LAW SOCIETY OF NEW SOUTH WALES

WENTWORTH SHERATON HOTEL

WEDNESDAY, 27 OCTOBER 1993

A LEGAL SYSTEM FOR MULTICULTURAL AUSTRALIA

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The Hon Justice Michael Kirby AC CMG
President of the New South Wales Court of Appeal

I congratulate the Law Society of New South Wales on this cross-cultural initiative.

The starting point of the need for lawyers in modern Australia to bridge the gulf of language and cultural differences is a realisation of the very large numbers of Australians whose first language is not English and whose culture is not Anglo Celtic. It is estimated that about one in five Australians speak a language other than English at home. When people not completely fluent and comfortable in the English language come before the courts of Australia they will usually be at a great disadvantage. To the fear and anxiety that is usual in any formal system of decision-making must be added the terror that a word will be misunderstood, that the native speakers will speak too quickly, that the remarks from the Bench will be misheard and that the strange Anglo-Saxon ways of the law will be magnified to enormous disadvantage.

The problems of linguistic diversity in a country such as Australia are large enough. But to these problems must be added those of Australian-born litigants and witnesses who need interpreters. They include people who are deaf or mute or otherwise unable readily to express themselves and understand what is going on in this unfamiliar and sometimes terrifying environment.

When I was a young articled clerk I was often astonished at the belief, still remarkably enough common in the 1950s and 1960s in Australia, that everyone coming to this country could and should speak English; that most migrants did so and only pretended to need an interpreter; that they should be forced to give their evidence as far as possible in English without an interpreter until it manifestly, absolutely and indisputably became plain that an interpreter was necessary; and that the wall of incomprehension could sometimes be penetrated by raising the decibels of the questioning both from the Bar table and from the Bench.

I have survived to more enlightened times in the law. But even today experienced and humane judges can err in failing to recognise the special dangers of injustice to a person who must comprehend the events of the court room through a glass darkly: helped by a skilled interpreter bridging the gulf of linguistic difference or verbal impairment.

Such a case was **Gradidge v Grace Bros Pty Limited** (1988) 93 FLR 414 (NSWCA). There, a deaf mute in the Compensation Court of New South Wales required manual/visual language interpretation. The interpreter continued to translate exchanges between the judge and the barristers during legal submissions. She persisted in doing so despite the instruction of the judge that the exchanges did not need to be interpreted. Her insistence upon translating everything that occurred in the public courtroom was upheld by the Court of Appeal:

> "Ultimately, it is for the court to be satisfied that a person understands what is happening. Otherwise, the court hearing may be reduced to little more than a charade so far as that party is concerned. Especially is this true in the case of a person whose disability is not just a lack of the English language but the lack of hearing. Into that silent world justice penetrates."

Even more recently, in **Goktas v Government Insurance Office of New South Wales** (Court of Appeal (NSW), unreported, 31 August 1993) it

was necessary to examine a remarkable exchange between a judge of the District Court of New South Wales and an accredited interpreter for the Turkish language:

"His Honour: Are you a government interpreter?

Interpreter: Yes.

His Honour: Have you your authorisation with you?

Interpreter: Yes.

His Honour: Mrs Curak, can you speak English? You are shaking your head. You cannot. I see. Would you swear the interpreter? Why do you seek an affirmation?

Interpreter: I am not a religious person.

His Honour: You are not a Christian?

Interpreter: No.

His Honour: Do you belong to any religion?

Interpreter: I was brought up as a Muslim but I am an atheist.

His Honour: Do you wish to swear on the Koran?

Interpreter: No.

The interpreter was then affirmed."

The Court of Appeal ordered the retrial of this case too. These instances demonstrate that interpreters must be ready for the unexpected when they walk into some Australian courtrooms. Yet their functions are absolutely vital in many cases to the just performance by the courts of their mission to do justice according to law.

Interpreters should not, of course, become a supplementary source of counsel and advice to litigants. Although many of them will inevitably gain a great deal of specialised legal knowledge just by sitting in the back of

courtrooms over many years, it is important that they should always maintain their neutrality and professionalism. See **R v Mitchell** [1970] Crm LR 153. Understandable though the demands for sympathy and a comforting word in their own language may be, interpreters must stick to interpreting. They must avoid second-guessing lawyers and the other **dramatis personae** of the legal drama.

There was a time, not so long ago, when it was firmly believed that the Australian legal system did not confer upon people with a linguistic or other disabilities an enforceable right to an interpreter before the courts. See eg **Dairy Farmers Co-operative Mills Co Ltd v Acquillina** (1963) 109 CLR 458; **Filios v Moreland** (1963) 63 SR (NSW) 331 (FC). In this, the Australian law followed unquestioningly the principles laid down by the courts of England, established in circumstances of a fairly homogenous society overwhelmingly speaking the English language from birth. See **R v Lee Kun** [1916] 1 KB 337. As recently as 1961, the High Court of Australia assumed, quite wrongly, that the interpretation from one language to another was a simple and mechanical task. See **Gaio v The Queen** (1961) 104 CLR 431. We now know the imperfections of language and the inescapable judgments which interpretation necessitates. Since the foregoing rules were written, the development of the international law of human rights has helped us to see, especially in Australia, the basic injustice involved, at least in major and serious trials, of forcing a person to a hearing without the proper assistance of an interpreter.

English courts too have now begun to uphold a more enlightened rule. In the recent decision of the Judicial Committee of the Privy Council in **Kunnath v The State** [1993] 2 WLR (PC), that court quashed a conviction obtained in the trial of the appellant in Mauritius where it was shown that the hearing was conducted in English - a language which the appellant did not understand. It was proved that, although an interpreter was present, he was not translating to the appellant the evidence of the prosecution witnesses. In his

unsworn statement, the appellant asserted that he had not understood what had been said by the witnesses called against him. His conviction was quashed and a new trial ordered.

The requirement to afford a person a fair trial is fundamental to the legal system of Australia. It was expressed in **Jago v District Court of New South Wales** (1989) 168 CLR 23; (1988) 12 NSWLR 558 (CA). It has lately been reinforced in respect of the right to legal representation by the High Court's decision in **The Queen v Dietrich** (1992) 67 ALJR 1 (HC). At the Australian Legal Convention in Hobart in October 1993, the Federal Attorney-General, Mr Michael Lavarch, suggested that the basic right to an interpreter, at least in serious criminal trials, had now to be reconsidered in Australia following the High Court's decision in **Dietrich**.

This simply shows how the common law system of Australia adapts to the society which it serves. Today, that society is one which includes many people who are not fluent in the English language. To them, in the Australian courtroom, an interpreter is not a mere luxury. Usually, the interpreter is a vital necessity to achieving a just decision and a manifestly fair trial.

All of this is to say that the interpreter's importance to the administration of justice in Australia is now increasingly recognised by the courts themselves. They are vital to the system of justice which the courts administer. It is true that that system is not perfect. However, it has many strengths and can be approached by interpreter and litigant alike with a high measure of confidence that the decision maker will be independent, informed and anxious to do justice. To the interpreter who performs such a vital role in this process must go the appreciation not only of the client, nor even of the courts, but also of a multi-cultural country; immeasurably enriched by the unique harmony of so many tongues.

All Australian lawyers should realise the ever-changing nature of our society. To attain true justice, we must bridge the gaps of cultural and language differences. Only then will our legal system truly serve the multicultural society of Australia.