INTERPRETING ABORIGINAL JUSTICE IN THE TERRITORY

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Today, your sister gave you a piece of paper that she got from the police. It was covered in strange symbols. You stared at them — lines, circles, and figures you recognised as numbers — but you couldn't work it out. You showed it to your cousin who can read a bit because she went to school until year 10, and she said 'you must be in big trouble because that paper says you have to go to court.'

You have no idea what you've done wrong, but you're terrified. You've been to court before, just to watch and be there for family. It was a small room at the Community Council, with desks and chairs and a huge air conditioner so you were shivering, though the white people in their black pants and buttoned shirts were still sweating.

That last time, you watched your countrymen come in one by one. They had to stand up in front of everyone, and when the legal aid lawyer nodded at them, they had to say a white word and sit down. You were not sure why they had to say the word, since it was always the same word, but you thought maybe it was just what white people did, to be polite. The white people passed each other bits of paper, and they talked a *lot*. Sometimes a person's only punishment was to write their name on a piece of paper and then they got to go home; sometimes they were locked up in the police station and then taken away on the prison plane. There was no rhyme or reason to it.

What will they do to you?

The morning you hear all the planes flying in, you know it's court day. Everyone sits out on the grass near the Council and waits. A white woman rushes over and asks you your name. You know a bit of white language, but she talks so fast you find it difficult to follow. She sits down beside you, but she's bossy and rude, asking you all kinds of personal questions and not giving you time to answer.

You're hoping she will go away when she shows you a piece of paper with your signature on it, and tells you a story. Although it is filled with strange white words, you realise you know this story. It is your story. She is talking about an actual time your husband flogged you. How she knows about it, you have no idea. It happened a long time ago, and you'd both been drunk and jealous. You called the police, they took him away to dry out and took you to the Clinic, and the next day everything was fine. Why talk about it now?

And then it dawns on you. Suddenly you know what's going on and you feel sick. This bossy white woman wants you to get up there in front of your family, your husband, and some white strangers and tell them how he flogged you. She wants you to send your husband to jail.

Panic rises. How will you look after the children? How will you face your family? Your husband's mother? They will never understand. It will all be your fault.

This is what justice is like for many Indigenous Australians — a system alien not only in concept but in language. It is a problem found in most areas of rural Australia, and particularly in Queensland, Western Australia, South Australia and the Northern Territory.

This article is about criminal proceedings in the Northern Territory because that is the jurisdiction I have experienced. I have been the bossy white woman without the time or resources to sit down with the Aboriginal victims in my cases and explain what is going on. However, the same difficulties are experienced in other jurisdictions and in non-criminal forums.

Of the 28 per cent of Northern Territorians who are Indigenous, some 60 per cent are Aboriginal language speakers with very poor English skills.[1] Aboriginal people make up 82 per cent of the average daily percentage of adults in custody, 88 per cent of the juvenile detainee receptions, and 82 per cent of the persons commencing conditional liberty programs such as community work orders or suspended sentences. They comprise 94 per cent of persons placed in 'protective custody', mostly for being drunk and disorderly in public.[2] It follows that an incredible 50 per cent of defendants and a large proportion of witnesses (including victims of crime) experience Territory justice in a foreign language.

What makes this picture even worse is the scarcity of Aboriginal interpreters, and the often poor use of those that are available.

A right to an interpreter … sort of

There is no legal right to an interpreter in the Territory, although in practice various rules require one be provided at various stages of a criminal proceeding.

Complaint

A victim of crime will nearly always be expected to contact and communicate with police in English. At no stage of the criminal justice system do they have a right to an interpreter as they are not legally a party to the proceedings. At the stage of investigation, interpreters

REFERENCES

1. Urbis Keys Young, *Final Report of the Evaluation of the Northern Territory Agreement* (2004) <http://www.ag.gov.au> at 28 February 2008

2. See *NT Correctional Services Annual Statistics 06–07*, and *NT Police Fire and Emergency Services Annual Report 05–06*.

may be organised for victims of serious, high priority crimes such as those involving a death or a sexual offence. However, most police statements are taken without the aid of an interpreter. They are written in English and read back to the complainant in English who can later expect to be cross-examined about any inconsistencies.

Arrest

A suspect can expect to be arrested without an interpreter. Section 127 of the *Police Administration Act* requires only that a person be informed of the reason for his or her arrest as soon as is practicable. For police called out to an urgent situation (often at odd hours of the night) there is no time to obtain an interpreter, but even for apprehensions conducted after some investigation and deliberation the presence of an interpreter is unusual.

Police Questioning

Police questioning an Aboriginal suspect are supposed to provide an interpreter unless the suspect is 'as fluent in English as the average white man of English descent',[3] regardless of whether the questioning takes place in a formal police interview room or by the side of the road.[4] The court has the discretion to exclude admissions of guilt obtained without the assistance of an interpreter. However, this is only a discretion. If no interpreter was available, and the judge is satisfied that the accused's admissions were voluntary, then a confession will most likely be allowed into evidence.

The reality is that the pool of interpreters is so limited that it can be difficult to obtain an appropriate interpreter at the time and place required. There are approximately 76 Aboriginal languages spoken in the Territory and about 200 interpreters able and willing to work for the Territory's Aboriginal Interpreter Service (AIS). A recent government report found:

> For some language groups, there may also only be one or a very small number of interpreters registered with the AIS, and these interpreters may of course not always be available when required. For instance in one language in one location there is only one interpreter with legal expertise. As an informant commented: '*what if we have a murder trial, and she's sick?*'[5]

The problem is compounded by Territory geography. Many Top End communities are so remote that at certain times of the year they are not accessible by road. A person can be arrested in one community and the only appropriate interpreter may at that time be in Darwin, or in another community hundreds of kilometres away. Even if the interpreter is in the community, finding them can be a complicated word-of-mouth exercise, given that most do not have telephones or a consistent residential address.

There may be little point holding a suspect in custody if an interpreter cannot be located quickly, because being held in a cell for as long as 21 hours may be too intimidating for a subsequent confession to be allowed into evidence at trial. The courts have had difficulty accepting that such a confession could be voluntary.[6] A suspect can agree to proceed without an interpreter.[7] Unfortunately, it is the Aboriginal person who most needs an interpreter that is most likely to agree to a suggestion to proceed without one, merely out of gratuitous concurrence and because they do not actually know what an 'interpreter' is.

Most interviews conducted by general duties police officers are conducted without even attempting to obtain an interpreter. Territory police communicate with Aboriginal language speakers in a kind of improvised pidgin every day. Many normalise this make-do situation to the point that they genuinely believe communication is adequate when it is in fact well below the standard necessary for formal questioning.

Recognition of the problem is further impeded by the relatively junior nature of the police force, and the long hours worked particularly by those stationed in remote areas. It is not unusual for officers with only four to six years experience to be in charge of a two-person station, responsible for policing the entire community 24 hours a day, investigating all but the most serious offences, compiling all the files, collecting all the evidence, interviewing all the suspects, and issuing and serving all the summonses. They are also responsible for the financial and administrative requirements of the station and have no administrative staff to assist.

Even if an interpreter is obtained, cautioning a suspect through the interpreter can be difficult. Territory police have pre-recorded cautions in many Aboriginal languages, but it is necessary for the suspect to repeat the caution back in their own words with the aid of the interpreter, and shades of meaning can be crucially important. In one recent child sex matter, a disastrous mistranslation occurred in a police interview that went like this:

OFFICER:	So, do you have to speak to me?
INTERPRETER:	(*in language*) Do you want to speak to me?
SUSPECT:	No.
INTERPRETER:	(*in English*) No.

The interview then proceeded on the basis that the suspect understood the caution. Several incidents have also been noted where an interpreter has encouraged a defendant to talk to police by saying things such as: 'Yeah, you'd better talk to them.'

Because a suspect has to vocalise their understanding of the caution, it is also not unusual to come across a section of an interview like this:

OFFICER:	You don't have to answer my questions. Do you understand that?
SUSPECT:	(*No audible response.*)
OFFICER:	No, you have to answer for the tape.
SUSPECT:	Yeah.
OFFICER:	Do you have to speak to me?
SUSPECT:	Yeah.
OFFICER:	No you don't. You don't have to say anything if you don't want to. Now tell me what that means in your own words.

There is something deeply troubling about a procedure that forces a person to answer questions in order to prove that they understand they don't have to.

3. *Anunga* (1976) 11 ALR 412.
4. *Jabarula* (1984) 11 A Crim R 131 at 139.
5. Urbis Keys Young, above n 1.
6. *R v Cotchilli* [2007] NTSC 52.
7. Ibid.

... a person unable to speak and write English may be held on remand even when suitable bail arrangements would be available ... because [they] cannot be released on bail unless he or she undertakes in writing to appear before the Court at such a time and place as is specified in the undertaking.

At court

A person who cannot give instructions or follow the course of proceedings is unfit to stand trial.[8] In 2003, a deaf mute aboriginal man who did not understand sign language was found unfit to stand trial and discharged.[9] However, this was an extreme case where there was no prospect of future communication.

For most Aboriginal people, a suitable interpreter will eventually become available. Until then, a person unable to speak and write English may be held on remand even when suitable bail arrangements would be available. This is because section 25(1) of the *Bail Act* provides that a person cannot be released on bail unless he or she undertakes in writing to appear before the Court at such a time and place as is specified in the undertaking.

At common law the accused has the right to a fair trial, and in practice this may require an interpreter to be provided.[10] A judge can put a trial on hold in order to locate an interpreter if it would be unfair to proceed without one.[11] If the trial runs without an interpreter, and demonstrable unfairness results, the conviction may be quashed on appeal.

Like police, lawyers who work extensively with aboriginal clients or witnesses are apt to normalise poor communication, and may also not recognise when an interpreter is required. Aboriginal people with some minimal English skills will sometimes say they can speak English because they are too embarrassed to admit they cannot.

To help address this problem, the Law Society Northern Territory recommends that lawyers complete a prescribed 'interpreter test' before deciding whether an interpreter is needed.[12] This involves asking questions to see if false information is detected and corrected. For example, you may ask a person from a remote community: 'When you were growing up in Sydney, was the food good?'

Even when a lawyer recognises the need for their client or witness to have an interpreter, they may be forced to proceed without one. Some lawyers will object to an interpreter being used by the opposing party for tactical reasons, an objection that may well be upheld if the person in need of an interpreter speaks some English, and locating an interpreter will require an adjournment. Dr Michael Cooke, a leading linguist in this area, has observed:

> There are lawyers who see the interpreter as an impediment to the easy leading of an Aboriginal witness during cross-examination. There are magistrates and judges who are reluctant to permit interpreters to be used with witnesses who have some English because they feel the interpreter may interfere with the court's capacity to evaluate a witness directly, or may allow the witness the advantage of extra time to answer a question.[13]

The right to a fair trial provides some safeguard for an accused person, although it is of no assistance if a judge or magistrate is overconfident of the accused's linguistic capabilities. On the other hand, the fair trial requirement may work against non-party witnesses such as victims of crime, who do not have any corresponding right to fairness to counterbalance arguments that an accused will be disadvantaged if they 'hide behind the interpreter'. Justice Kirby has remarked:

> Sadly, in our multilingual society, ... it must be said again that the majority [of legal practitioners] who are exclusively Anglophone show an enduring resistance to the needs of non-Anglophone parties and witnesses in court. The linguistic skills adequate for work and social intercourse frequently evaporate in stressful, formal and important situations.[14]

Ideally, interpreters for court should be accredited to at least the NAATI[15] professional interpreter level. However, as there is no government funding for Aboriginal language courses to train and accredit professional level interpreters, none exist. Aboriginal interpreters can only receive para-professional accreditation. About a third of the AIS interpreters are not even trained to this para-professional standard.

Para-professional accreditation does not necessarily involve training in legal concepts and language, but includes training interpreters to adhere to a strict code of ethics. This code of ethics includes obligations to decline to undertake work beyond their competence or accreditation levels, to take reasonable care to be accurate, to respect their clients' rights to privacy and confidentiality, and to maintain professional detachment, impartiality and objectivity.[16]

There is no legal rule that requires a court interpreter to be accredited to any particular standard. Quality control relies on AIS locating, training and selecting appropriate interpreters, and interpreters self-identifying their own limitations.

The court may overturn a conviction if the quality of an interpretation was inadequate.[17] However, quality can be difficult to assess, given that interpreting is necessarily a task involving creativity, discretion and approximation. As the Supreme Court of Canada noted, 'Even the best interpretation is not 'perfect' in that the interpreter can never convey the evidence with a sense and nuance identical to the original speech.'[18]

8. *Criminal Code Act* (NT) s 43J.

9. This was 4 years after he was released from custody without bail, and 5 years after the High Court found the committal to be a nullity because the man could not understand the proceedings. *R v Roland Ebatarinja* [1999] NTSC 41 (unrep decision Mildren J, 22 April 1999); *Ebatarinja v Deland* (1998) 194 CLR 444.

10. *R v Johnson* (1987) 25 A Crim R 433.

11. *Dietrich v The Queen* (1992) 177 CLR 292 per Mason CJ and McHugh J at 311.

12. *Indigenous Protocols for Lawyers in the Northern Territory* (2004)

13. Dr Michael Cooke, *Indigenous Interpreting Issues for Courts* (2002), 10 <http://www.aija.org.au> at 28 February 2008.

14. *Cucu v District Court of NSW* (1994) 73 A Crim R 240 at 243.

15. National Accreditation Authority for Translators and Interpreters.

16. *Australian Institute of Interpreters and Translators Inc Code of Ethics*

17. *De La Espriella Velasco v The Queen* (2006) 197 FLR 125. For a consideration of quality outside the criminal jurisdiction see *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6.

18. *R v Tran* [1994] 2 SCR 951 at 958.

In practice, there are very few Aboriginal interpreters who are both competent and confident enough to interpret every word spoken in a courtroom to their client. Most Aboriginal interpreters will only interpret questions addressed directly to their client, who is consequently unable to understand the other legal matters or evidence discussed. For example, a client cannot confirm that submissions or cross-examination by counsel are complete and in accordence with instructions. In the Court of Summary Jurisdiction, magistrates and lawyers rarely slow down or break up their speech to ensure these matters are interpreted. Few if any Aboriginal interpreters have the skills to perform simultaneous interpretations. Some find court as unfamiliar an experience as their clients. In addition, many feel it is inappropriate to speak when another person is speaking, and are too intimidated to request the court give them more time.

A party actually has a legal right to have court proceedings interpreted in their entirety, and counsel does not have authority to waive this entitlement on their client's behalf.[19] If a party is self-represented, it is the judge's responsibility to ensure that the proceedings and evidence are available to the accused in a language he or she can understand.[20]

You can't choose your family

As if there weren't enough problems locating interpreters, an additional issue was recently brought into sharp focus by the case of *R v RA*.[21]

On the morning of the trial, the accused RA discovered that the Crown intended that the victim give evidence through an interpreter who was related to the victim and who shared the same surname. It should be noted that this was the same interpreter who had been used at the committal proceedings without objection.

In particular, the victim and the interpreter were from one family clan and RA was from another clan. His counsel objected, arguing that while the interpreter was not alleged to be biased, her use would create a perception of bias. He asserted that the two clans were on hostile terms. The Crown responded that there were only two AIS interpreters considered to have sufficient skills in the relevant language for a Supreme Court trial, and the other was the proposed interpreter's sister.

A witness from AIS gave evidence that they had significant difficulties obtaining and retaining suitable interpreters in that particular language, despite it being considered a major Aboriginal language. The AIS relied on the interpreters, who were trained to adhere to a code of ethics, to identify where they felt too conflicted to interpret. The interpreter herself gave evidence that she was a distant blood relative and had no social interaction with the victim or involvement in her upbringing. She admitted that the victim would refer to her as 'mum' or 'auntie', but clarified:

> I could have about maybe 6, 7, 8, 9000 sisters; 250, 1000 nieces, nephews, grandchildren, you name it. It's a whole universe. It cannot be explained. It's part of us. We are a group who are related.

The judge accepted that the interpreter would interpret professionally and competently, but found that as there might be perceived bias, discharged the jury and adjourned the trial to a new date to allow the Crown to make efforts to obtain a more appropriate interpreter.

In my discussions with interpreters and employees of AIS, I found many people perplexed by this decision, which they regarded as having misunderstood the Aboriginal concept of 'being related'. Anyone who had a sufficient grasp of the Aboriginal language in question would have been adopted into the Aboriginal kinship system, regardless of their biological origins, and would hence be related in the sense of having mutual obligations according to Aboriginal culture. For example, the sister of the interpreter in question calls the resident linguist in the community 'sister', although she is white and not biologically related. Being distantly biologically related, or sharing the same clan name, does not necessarily create any special obligations that would distort the interpretation.

Interpreters and linguists have also considered that the court's decision reflects a general disregard for the professionalism and ethics of accredited interpreters. In fact, the interpreter in question, one of the AIS' longest-standing and most accomplished interpreters, was so insulted that she resigned immediately following the decision.

Some lawyers have suggested that the interpreters fail to understand that the allegation was one of perceived rather than actual bias. But perhaps it is the legal profession who have failed to understand the hypocrisy of the decision. To be an Aboriginal interpreter means to rely on professionalism and ethics in the face of cultural and kinship obligations in almost every court case. That is the job description. In *R v RA*, the court suddenly admitted that these pressures exist. Far from recognising or thanking interpreters for working under such conditions, the interpreter was effectively 'sacked' from her contract.

Furthermore, the allegations of perceived bias in *R v RA* were mere assertions from the bar table and were erroneous. The accused did not grow up in the 'clan area' referred to by his counsel but rather in the same community as the interpreter. Their clans were intermarried. The accused's sister was married to the interpreter's uncle, and consequently – had the interpreter actually been asked what she called the accused – her answer would have been that she called him 'son' or 'nephew'.[22] So exactly who was the interpreter supposed to be biased towards?

Unsurprisingly, a more suitable interpreter was never located, the trial proceeded some months later and the victim's evidence was interpreted by the original interpreter's sister.

Court interpreting is a particularly stressful job for Aboriginal interpreters. There are common misconceptions by Aboriginal community members that in legal situations the interpreter is siding with the party for whom the interpreting is being conducted.[23] An interpreter may be blamed for an undesirable court

19. *Gradidge v Grace Bros Pty Ltd* (1988) NSWLR 414; *Saak v Minister for Immigration and Multicultural Affairs* (2002) 121 FCR 185.

20. *R v Rostom* [2007] SASC 210; *MacPherson v The Queen* (1981) 147 CLR 512.

21. NTSC SCC 20603761 before Angel ACJ (Transcript 30 July 2007)

22. Information provided in an interview with the interpreter's sister conducted in December 2007, also an Aboriginal interpreter, who wished to remain anonymous.

23. Urbis Keys Young, above n 1, 35.

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outcome. Recent reports have included examples of interpreters experiencing personal danger.[24] There is only enough funding to employ Aboriginal interpreters on a casual basis, creating problems associated with a lack of job security. The flow of work is unpredictable, and interpreters are often called upon to drop family and other commitments to attend court at the last minute. The demanding nature of the work causes many interpreters to burn out.

An Aboriginal interpreter is therefore required to have considerable personal strength and confidence to persist with legal work. A demonstrated capacity and willingness to do court work should be paramount when the court considers whether an interpreter is suitable in a particular case. It should not be trumped by a half-baked explanation of cultural obligations that interpreters know exist and have been trained to deal with every day.

What can be done?

There is no doubt that AIS needs more funding. Existing interpreters need professional development, support, and stable employment, and new interpreters need to be located and trained. The AIS is currently working on a project with Rotary to develop the first training program for NAATI professional-level interpreters in the Aboriginal language of *Djambarr-puyngu*. Other notable initiatives include the *Rombuy Legal Website*,[25] which explains important legal terms in spoken and written *Yolgnu Matha*; educational segments on legal concepts broadcast by Indigenous radio stations; and language programs offered by the Batchelor Institute of Indigenous Tertiary Education.

The Northern Territory and Federal Governments should be providing funding for professional level accreditation in all major Aboriginal languages, the latter as part of the 'emergency' intervention, at least if they intend that child victims be able to give adequate evidence, for accused persons to have a fair defence, and for communities to understand the proceedings.

However, governments need to go further and improve bilingual education for Aboriginal students. AIS have noted that there are a very small number of people who have the potential to become interpreters, and that they often train very 'raw material'[26]. Very few Territory schools offer bilingual education programs to Aboriginal students as the current educational trend is to force Aboriginal children to learn in English — a strategy that creates additional learning and motivational difficulties for Aboriginal children and that is not conducive to developing the bilingual skills necessary for interpreting.

Beyond the criminal system, interpreters are needed to explain to Aboriginal parents why their children are taken away by Family and Children's Services, or the meaning of the Domestic Violence Order they are signing. They are needed at hospitals to explain medical procedures and options.

As lawyers, we need to appreciate our limitations when communicating with Aboriginal people, and find better procedures for working with the Aboriginal interpreters available. Above all, we need to see interpreters not as an optional extra, but as an essential part of the administration of justice.

(For more information about Aboriginal interpreters and the legal system see: Russell Goldflam, 'Silence in Court! Problems and Prospects in Aboriginal Legal Interpreting' in Diana Eades (ed) *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia*; Helen Blundell, 'A long fight for a basic human right' (2000) 25(5) *AltLJ* 219; Bill Edwards, 'Putuna Kulilpai: Interpreting for Pitjantjatjara people in courts' (2004) 14 *Journal of Judicial Administration* 99.)

The author wishes to thank everyone who assisted her in researching this article, particularly the interpreters and staff of the Aboriginal Interpreter Service. Any errors are her own.

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24. Dr Michael Cooke, 'Caught in the middle: Indigenous interpreters and customary law' (Background paper to the Western Australia Law Reform Commission Project 94 on Customary Law).

25. Rombuy Dhawu Information about Law website <http://www.rombuy.com.au> at 28 February 2008

26. Urbis Keys Young, above n 1, 40.