One Justice — Many Voices

Language and the Law Conference

Chief Justice Robert French AC
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Chief Justice Riley, your Honours, Ladies and Gentlemen. I thank you for inviting me to address this important conference. The topics it covers under the general title of 'Language and the Law' go to the heart of the concept of equal justice. I necessarily speak from the perspective of a relative lay person against the expertise and experience represented here today. Nevertheless, it is important to acknowledge support for your endeavours and the basis for that support in our common concern for equal justice.

Equal justice sets a standard which is more demanding in principle and difficult to achieve in practice, than formal equality before the law, which can be indifferent to difference. The aspiration to that standard raises a general question about the extent to which a legal system can accommodate or respond to differences between persons and in particular cultural differences. The question is most difficult to answer when asked about the substantive law which creates rights and duties, powers and privileges and imposes liabilities, penalties and punishments. The discriminatory application of the substantive law is never easy and often contested. The law can, however, be made responsive to relevant difference by shaping the procedures and practices which affect access to the justice system and effective engagement with it. Those procedures and practices are about the ways in which justice is administered by judges, court officials and ancillary service providers, lawyers, regulators, prosecuting authorities and law enforcement agencies including, importantly, police services. Much of the justice system is what happens on the ground in its day to day administration. That is something upon which the participants in that administration can have a direct and beneficial effect. It is that field of action, with a focus on fair and effective communication, which is the subject of this conference.

The communication with which we are concerned occurs between persons who are part of the justice system and those who seek its remedies or who are involuntarily subject to its processes. Equal justice standards are in play in all such communication whether in the English language used by the courts, the English language used by those brought before the courts, variants of the English language includin g what is sometimes called 'Aboriginal

English' and other languages, relevantly Aboriginal and foreign languages. To facilitate fair and effective communication requires an educated understanding by all actors in the justice system, the development of techniques to give effect to that understanding and the resources, physical and human, to allow them to be implemented. Such communication also requires the development in communities disadvantaged in dealing with the justice system, of an educated understanding of its working. Against that background, I want to say something about language and the law.

Something always seems to get lost in translation when parties and witnesses in court proceedings try to convey, in their testimony, the truth of events, circumstances, conversations, motivations and intentions. That is so even when all concerned are fluent in the English language. It is a truth which has been recognised for a very long time. John Wigmore referred to the inadequacies of language in his *Science of Judicial Proof*, published in 1937. He reproduced a passage from an article published in 1869 which seems apposite even today:

> This incapacity of speech to reveal all that the mind contains meets us at every point. The soul of each man is a mystery which no other man can fathom: the most perfect system of signs, the most richly developed language, leads only to a partial comprehension, a mutual intelligence, whose degree of completeness depends upon the nature of the subject treated, and the acquaintance of the hearer with the mental and moral character of the speaker.[1]

Wigmore observed after setting out that quotation:

> One effect of this peculiarity of Language is that, in the delivery of testimony in open court, the special conditions often affect the utterance so as to mislead the hearer in the interpretation of testimony.[2]

How much less adequate is communication when parties and witnesses who do not speak with fluency, or perhaps at all, the language of the justice system, seek to convey their

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[1] John H Wigmore, *The Science of Judicial Proof*, 3rd ed, (Little, Brown and Company, 1937) 571, citing WD Whitney *Language and the Study of Language* (1869) 405.

[2] Wigmore, above n 1, 571–72.

truths. And when a party comes from a culture which is not that of the judicial system and its actors, the alienness of the assumptions and the very process in which he or she is engaged will further diminish the capacity of that party to convey his or her truth. Interpreter services may ameliorate but will never eradicate that kind of difficulty.

The problem was well stated in a report prepared for the courts of the Australian Capital Territory in the 1980s:

> Different languages are different worlds. Transferring messages from one such world into another is not impossible — but far from being a simple technical operation it is a difficult and sophisticated art. To be done well, it requires not only linguistic sophistication and sensitivity to 'minor' linguistic details (which may be correlated with vast differences in conceptualization), but also an intimate knowledge of the cultures associated with the language in question, of the social and political organization of the relevant countries, and of the world-views and life styles reflected in the linguistic structure.[3]

As the program for this conference and published studies, policies and practical advances of the last few years demonstrate, there is an increasing level of awareness of the problems of cross-linguistic and cross-cultural interaction in the judicial process.

Fair communication in the justice system is not achieved simply by deploying a sufficient number of competent interpreters. Problems of communication begin with difficulties faced by participants who are English speakers but not fluent speakers of the English used in the legal system. The problem can be acute in the case of Aboriginal English speakers. The work of Professor Diana Eades and Dr Michael Cooke has raised awareness of injustices which can be visited upon Aboriginal English speakers in their interactions with the law. Professor Eades addressed the conference on the topic of 'Aboriginal people speaking English in legal contexts'. Her handbook, which was published in 1992 under the title *Aboriginal English and the Law*, has become something of a classic in this field. It was written for the legal profession in Queensland but is of general application in its aim of improving lawyers' understanding of Aboriginal speakers of English so that the delivery of legal services to their Aboriginal clients can be made more effective. She has described such

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[3] RMW Dixon, Alan Hogan and Anna Wierzbicka, 'Interpreters: Some basic problems' (1980) 5 *Legal Service Bulletin* 162, 163.

understanding as one of the many steps needed in addressing the issue of equality for Aboriginal people in the legal system. In her text she makes some important and frequently quoted points about difficulties of cross-cultural communication in the English language including the phenomenon of gratuitous concurrence — that is to say, saying yes in answer to a question because the respondent expects that that is what the questioner wants to hear. As she has written:

> to understand a speaker's meaning it is not enough to know meanings of words and phrases and to understand grammar. We also need to understand the speaker's cultural background, often called the socio-cultural context.[4]

There is also a question about the circumstances in which interpreter services should be used. Doctor Michael Cooke referred in a report, published in 2002 for the Australian Institute of Judicial Administration, to the reluctance of lawyers and courts to use interpreters for Aboriginal people who speak at least basic English and who can respond to simply framed questions. He made three points:

> - Aboriginal evidence given in English is easily misconstrued through failure to identify how the semantic and grammatical differences between non-standard dialects of English used by witnesses, and Standard Australian English ... can affect meaning;
> - where an Aboriginal person speaks some English, lawyers often overestimate their capacity to be fairly interviewed in English; and
> - courts commonly fail to account for the suggestibility and linguistic manipulability of NESB Aboriginal witnesses through regulating how they are questioned, particularly in reference to leading questions.[5]

An example which he gives is of a question put to a Yolngu witness by an English speaking counsel about whether or not the deceased person had thrown a spear at his own brother. The answer was yes. However, it was later found that what was thrown was a spear shaft, a

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[4] Diana Eades, *Aboriginal English and the Law Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (Queensland Law Society, 1992) 26.

[5] Michael Cooke, *Indigenous Interpreting Issues for Courts* (Australian Institute of Judicial Administration, 2002) 2.

length of light wood that was yet to be fashioned into a spear. The witness was confounded by the fact that the English word 'spear' translated into his dialect as 'gara' a generic term for spear which also means 'spear wood'. Cooke observed that after twice trying unsuccessfully to explain that the deceased had only thrown a stick at his brother, the witness misinformed the court under pressure of insistence to accept the confinement imposed by a declarative 'yes/no' question.[6]

There was a time when interpretation and translation were thought to perform a fairly mechanical function. That approach was well illustrated by Sir Samuel Griffith's translation of the *Divine Comedy*. The translation expressly set out to be literal and reproduced Dante's original metre.[7] Sir Samuel placed on his title page what one critic called 'his translator's slogan': 'A translation should present a true photograph of the original.'[8] The result was not entirely a happy one. A reviewer wrote in 1912:

> Sir Samuel Walker (sic) who has found leisure from his labours as Chief Justice of the High Court of Australia to complete such an exacting task as the translation of the Divina Commedia, speaks so modestly of his work in the preface that it seems almost ungracious to criticise it.[9]

Some unfortunate lines from the translation were reproduced in the review: 'But when that I the foot of a hill had come to',[10] which was described as 'a line in which no poet could take pleasure'.[11] Another line 'Yon mount delectable why not ascendest?' was described by the reviewer as 'equally distressing'.[12] The reviewer said:

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6 Ibid 19.

7 Samuel Griffith, *The Divina Commedia of Dante Alighieri* (Oxford University Press, 1911).

8 Comment 'The Divina Commedia of Dante Alighieri: translated by Sir Samuel Griffith' (1912) *The Bookfellow* 76-77, 76. Griffith above n 9.

9 Austin Harrison, Comment ' The Divina Commedia of Dante Alighieri' (1912) *The English Review*, 740, 740.

10 Ibid.

11 Ibid.

12 Ibid.

> These, indeed, are extreme cases, but they show whither rigid principles of translation lead. Surely the best translation of a poet is by a poet, even if the metre is changed, and paraphrase is often used.[13]

The same might be said of rigid principles of interpretation of testimony.

A literal approach to the function of the interpreter in judicial proceedings existed for a long time before and after Sir Samuel Griffith's translations. In *Gaio v The Queen*[14] the High Court heard an appeal from the Supreme Court of the Territory of Papua New Guinea. The appellant, an indigenous Papuan, had been convicted of murder. Evidence had been given of his admissions to a patrol officer made through an interpreter. The appellant contended that the evidence of the admissions as interpreted was hearsay. That proposition was rejected. Kitto J, in the course of his judgment, described the role of the interpreter as:

> not different in principle from that which in another case an electrical instrument might fulfil in overcoming the barrier of distance.[15]

Dixon CJ in not dissimilar vein said:

> I think that the translation word by word or sentence by sentence by the interpreter is not an *ex post facto* narrative statement of an event that has passed within the rule against the admissibility of hearsay but is an integral part of one transaction consisting of communication through the interpreter.[16]

It is important to note that the decision in *Gaio* was concerned with whether or not the interpreter's rendition was hearsay evidence. It was also concerned with an out of court translation of an interview. The literal translation approach was designed to avoid characterisation of what the interpreter said as a hearsay report of what the person being interpreted had said.

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[13] Ibid.

[14] (1960) 104 CLR 419.

[15] Ibid 430.

[16] Ibid 421 (emphasis in original).

The difficulties of literal interpreting are obvious enough. Laster and Taylor summed up the problems of that approach in an article in *Criminology Australia* in 1995:

> The narrow conception of the interpreter as 'mere conduit' expressly excludes the human elements of successful communication. Interpreters are not expected to take an interest in proceedings but rather are required to "perform" as neutral, machine-like functionaries.[17]

The authors suggested that in the courtroom the advantage of that concept was to preserve the lawyers' traditional control and dominance of the proceedings. I have reservations about approaching the undoubted deficiencies of literal or conduit interpreting through the prism of power relationships in the court process. It is more useful to look at the problem in terms of its effect on the constitutional function of courts. Literal interpreting impedes that function to the extent that it disables the court from an optimal comprehension of what the party or witness is seeking to communicate. An example of a literal approach to interpreting misleading the court in a way that led to serious injustice was described by the Australian Law Reform Commission in its 'Evidence (Interim) Report'. It concerned a defendant who had been committed to a psychiatric institution for observation. When a magistrate had asked the defendant how he felt, he used a term which in its literal translation meant 'I am God of Gods'. However, the expression was a colloquialism meaning 'I feel on top of the world'. [18]

On the other hand, some forms of creative interpretation of what a witness is said to have said can be positively misleading. One example from my experience a long time ago was the use of English language records of interview with traditional Aboriginal people suspected of the commission of a crime where the interviews were prepared by interviewing officers and signed by the suspects.

In the 1970s I was engaged, along with a number of other counsel including the late John Toohey, to represent a group of traditional Aboriginal people from the Wiluna area charged with the murder of one of their community who had disrupted initiation related

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17 Kathy Laster & Veronica Taylor 'The Compromised 'Conduit': Conflicting perceptions of legal interpreters, (1995) 6(4) *Criminology Australia* 9, 10.

18 Australian Law Reform Commission, *Evidence (Interim) Report No 26* (1985), 146 [284].

business. The trial was conducted in Kalgoorlie. The prosecution provided signed records of interview from each of the men in fairly impeccable English. The language of the records of interview was in sharp contrast with our own challenging experiences in communication with our clients for the purpose of taking their instructions. We engaged a suitably qualified psychologist to test each of them for English language ability. It was not surprising that it turned out to be well below the levels disclosed in the records of interview. The accused men were described in the psychologist's report as having the English comprehension ability of six year olds. That, of course, had nothing to say about their intelligence levels or ability to communicate in their own language. It was simply a measure of their fluency in English. One of their lawyers in conference saw a wonderful jury point. All we had to do was to show the jury that they were dealing with a group of six year olds. The outrage of our expert witness and the frosty disapproval of his co-counsel put paid to that suggestion.

The disconnect between the accused and the trial process in that case, rendered the process close to farcical. The first Crown witness, an indigenous man from the same community as the accused, was questioned by the judge to determine whether he understood the oath. The judge asked him if he knew who God was. The witness plainly did not have the faintest idea what the judge was talking about. He knew however that it was a question and began to recite from a carefully memorised proof of evidence. The case was thrown out at the end of the prosecution evidence.

The courts have moved beyond the notion of an interpreter as a mere conduit. In the Federal Court and the Federal Circuit Court there has been over the last two decades a high volume of judicial review processes in which asylum seekers have challenged tribunal decisions. Some of those challenges have been based upon alleged interpreter errors. In *Perera v Minister for Immigration and Multicultural Affairs*,[19] Justice Susan Kenny rejected the notion of interpretation as a mere mechanical exercise. She observed that it requires both technical skill and expert judgment. The limitations of even the best technique were acknowledged in her observation that 'perfect interpretation may, moreover, be impossible'.[20] I would observe that it may also be difficult, if not impossible, to find an agreed definition of the concept of 'perfect interpretation'. Her Honour went on to quote from an American academic on the topic, M B Shulman:

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19 (1999) 92 FCR 6.
20 Ibid 18 [26].

> No matter how accurate the interpretation is, the words are not the defendant's nor is the style, the syntax, or the emotion. Furthermore, some words are culturally specific and, therefore, are incapable of being translated. Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony.[21]

Justice Kenny accepted that interpreting at a tribunal hearing need not be at the very highest level of a first flight interpreter. Nevertheless, the interpreter should express, in one language as accurately as that language and the circumstances permit, the idea or concept expressed in the other language.

What Justice Kenny said was approved in 2006 in the Court of Appeal of Western Australia in *de la Espriella-Velasco v The Queen*,[22] by Roberts-Smith JA, with whom Pullin JA agreed. Roberts-Smith JA emphasised the significance of communicating the idea or concept being expressed as distinct from merely substituting a word in one language for an equivalent in the other. Social or cultural differences might mean that even the idea or concept itself had no equivalent in both societies.

The idea of 'concept-based interpreting' brings with it a need for a clear understanding on the part of the judge, lawyers, court officials and interpreters of what that term means. What is the interpreter doing in concept-based interpreting? In particular, there must be an understanding of the boundaries between transmission of concepts and a creative rendition of what the witness is saying that perhaps cannot and should not be attributed to the witness.

Practical questions may also arise in relation to the availability of suitable interpreters particularly when the party or witness whose evidence is to be interpreted comes from a small community and may have connections with the interpreter, a fortiori, where the events leading to the court proceedings have involved members of the community.

The process of single witness oral testimony whether through an interpreter or otherwise, may be inappropriate in cases in which a witness testifies on matters of customary law or relationship to country and does so in the exercise of a communal responsibility. In

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[21] Ibid citing M B Shulman, 'Note: No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants' (1993) 46 *Vanderbilt Law Review* 175, 177.

[22] (2006) 31 WAR 291, 313 [75].

some cases, the Federal Court in native title hearings has accepted evidence from a witness acting in consultation with members of his or her community.

The challenge of communicating concepts from one world to another via an interpreter may be reflected in misunderstanding by parties and witnesses of court processes and their significance. A report published by the Aboriginal Resource and Development Services (ARDS) in 2008, focussed on misunderstandings and knowledge gaps of Yolngu people in relation to what they called the Balanda legal system. The report was titled 'An Absence of Mutual Respect'. Based on surveys of Yolngu people and interpreters, the report outlined the disjunction between literal interpretations of legal words and explanations of the concepts themselves, as well as the adverse effects of that disjunction on Aboriginal people involved in the court system. In connection with the word 'bail' the ARDS report showed that 80 per cent of responses relating to bail were either incorrect or gave the incorrect context meaning. Two very common misunderstandings emerged. The first was that the bailed person had been 'bailed out of trouble', that there was no requirement to return to court and no requirement to pay money or a fine. The fact of release on bail was seen as termination of the court proceedings. A variation of the misunderstanding related to Own Recognisance bail security. This was often thought to be a fine. On that basis it was thought that if money was brought to court that would be the end of the matter. Alternatively, the money could just be sent to the court and that would be the end of the matter. The nature of the misunderstanding only has to be stated to indicate the potential seriousness of its consequences.

It is encouraging to see that a project involving ARDS, the North Australian Aboriginal Justice Agency and the Aboriginal Interpreter Service to develop a 'plain English legal dictionary' translating legal 'concepts' behind key terms into plain English and Yolngu Matha, was completed in April this year. The hope is that the dictionary will be regularly used in court by practitioners and legal interpreters. There is an extended definition of the word 'bail' setting out clearly its significance and the obligations that it imposes upon the person bailed. I note that the plain English legal dictionary is on the program for this conference.

This conference and the research and activities which are being discussed are part of an ongoing national effort to deal with the challenge to equal justice presented by cultural difference in its interaction with the law. For many years the National Judicial Conference

and before it, the Australian Institute of Judicial Administration, have conducted Commonwealth funded indigenous cultural awareness programs for judges and magistrates, including programs dealing with issues of communication of the kind which you are discussing.

Those issues of communication and cultural awareness are located within the larger set of issues affecting the interaction between indigenous and migrant peoples and the Australian legal system. There has recently been established a Judicial Council on Cultural Diversity chaired by Chief Justice Wayne Martin of the Supreme Court of Western Australia. The Council will be an important source of research, education and advice to members of the Australian judiciary trying to do equal justice in a culturally complex community. The Council has the support of the Council of Chief Justices of Australia and New Zealand and of the Migration Council of Australia.

On 3 March 2015, the Federal Government announced funding of $120,000 over a two year period to support the development by the Judicial Council of a national framework, guidelines, protocols and training to ensure more effective and consistent administration of justice for culturally and linguistically diverse women and their families.

On 24 June 2015, I attended the opening session of a National Roundtable convened to consider the problems faced by culturally and linguistically diverse women, both indigenous and migrant, particularly in the context of family violence and family breakdown. The Roundtable was also addressed by the Minister Assisting the Prime Minister for Women. In the announcement of the funding to support the development of the national framework, it was recognised that a 'one-size-fits-all' approach to dealing with family and sexual violence would not address the unique challenges faced by different groups of women in Australia. Importantly, the National Roundtable was attended by representatives of both indigenous and migrant women.

These activities indicate a recognition of the scale of the challenge to our aspiration of equal justice in the face of cultural and linguistic diversity. The particular challenge in relation to Australia's indigenous people is massive. The issues raised by linguistic diversity and the law are an aspect of a larger problem. They cannot be treated as a discrete set of issues. The depth and breadth of this conference, the expertise of those attending it and the support of the Northern Territory judiciary for it are very encouraging indicators of a serious

commitment to meeting the challenge by all those involved in it. Thank you for giving me the opportunity to address you.