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FOR TRANSLATORS & INTERPRETERS

SYDNEY 28 JULY 1989

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The Hon Justice Michael Kirby CMG
Acting Chief Justice of New South Wales and
President, New South Wales Court of Appeal

Introduction and the rule in Acquilina's Case

Mr Chairman, Sir Harry Gibbs, Your Honours, Ladies and Gentlemen. I was very grateful for that introduction, though a little disconcerted by the information that his Honour had been elected unopposed to be my admirer. I am worried lest that shows that there was no opposition because there were no other candidates offering. Secondly, you will see that I am continuing a life long devotion to interrupting people's dinners. I hope that you will all continue to enjoy yourself although I cannot. I have to return at 2 o'clock to the Court of Criminal Appeal. I say that lest you should assume from his Honour's statement that we are "performing somewhere else", that I am going with him onto the stage. Mind you, there are some similarities between the criminal courts and the stage; indeed all courts and the theatre. The drama is about human life.

I take as my text the perils that attend translation in courts. The perils of misunderstanding that can arise from the attempt by people, however skilful and however honest, in

one language, to understand the communication of another in a different language. In the far-off days of 1963, when I had just graduated from the Law School, with his Honour the chairman, I read the authority of the High Court of Australia in the case of Acquilina.[1] You have probably been told about that case this morning. In it, the applicable rule was laid down by the High Court. It was stated with great clarity (as is almost always the case). The rule was:

> "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 the exercise of the discretion of the trial judge to determine, on the material which is put before him, whether to allow the use of an interpreter. The exercise of this discretion should not be interfered with on an appeal, except for extremely cogent reasons".[2]

When I read that authority for the first time I had a practice which involved me in the courts, where there were many "new Australians", as we called them, giving evidence. At the time I thought that the rule was very sensible. It is an appropriate rule, because otherwise we might have people using interpreters for their own advantage. Using interpreters to gain time. To delay. To think about their answer. That would give them an unfair advantage over other litigants. Therefore, it is appropriate to leave it to the trial judge, on the information put before him or her, to decide whether, exceptionally, notwithstanding this peril, an interpreter should be provided.

I must reveal to you my Damascus Road conversion since

that time from those ideas. That conversion has come about by reflection. This was permitted to me, as it has not been to many engaged in the daily business of the courts, during my time as Chairman of the Law Reform Commission and since. It rests upon three main considerations.

The implication of Multiculturalism

The first is the change, even since 1963, in the multicultural nature of our community and in the adoption, by governments of differing political persuasion of the principle of multiculturalism and in their reinforcement and restatement of it. That principle is very important to my philosophy of life, if I may so dignify it. This is a philosophy which I believe most Australians nowadays accept. It is the philosophy of equal opportunity or non discrimination. We do not disadvantage people for immutable characteristics. If their immutable characteristic is being a woman, we do not disadvantage them for that reason. If their immutable characteristic is being of a certain race, we do not disadvantage them for that reason only. If the immutable characteristic is an incapacity to speak English as a mother tongue, then, puzzling though that may at first be for a generally monolingual community, we accept that that should not normally disadvantage such people, at least so far as we can equalize that disadvantage in our legal institutions.

Since 1963 there has also been a growing recognition of the self-evident fact out of which this principle of

multiculturalism has been constructed. This is the fact that the numbers involved in our community, whose first language is not English, are very great. The numbers who at home speak languages other than English are very great. They continue to grow. And out of that factor, concerning the character of our country, conclusions must be derived which affect our institutions. These include the courts of law. So that is the first consideration. That which was appropriate in England in the nineteenth century and that which was even appropriate as a principle for an overwhelmingly English-speaking country of the earlier part of this century and even into the post-war period, may not be appropriate for our country today. Its ethnic, cultural and linguistic base has shifted. The law which serves the community as it is must also shift with that change.

The injustices of denial of full translation

The second and most potent force for change which occurred to me was when, in the Law Reform Commission, we were examining the review of the law of evidence in Federal courts. Until now, as many of you would know, Federal courts have applied as the law of evidence (including the law relating to interpreters) that law as has been developed in different parts of the country. Where Federal courts sit, they apply the local law, if it is one of practice. In the Law Reform Commission we began to look at this rule and to consider whether it observed the right principle. A number of considerations began to be revealed which made clear to me

that which I suppose ought to have been clear earlier, but which I had not earlier perceived.

For example, the following cases were given to the Law Reform Commission in the course of its enquiry.[3]

1. An Anglo-Australian youth was accused of entering the property of a Polish born couple. Both were aged pensioners. The youth was accused of bashing them so that medical help was urgently needed. An interpreter was called to help the woman. However the judge found that the woman could speak some English. He ordered the interpreter to stay away from her. He also ordered him not to speak to her during the recess. The lawyer for the defendant conducted the questioning by needling the woman with detailed questions. The woman used her insufficient English as well as she could to face the cross-examination. However there was a moment when the plaintiff became confused. She was asked if she was "present" at the Police Station. As it later emerged, she did not know that "present" meant something other than a gift. At that time, the interpreter rose up to interrupt the proceedings. The trial judge ordered: "No interpreting". There were many similar moments in the case when the judge declined to permit an interpreter.

2. In the Russian language the word "ruka" corresponds both to the English word "hand" and the word "arm". The expression "family" has a wide or narrow meaning,

according to the cultural background of witness. Basic English words such as "girlfriend", "housewife" or "babysitter" do not have any strict Polish equivalent. In England, the morning finishes, and the afternoon starts at twelve noon. But in Polish, the morning ("rano") finishes early, around eleven o'clock. The afternoon starts later at approximately three thirty. A person could be hanged in other countries, and sentenced to imprisonment in this country, on a particular understanding of a time consideration as small as that.

3. The seriousness of the question was brought home particularly by a third example given to the Law Reform Commission. This case occurred in New South Wales. An accused was charged with molesting his daughter. He was convicted. His wife had been called to give evidence. She was asked in English, without translation: "Is your husband infatuated with your daughter?" This was extremely difficult to translate into her native language. It was in fact translated into the native language in such a way as to mean: "Does your husband love his daughter?" An attempt was then made to elaborate the question. The Judge said: "Just interpret the question". The wife answered the question in the affirmative. The husband was convicted.

4. A number of grammatical forms were brought home to us

in the Commission. In Spanish a sentence such as "Juan levos los pantalonas y Maria" reports the fact that Juan saw Maria's underpants. That much can be translated into English. However, the sentence implies very much more. It implies that Maria was affected by that fact. It is almost certain that Maria was actually wearing the pants when Juan saw them. Maria's disgrace or embarrassment, hinted at (but not put into words) is essential for securing the true meaning of the Spanish sentence. But it is virtually untranslatable, word for word, into the English language.

5. Another case was called to our notice. It involved a defendant who had been committed to a psychiatric institution for observation. The reason for this was that the magistrate had asked the defendant how he felt. he used an expression, which translated literally mean, "I am the God of Gotz". It was literally translated: I am the God of Gotz" to the magistrate. His decision therefore may not be seen surprising. But the expression in his language, is a colloquialism for: "I am feeling on top of the world". Perhaps if, in Croatia, that English expression: "I am on top of the world" were translated directly into the native language, the view might be taken that an English-speaker was suffering from delusions.

So, it was in the course of the inquiry of the Law Reform Commission that I suffered the sea-change in my understanding of this problem. Language is not simply a pipeline. Translating is not simply a mechanical task. It is not simply a task of conveying ideas, word for word. It may sometimes need elaboration. It does depend on the quality of the speaker and of the translator. And that which you can do, as any person with even a smattering of knowledge in another language, in direct speech - that is to say, asking if you can have a glass of water - is very different from that which you can do if asked a question and required to answer immediately. In the former, but not the latter, you are in charge of the conversation. By analogy, that which you can answer, e.g. answer to examination of chief (where perhaps you have been through the statement and you know generally the questions and are comfortable with the questioner) may be quite different from that which you can do with success under interrogated in a dramatic situation where important issues are at stake and where you do not know what the next question is going to be. Tiredness, lack of confidence about the environment, and general unfamiliarity with that which is going to happen, can affect not only the subject, but also the translator.

It was these considerations which led the Law Reform Commission to its recent report on evidence law reform, to suggest that Federal laws should be changed in Australia so that the onus would be upon those who opposed the facility of

translation, when sought, to establish that it should not be given.[4] I was told that such a law has been adopted in South Australia. I hope that Mr Bowen, this morning, told you that his consideration of the Law Reform Commission's report would lead to its adoption in the Federal sphere. My understanding is that the report is well advanced in its consideration in a number of jurisdictions. I understand that the general statute proposed by the Law Reform Commission may well pass into law. I hope it contains the clause which I have mentioned.

Fundamental Human Rights and the Covenant

I pass to the third reason which has led me to believe that Acquilina should not now be the law. It must be put briefly; although it is not easy to put briefly. In February 1988 I went to a conference in Bangalore in India. Collected there were judges from all parts of the Commonwealth of Nations. The question was: "What is the function of domestic courts, in relation to international human rights conventions to which their countries have acceded?"

If you look at the reports of recent decisions of the English Courts on, say, the Spycatcher case,[5] you will notice something interesting and new. The beginning point of the judgment of the Judges of the English Court of Appeal in resolving that conflict between the claim of secrecy (in the name of the duty owed by Crown officers to the Crown), and the claim of the community to have exposed matters of

importance in which it was interested is not a search through the ancient principles of the English law. It is a reference to the statement of the obligations, which had been accepted by the United Kingdom under the European Convention on Human Rights. If you look at the recent parts of the Weekly Law Reports you will see this same phenomenon in many cases. It is the assignment of the major premise, in matters touching important rights, by reference to the European Convention on Human Rights. I saw this new development reflected recently in a case on whether a wardship order could be made in respect of an unborn child. The starting point which the judge took was not ancient principle or English case law. It was the European Convention. So gradually, in that great legal system from which we have derived, with enormous advantage, the basic principles of the law of Australia, the judges are looking to the European Convention for their basic rules in many cases. The question that was posed by the Bangalore meeting was what implications this development had for Australia and other countries. Do our judges have a similar obligation?

The answer comes back: "Well, we are not in the same position". The British Government can be taken to Strasbourg to answer in the European Court of Human Rights the complaints of citizens concerning violations of the European Convention. The Australian position is not similar. We are not parties to that Convention and Australia cannot be taken to any international tribunal for suggested breaches of

international human rights norms. But the legal answer that comes back to that suggested point of distinction is that the legal status of the European Convention is the same in the United Kingdom as is, say, the International Covenant on Civil and Political Rights in Australia. In this country it is not part of a domestic law. The Convention is not part of the law of England. It is true that there is a coercive mechanism for taking the United Kingdom to the European Court and for there asking why their law has not been brought into harmony with it. However the very question - why has it not been brought into harmony? - acknowledges that it is not part of the law of the United Kingdom. Yet the judges of England increasingly, in order to ensure that their common law and statutory interpretations are as close as possible to harmony with the European Convention, are starting from that point. They are saying: "What is the European Convention requirement on this issue? Is that compatible with the law of England? As far as possible we should seek to make it so".

Now what lessons does this important development have for us in Australia and for this topic? There was not a word of the International Covenant on Civil and Political Rights in any of the decisions of the courts of Australia and New Zealand, concerned with the Spycatcher matter, including my own. Reference to the Covenant was not submitted in argument. It was not put to the Court that we should consider the principles it contains relevant to the right of

free speech. It was not thought by the Court itself to be relevant. Are we different because we are a Federation? Does the fact that the Commonwealth accedes to the Covenant under the external affairs power in the Australian Constitution alter the position of the basic rights stated in the Covenant when compared to England? Do our judges for that reason have no warrant to look to the International Covenant on, for example, the right, as the Covenant says, to have an interpreter. The Covenant expression is well known to you. It is to have the free assistance of an interpreter if you cannot understand or speak the language used in the court.[6]

Recently the Court of Appeal in New South Wales the question arose as to whether there was a right to speedy trial in this State. Two of the judges took as their starting point what had been the practice of the justices in Eyre in England in the reign of King Richard II. There was a search amongst the books, old and new, to find what the English courts had said century after century ago. And what had been said since. I too undertook that enquiry, which was rather unrewarding. However, I also directed attention in my judgment to the obligations of the International Covenant on Civil and Political Rights.[7] As it happened, I did not hold that there was a right to speedy trial as such, except as an attribute of the right to fair trial. But my own view is, and I believe that of other judges will be, that it is relevant in Australia in 1988 and henceforth, in looking at matters as fundamental as basic rights, to look to

international agreements which our country has signed and ratified.[8] I believe that the courts may look to them because they are the work of much scholarship. Their contents may in some cases have passed into international law as part of the Law of Nations - the common law of the international community. I consider that the courts may look to these basic principles for the guidance they give, for the principles which should be applicable in the development of Australian common law and in the interpretation of statutes here. Surely it is at least as relevant in our search for the principles of the common law of Australia in 1988 to look to these international instruments as is the search amongst the ancient history books for the legal practices of twelfth century England.

We can find wisdom in both sources. But I suggest that in the next twenty or thirty years, the lawyers and judges of Australia will come gradually to find intelligence and guidance in this new international source.

If they do, they will find, relevant to the question which is before us now, that even if the Parliament does not act as the Law Reform Commission has suggested, guidance exists of what the common law of Australia, of multicultural Australia, requires of us as we move towards the twenty-first century. In the collection of basic rights there is mentioned the right, in some circumstances, to an interpreter. This statement should colour our approach to the content of our own law.[9]

The need for reform

If I keep speaking Justice Einfeld will not be able to deliver his judgment at 2 p.m. and I will not have time to get into my crimson robes. So I must leave you. This is an important conference. It is a conference which touches a matter which is at the heart of the multicultural ideal of Australia. It behoves all thinking citizens to defend that ideal. The right to an interpreter in a court of law is just one facet of the diamond of human rights. But in multicultural Australia as we move towards the 21st century, it is a very important one.

FOOTNOTES

1. See Dairy Farmers' Cooperative Milk Co Ltd v Acquilina (1963) 109 CLR 458.
2. Ibid, 464.
3. See Australian Law Reform Commission, Evidence Research Paper No 8 1984, Manner of Giving Evidence p 94.
4. Australian Law Reform Commission, Evidence, ALRC 26, Interim, Canberra 1985, 610.
5. Attorney General v Guardian Newspapers Ltd (No 2) [1988] 2 WLR 866, 868, 892, 907.
6. International Covenant on Civil and Political Rights, Article 14.3(a)(f).
7. Jago v District Court of New South Wales (1988) 12 NSWLR 558, 569.
8. M D Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" (1988) 62 ALJ 514.
9. See e.g. Gradidge v Grace Bros Pty Ltd, NSW Court of Appeal, 4 November 1988, (1988) NSWJB 219.