Defence 2: The defendant reasonably believed that, if the craft had not stopped or hovered as it did, the health or safety of a person or the safety of a craft would have been endangered.

Defence 3: The craft was required by or under the Air Navigation Act 1920 or the Quarantine Act 1908 to stop or hover as it did.

Defence 4: The craft stopped or hovered in the ordinary course of navigation.

Fault element: Except as provided in defence 2, the defendant's state of mind, intentions and beliefs, and the degree of care, if any, that the defendant exercised, are irrelevant.

views sought. Over the next few months the ALRC will be seeking views on the Bill and on those matters not yet finalised. Views are sought not only on the content on the draft provisions, but also on the structure of the Bill and on the drafting style. The comments received will be carefully considered and taken into account in the production of a final Bill towards the middle of the year. Copies of the draft Bill are available from the ALRC.

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interpreters in the legal system

report released. In September 1990 a draft report *Access to Interpreters in the Australian Legal System* was released by the federal Attorney-General's Department. As part of the National Agenda for a Multicultural Australia, the Department was asked to review the legislative and administrative arrangements for interpreter services to those of non-English speaking background and others, including Aborigines, who may need help to understand and be understood in legal proceedings. The report also deals with other circumstances in which people may require an interpreter, such as dealings with the police or instructing a solicitor.

In the 1986 census 370 000 individuals of non-English speaking background said that they were unable to speak English well or at all. As the report notes, this country has a large but underused reservoir of language skills. Over two million Australians, including immigrants and Aborigines, speak a language other than English at home.

Taken together, the government's Access and Equity Strategy and the National Policy on Languages require that

- interpreter services be provided to those Australians whose inadequate skills in English may prevent their obtaining proper levels of access and equity in their dealings with the legal system
- language skills of bilingual Australians be developed to a degree adequate to enable them to function as legal interpreters.

In addition, art 14(3) of the International Covernant on Civil and Political Rights (ICCPR) enshrines the right to an interpreter in criminal proceedings where a person cannot otherwise understand or speak the language being used in the proceedings.

consultation. The review engaged in extensive consultation and advertised widely. There was a great deal of interest shown in the project and 103 submissions were made. A survey of interpreter use in major Commonwealth and ACT courts and tribunals showed considerable variation on the jurisdiction, practices and location of the court concerned.

existing arrangements. The report details existing arrangements for interpreters in the legal system. These vary both between and within jurisdictions and between different State and federal courts and tribunals. Only Victoria has established a specialist legal interpreting service. In New South Wales and South Australia, legal interpreting is provided as part of general interpreting services

while in Western Australia, Tasmania and the ACT there are no State or Territory provided language services. In the Northern Territory and Queensland there are limited services. The Commonwealth telephone interpreter service operates in all States and Territories. The report found that, even in those jursidictions with well established language organisations, the delivery of interpreting services to the legal system suffers from serious gaps and a lack of co-ordination and awareness.

interpreters in court. The report gives detailed consideration to the need for legislation about the use of interpreters in court. South Australia and Victoria already have legislation entitling a person to an interpreter in certain circumstances. In other jurisdictions, common law principles apply which give the court a discretion to permit the use of an interpreter. The material consideration is whether, without an interpreter, the witness is likely to be unfairly handicapped in giving evidence, and, in the case of a party, whether she or he can understand sufficiently what is being said. The report discusses at some length what is involved in the exercise of judicial discretion, and the wide-spread criticism of the way discretion is exercised in practice. Many submissions criticised the capacity of largely mono-lingual lawyers and judges to assess whether a party needs an interpreter. Particular difficulties can arise where an individual has some basic competence in English but their command of the language is insufficient to enable them to understand fully and express themselves in court. The report comments that

> in the exercise of common law discretion, considerable weight has been given to the need to ensure that a witness with some English does not obtain an unfair advantange, and to difficulties in assessing the veracity of evidence given where an interpreter is interposed between the cross-examiner and the witness. Less attention has been given to the real risk that if a witness has some, albeit minimal, knowledge of English, he or she may not be able to adequately understand the questions or and convey the meanings he or she wishes to express.

The report endorses the recommendation in the 1987 ALRC report Evidence (ALRC 38) which proposes legislation which would give all witnesses a right to an intepreter. The judge would retain a discretion to deny this right if it can be established that the witness has an adequate command of English. This reverses the present onus. The ALRC proposal is preferred to the legislation enacted in South Australia and Victoria which still leaves it to a judge to determine whether an individual should have access to an interpreter. The report also proposes that, to put the non-English speaker in the same position as the English speaker, the entitlement to an interpreter should be extended to cover cases in which an accused or party needs help to understand what is going on in the court room and to instruct counsel if necessary.

criminal investigation. The report also deals with interpreters in the criminal investigation process. As it points out, 'the intrinsic nature and potential consequences of criminal investigation make it perhaps the most stressful of all legal situations'. Again, South Australia and Victoria are the only States which have enacted legislation requiring the use of intepreters by investigating officials. Elsewhere, police standing orders lay down the procedures to be followed. Only the Police Department of Western Australia has no written guidelines on the use of interpreters. Although the police are generally required to arrange for an interepreter to be present if it is clear that a suspect has an inadequate grasp of the English language, there is widespread concern about police reluctance to use intepreters. Statements made by a person with an inadequate command of English, who has been interrogated without an interpreter, will not necessarily be ruled inadmissible in court.

In 1975 the ALRC report Criminal Investigation (ALRC 2) recommended that persons unable to speak or understand English with reasonable facility should not be ques-

tioned except in the presence, and with the assistance, of a competent intepreter. Similar proposals were made by the Committee of Review of Commonwealth Criminal Law (Gibbs Committee) in its 1989 interim report Detention before Charge. They recommended legislation which would

- require police cautions to be given in or translated into a language in which the person in custody is fluent
- give the arrested person a right to communicate with a friend or relative or legal practitioner
- confer the right to an interpreter in specified circumstances
- require tape recordings of cautions and other information as well as confessions and admissions.

The Attorney-General's Department report does not concur with the view expressed in several submissions that suspects from a non-English speaking background should be given an unfettered right to an intepreter. The main argument in favour of this is that police are not qualified to assess a suspect's language competence and may be mislead by an appearance of fluency. The report suggests that this could lead to unnecessary delay and disruption to police work and that the Gibbs Committee proposals strike an appropriate balance between the rights of suspects and the need for efficient criminal investigation. The Gibbs proposal confers a right to an interpreter 'where an investigating official has reasonable grounds for believing that a person in custody in respect of a Commonwealth offence is unable, because of inadequate knowledge of the English language or a physical ability, to communicate orally with reasonable fluency in that language . . .'.

The Attorney-General's Department report rejects the suggestion made in a number of submissions that police would be encouraged to use interpreters more frequently if the law clearly required the exclusion of evidence obtained without the assistance of an interpreter where, in the opinion of the court, an interpreter should have been used. The reasons given are pragmatic rather than principled and will not satisfy those who consider the present safeguards inadequate. The Northern Territory's Anunga guidelines on interrogation of Aboriginal and other minority suspects provide a precedent for more stringent rules that could usefully be followed in other jurisdictions.

linguistic competence. Legislation strengthening the right to an interpreter would be quite ineffectual unless accompanied by measures to ensure the availability of competent interpreters. The requirements for competent legal interpreting are discussed in chapter 5 of the Attorney-General's Department report. It recommends that NAATI level three accreditation is the appropriate standard of linguistic competence and that interpreters should have a reasonable knowledge of the Australian legal system, court room procedures and legal terminology, and some knowledge of the legal systems operating in the major countries where the other language is spoken. The report discusses the need for a code of ethics, the limits of the interpreters role, and the different and often conflicting expectations with which interpreters have to contend.

interpreting as a career. Chapter 6 addresses the need to increase the use of competent interpreters. This includes an examination of the career structure and remuneration of interpreters, the reluctance of interpreters to work in the stressful and demanding working conditions in courts and the criminal investigation system, the failure of courts to insist on properly qualified interpreters, the unavailability of appropriate courses and accreditation in many languages and the cost of NAATI testing. The report proposes the introduction of a registration system for interpreters and that, once this is operating, consideration should be given to establishing a specialist legal interpreter registration system. It suggests that, once the national registration system has been established, legislation should be enacted requiring the use of registered interpreters except

where in the circumstances of the particular case a registered interpreter was not reasonably available. This is a departure from the position adopted in ALRC 38 that

> flexibility in the choice of intepreter is desirable and so far as rules of evidence are concerned formal qualifications of interpreters should not be required.

If adopted, it could have the undesirable consequence of leaving some people without access to any interpreter at all. This would be a particular difficulty in the criminal investigation context.

overcoming ignorance. The need to educate lawyers, police and the judiciary in the use of interpreters is also addressed. Ignorance of linguistic and cultural differences can lead to misunderstanding and injustice. Knowing how to work with interpreters is a vital skill in a multicultural society. Federal courts and tribunals should consider the need to adopt rules of court or guidelines on the effective use of intepreters.

increasing efficiency. The report also deals with the most cost effective means of service delivery and starts by emphasising that the use of competent intepreters in the legal system will of itself result in cost savings and efficiencies. Trials are less likely to be delayed or aborted and hearings will run more smoothly. Various measures for improving the co-ordination and efficiency of interpreter use are discussed, including improved liaison between courts and intepreter services, the use of strategically located venues, increased use of technology and the use of simultaneous interpreting mode.

who should pay? The question of who should pay for interpreters is also tackled. On this issue, the report concludes that, with the exception of the Administrative Appeals Tribunal, existing arrangements for the provision and payment of intepreters in federal courts and tribunals should be maintained. Currently in the criminal investigation process, interpreters are provided and paid for by the police. In criminal courts interpreters are paid for by the Crown. This situation is considered satisfactory as it accords with international human rights obligations and principles of fairness and equality before the law.

civil cases. The position is more complex in civil cases where the general principle is that parties are responsible for the provision of interpreters required by them though the successful party may recover the costs. There are exceptions – for example, in South Australia, the cost of interpreters for witnesses is met through a levy included in court filing fees. Where a party is legally aided, the grant will cover the payment of interpreters. However, as the Combined Community Legal Centres (NSW) point out in their submission, there are increasing numbers of people who now fall outside legal aid guidelines but who neverthless cannot afford to pay for legal assistance or interpreters. This point is not really considered and the report concludes that existing arrangements are satisfactory and do not prejudice an individual's right to a fair trial.

Aborigines. The particular interpreter needs of Aborigines are considered in Chapter 9 which concludes that although Aborigines may be especially disadvantaged in their dealings with the legal system, the general recommendations of the report should adequately meet their needs. This chapter also deals with the need of the deaf and hearing impaired and others whose capacity to communicate is affected by disability.

The report concludes with a brief assessment of the cost of its recommendations, which are considered to be limited to approximately $16 000.

Copies of the report are available from the Interpreters Project, Attorney-General's Department, Robert Garran Offices, National Circuit, Barton, ACT, 2600. Fax (06) 250 5911. All submissions and comments should be sent to this address.

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