

ADVOCACY

Cross-examining through an interpreter

The requirement for counsel to cross-examine witnesses through interpreters is an increasing one. In the not so distant past there existed an attitude of having to “make do” without an interpreter when a witness had either no grasp, or an inadequate grasp, of the English language. There was a tendency to “make do” with whatever interpreting skills may have been readily available. A graphic example of this was revealed in the re-enactment of the trial of Tuckiar in the Law Week celebrations.

In more recent times there has been an increasing recognition of the desirability of ensuring that the witness fully understands the proceedings and is able to give evidence through an interpreter. This involves determining when an interpreter is necessary and ensuring that an appropriately qualified interpreter is available. It is no longer satisfactory to “make do”.

The need for qualified interpreters in the legal system and, indeed, in many other areas of daily life in our community, has been the subject of much discussion within our community in recent times. The recognition of the importance of employing skilled interpreters has led to a wider range of interpreters becoming available and to those interpreters demonstrating vastly improved skills in this very important undertaking.

The conduct of a cross-examination through an interpreter is not an easy task even where the interpreter is highly skilled. The process allows the witness a substantially greater time to consider and formulate answers to questions without giving the appearance of prevarication. There is also greater opportunity to “misunderstand”

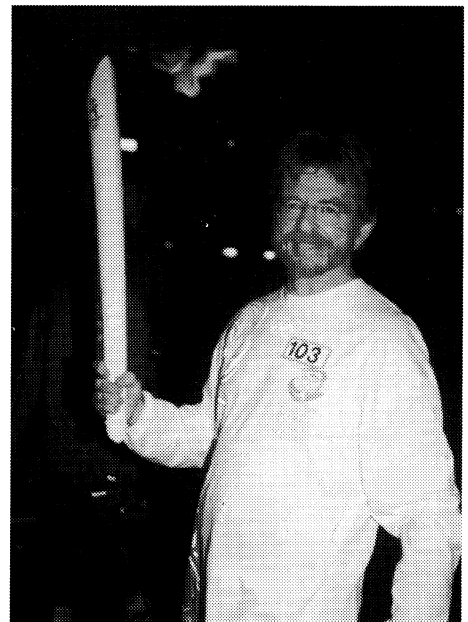
questions or to provide non-responsive answers than is the case where no interpreter is employed. The escape routes for witnesses are greater when an interpreter is used than when there is direct cross-examination.

To effectively cross-examine such a witness it is necessary for you to carefully prepare. You will wish to limit the ability of the witness to use the intervention of the interpreter as an aid to defeating or reducing the effectiveness of your cross-examination. To this end you need to have a clear plan for the cross-examination in mind prior to commencing that process.

Your questions should be formulated in such a way as to require of the witness direct answers. It is desirable that your questions themselves be short, sharp, clear and direct. Each question should be limited to one simple point. The language adopted should be plain and simple. Wherever possible the form of the question should limit the witness to a concise response.

In the event that you cannot avoid asking a lengthy question containing a number of propositions you should break the question up into manageable components. Have the interpreter translate each part as you proceed. When the last part of the question is put to the witness you will be entitled to expect an immediate response.

Be careful to ensure that the interpreter interprets all that is said by the witness even if the witness is simply seeking clarification of the question. It is not for the interpreter to clarify the question, that is your role. If the answer provided by the witness is non-responsive then you should return to the question. One approach is to enquire whether the witness understands the question and,



Hon Justice Riley was one of the Territorians chosen to carry the Olympic Torch during the Olympic Torch Relay in Darwin

when that has been established, invite the witness to answer the question. If there is any doubt about the understanding of the witness then you will rephrase the question, again using simple terms, and using a form of question that requires a straightforward answer.

In the course of your cross-examination I recommend that you closely watch the witness at all times in order to pick up any information available through the facial expressions or body language of the witness. The reactions of the witness may suggest an understanding of the question which is not revealed in the answer or a discomfort with a proposition being put which leads to a non-responsive answer. If the reactions of the witness may not have been obvious to the Tribunal, you may wish to build your observation into following questions. For example your next question may start “You showed surprise when I asked my question ...” or “You looked to where the plaintiff is seated when I asked my question ...”.

When asking questions and when listening to answers to questions the focus of your attention should always be upon the witness and not upon the interpreter. It is from the witness that you will obtain clues as to any discomfort likely to be of use in the continued cross-examination.