of the English language is able to understand all words in that language. Any Australian school child who has a smattering of French or German should be able to explain that linguistic ability in a foreign language is rarely an absolute thing. It is a spectrum. People who can get by in shops or factories cannot necessarily understand everything put to them in a court.

* Variable meanings; Secondly, although judges and lawyers frequently insist upon what they term a 'literal' translation, the plain fact has to be faced that this is not always possible. Words can have numerous meanings. Words can conjure up different concepts in different languages. What may appear to a mono-lingual English judge or lawyer to be an illicit conversation between an interpreter and the witness may be nothing more nor less than an endeavour of each to clarify precisely what it meant. Take these illustrations:

** In Russian the word 'ruka' corresponds both with the English word hand and arm. A question in clarification might not be unreasonable.

** In Nederlands, the use at the end of a word of the diminutive 'tje' is a clear signal of humorous or ironic intent - with no real equivalent in common English parlance.

** In Russian the expression 'family' has a wide or narrow meaning according to the cultural background of the witness.

** Basic English words such as 'girlfriend', 'housewife' or 'babysitter' do not have any precise equivalent in the Polish language.

** In England and Australia the 'morning' finishes and the 'afternoon' starts at twelve o'clock. But in Polish the morning ('rano') finishes earlier - around eleven o'clock. The afternoon ('popoudaie') starts later - approximately 3.30 p.m.

** There are great problems in coping with coloquial expressions used in Australian English and not existing in the Asian, Middle Eastern and European languages which must sometimes be used in our court. This works both ways. A defendant was involuntarily committed to a psychiatric institution for observation because, when asked by a magistrate how he felt, he used the expression, literally translated meaning 'I am God of Gods'. But this was a coloquism in his language meaning 'I feel on top of the world'. Even 'top of world' may seem an odd thing for an Australian to say - especially in translated into, say Norwegian.

Any rule of law or practice which forbade a translator or interpreter offering not only a literal rendition but also an explanation of such expressions, would plainly deprive the decision-maker (judge, magistrate or jury) of the most relevant information. It could also deprive the witness of a 'fair go' in Australian courts.

LAW REFORM PROPOSALS

This issue is specially important in Australia because we have accepted in this country, migrants from more countries and more varied cultural and racial backgrounds than any other nation on earth. It is constantly pointed out that the judiciary and the legal profession have not yet been effectively penetrated by the enormous linguistic and cultural changes that have happened elsewhere in Australia.[10] It cannot be said too often to 'old Australians' that about one-third of all people living in this country now are themselves (or are the children of) migrants whose first language is not English. Common fairness, as well as accuracy of decision-making and recognition of well-established features of interpretation, require the reform of our present approach to the 'right' to an interpreter in Australian courts. The Australian Law Reform Commission has examined closely earlier proposals for reform made in Australia[11], the United States [12] and Canada.[13] It has put forward for consideration the following reform:

* Recognising a 'right': In place of the current law in Australia under which the witness does not have a right to use an interpreter but may do so only with leave of the court, it will be a legal right for a witness to give evidence through an interpreter unless the court is satisfied that the witness can speak and understand the English language to a degree sufficient.

* Recognising particular needs: In place of the assumption that people are either 'English speaking' or 'non-English speaking', the law should recognise specifically the problem of a witness who can cope to some extent but not completely. The right to an interpreter should extend to cases where particular questions and answers cannot be satisfactorily dealt with, except through an interpreter.

* Adopting a new criterion: The criterion to be used by the courts in permitting an interpreter should not be, as at present, the vague test of the 'interests of justice'. Instead, it should be whether it is necessary to permit an interpreter to enable the witness to understand and answer the questions put to him.

* Changing professional attitudes: In addition to the changes in the letter of the law, it will be necessary to bring about changes in professional attitudes, changes in the understanding by judges, magistrates and lawyers of the subtleties of interpretation in practice; and greater awareness amongst people not fluent in the English language of the sensitivity of the Australian system to their needs.

Even at some additional cost, these reforms appear just. One need only reflect upon the difficulty which mono-lingual Australians would have in a courtroom in Turkey, or Thailand, Denmark or Algeria, to understand how important it is that in our multi-lingual country we adapt the rules which were developed in earlier times to serve a much more homogeneous community. This is not a matter of law reform by 'bleeding hearts'. It is a matter of the self-respect of a legal system which desires to perform its functions with maximum efficiency.

I hope that the members of this Association who will have had many experiences that will be relevant to reform of the law on this subject will place the benefit of such experience before the Law Reform Commission so that, if it is justified, a compelling case can be made out to achieve reform.

I am attaching to the written version of my speech a copy of the discussion of this topic in the Law Reform Commission's research paper.[14] I am also attaching the draft clause which the Commission is now considering for a reformed Federal evidence law. I hope that this information will be given the widest possible circulation amongst interpreters and translators throughout Australia.

FOOTNOTES

* The views expressed in this address are personal views only.

1. See V. Menart, 'The Language and the Courts', a paper delivered to the Seminar on the National Language Policy, 15 May 1982, mimeo, 1.

2. Association of Translators and Interpreters of Australia, Words, No. 18, August 1982, 7.

3. See e.g. M.D. Kirby, The 'Reasonable Man' in Multicultural Australia, address to the Ethnic Communities' Council of Tasmania, mimeo, 28 July 1982 (C. 51/82).

4. T. Rippon, quoted Melbourne Sun, 6 November 1982, 19. These views were repeated on the A.B.C. inaugural radio news on 9 November 1982 at 7.15 a.m.

5. Dairy Farmers v Aqualina (1963) 109 CLR 458, 464.

6. Brereton J. in Felios v Moreland (1962) 62 SR (N.S.W.) 331, 332-3.

7. R. v Lee Kun [1916] 1 KB 337.

8. Submission by Mr. V. Menart, dated 12 April 1977 to N.S.W. Law Reform Commission, referred to N.S.W.L.R.C. Working Paper, Course of the Trial, 156.

9. Dixon, Hogan and Wierzbicka, 'Interpreters: Some Basic Problems' (1980) 5 Legal Service Bulletin 162.

10. See e.g. Mr. Justice Murphy, Human Rights in Australia in Seventh Annual Lalor Address on Community Relations, December 1981, 8, 12.

11. N.S.W.L.R.C., n 8 above, 157-8.

12. United States Federal Rules of Civil Procedure, Rule 43; Federal Rules of Criminal Procedure, Rule 28.

13. Canadian Federal/Provincial Task Force on Evidence, s 126.

14. See generally Australian Law Reform Commission, Evidence Research Paper No. 8, Manner of Giving Evidence, 1982, 90-97 (attached).

PROPOSAL FOR FEDERAL EVIDENCE LAW

CLAUSE ON USE OF INTERPRETERS

7. Any witness in a trial may give evidence of a fact through an interpreter unless the court is satisfied that the witness can speak and understand the English language to a degree sufficient to enable him to -

(a) fully understand any questions about the fact that may be put to him in the trial; and

(b) to make adequate replies thereto.

Note on clause

This clause departs from the existing law under which a witness does not have a right to use an interpreter but may do so with the leave of the court. Under the clause, an interpreter may be used for the whole or part of the witness' evidence unless the court directs otherwise. The change of emphasis follows representations that the courts are reluctant to permit witnesses to have the use of interpreters. See chapter 4 - The Right to an Interpeter in ALRC Evidence RP 8 Manner of Giving Evidence 1982.