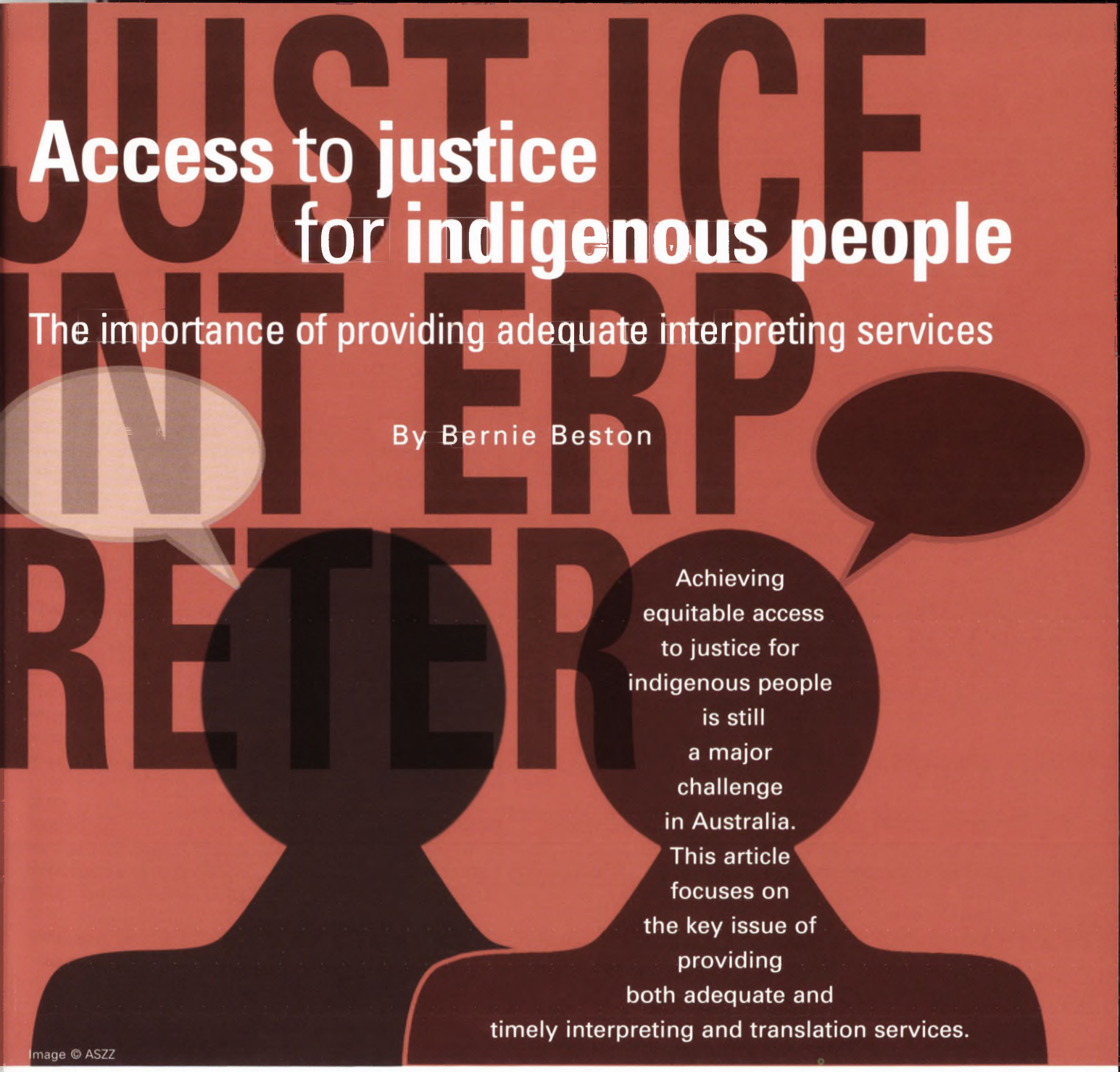
# Access to justice for indigenous people

## The importance of providing adequate interpreting services

By Bernie Beston




Achieving equitable access to justice for indigenous people is still a major challenge in Australia. This article focuses on the key issue of providing both adequate and timely interpreting and translation services.

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A substantial number of Australians speak and understand only English. For people charged with criminal offences and appearing before the courts for whom English is only their second or third language, the gap between justice and equality before the law continues to grow, and can amount to a denial of justice where no competent interpreter is provided by the state. This denial has not been addressed by any Australian government – state, territorial or Commonwealth.

Accounts of the difficulties faced by non-English speaking indigenous people in our court system are numerous. The Australian Law Reform Commission discussed the issue in its paper, *Language barriers to equality: interpreters and the legal system*.[1]

Some of the Commission's recommendations were incorporated in the resulting *Evidence Act* 1995 (Cth). But the Act relates only to federal jurisdictions or federal laws being administered by a state court. Even in these circumstances, s30 merely states that:

> 'A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.'

The section is silent at the injustice that can occur when no interpreter is present and the accused's charges are repeatedly adjourned, and s/he remains in custody >>

indefinitely. Non-English speakers, who cannot read the charges and understand the allegations against them, are also unlikely to know their legal rights and how best to defend them.

At common law, no witness has the right to give evidence in any language other than English. This absence of a right to speak in one's native tongue is tempered by the obligation on the Crown to ensure the availability of a competent and reliable interpreter to assist the court at all times.[2] This right was clearly defined in the appeal (from the magistrate's court decisions) before Sulan J in *Frank v Police*.[3] Having lost the appeal, the state of South Australia (SA) appealed the judge's decision to the Full Court (of the Supreme Court),[4] *inter alia* on the grounds that the single judge erred in stating that a (non-English speaking) defendant had a fundamental right to an interpreter, and that if that argument fell over, then at the very least the defendant could waive that right. How could anyone waive a right if they did not know what rights they possessed at law, had never had the law or the charges properly explained to them, did not fully know what they were charged with, or even understand court proceedings? This application by the state of SA – to further appeal to the Full Court of the Supreme Court – was refused.

Winmati Frank was a tribal man who lived in a remote region of SA. He had been in custody for nearly seven months before he came before a magistrate for sentencing on 10 May 2007, having pleaded guilty. The offences were common charges laid against Aboriginal people; namely, assaulting a police officer, aggravated assault, carrying an offensive weapon, resisting police in the execution of their duty.

Following Mr Frank's arrest, a bail application was refused, but a psychiatric report was ordered to assess his fitness to plead. No interpreter was provided by the court on his first two court appearances, nor to the psychiatrist when he conducted his assessment. The psychiatrist relied on a fellow prisoner to interpret – clearly a breach of ethics, but a course of action understandable in the circumstances. No one will ever know the level of competence of the interpretation, or its accuracy. On the next five occasions that the charges came before the magistrates court, no interpreter was made available to the court and, more importantly, to the defendant. He could not be expected to understand the charges laid against him, or the opportunity to obtain clear legal advice from or provide cogent instructions to his instructing solicitor. By the time Mr Frank pleaded guilty on 10 May 2007, he had appeared before the court on eight separate occasions over a seven-month period, with no interpreter provided on any occasion. He was sentenced (again without the assistance of an interpreter) to 20 months' imprisonment, with a non-parole period of nine months. The sentence was appealed by the state to the full court of the Supreme Court.

The system again failed to provide an interpreter for his Supreme Court appeal. Mr Frank had by this time served his full non-parole period.

Nothing has changed since 2007. No serious actions have been taken by the state of SA to address the issues so succinctly raised by Justice Sulan. A pilot program was started in the Port Augusta court but then abandoned.

In 2009, I represented a defendant in an Adelaide magistrates court, who was charged with various offences, including assault. He was denied bail by the police because he had no fixed abode, being resident in the Anangu Pitjantjara (APY) Lands. He was denied bail by no less than two competent magistrates on the grounds that, as the offences occurred in Ceduna, and the defendant resided north of Coober Pedy, a distance of 820 kilometres (with a travel time of over 14 hours), the likelihood that he would attend the court was remote. On no less than three separate occasions, the court-ordered interpreter failed to appear. This has become quite a common occurrence in SA. It is difficult enough when the defendant is a Pitjantjara speaker, but when s/he speaks another territorial dialect (for example, Arunda) or other Western Desert dialect, interpreters are simply unavailable.

When an interpreter is unavailable, it appears to be standard practice for the magistrate to adjourn the proceedings. Constant adjournments prior to a hearing can amount to a denial of a fair trial. When an interpreter is not provided by the Crown, charges ought to be stayed. Never was *'access delayed is access denied'* a truer maxim than in these circumstances.[5]

The competence of interpreters is another vexed and much-debated issue. Recommendations 99 and 100 of the Royal Commission into Aboriginal Deaths in Custody have yet to be implemented, although they were made in 1993, over 16 years ago.

**'Recommendation 99**

> That legislation in all jurisdictions should provide that where an Aboriginal defendant appears before a court and there is doubt as to whether the person has the ability to fully understand proceedings in the English language and is fully able to express himself or herself in the English language, the court be obliged to satisfy itself that the person has that ability. Where there is doubt or reservations as to these matters, proceedings should not continue until a competent interpreter is provided to the person without cost to that person.'

This is a commendable proposal. But does it go far enough to address the real issues? It begs the question of the accused's liberty until such time as a qualified interpreter becomes available, if at all.

**'Recommendation 100**

> That governments should take more positive steps to recruit and train Aboriginal people as court staff and interpreters in locations where significant numbers of Aboriginal people appear before the courts.'[6]

This proposal has not been put into effect by any government except the Commonwealth.

Another practical example of the difficultly encountered by non-English speaking Australians is illustrated by a recent case in which a defendant was charged with a breach of s74(2) of the *Motor Vehicle Act* 1959. The allegations

were that he had driven a motor vehicle while he did not hold a licence, and that he had never held one. The issue was whether he had previously held a valid driver's licence or not. If he had, the penalty would be significantly less. His English comprehension was such that no solicitor or magistrate could be confident that he understood the charge or the difference that having previously held a licence would make to the penalty. He was charged with three such offences. An interpreter was ordered for the trial by the Court Administration Authority and, mercifully, one attended. Unfortunately, the interpreter did not speak the defendant's language but knew enough of it to converse with him. It was found in his evidence that he had never held a driver's licence but had a permit to drive in certain confined areas in the Northern Territory and had driven as authorised. Because of this evidence, he was acquitted. In his language, the words 'permit' or 'licence' would probably been synonymous. The actual word used by legislation to describe the right to drive is a concoction of statute and did not even exist in our culture before the coming of the motor vehicle. This case illustrates the difficulty of interpreting a language and understanding a word that may have no analogous translation. Similarly, an 'expiation notice' – the dictionary definition for which is 'the act of making atonement' – cannot readily be interpreted into one indigenous word. The interpreter must therefore debate the question with witnesses to ensure firstly that they understand what is being asked; and then to ensure that the interpretation of their response is accurately rendered in English.

While this form of interpretation arguably loses or distorts much of the questioner's question, a simple, literal translation would often result in a meaningless response, much like some of the translations one gets from an internet search translation for some languages. Anyone who has attended international conferences where there are headphones and simultaneous translations will be only too familiar with the difficulties, especially where important technical terms and concepts are used; and this from professional interpreters who have frequently been given a copy of the written text of a speech prior to its delivery.

One of the most unjust outcomes for non-English speaking (and reading) accuseds arises from the tendency to confine interpreting to evidence from the witness box. The court system should also provide facilities to translate the proceedings as they unfold. This requires a soundproof system where the interpreter can translate all the proceedings to the accused so s/he fully understands what is happening. When a sentence is handed down to non-English speakers, they often have no idea of what has occurred. Instructing solicitors are frequently called to the cells to explain as best they can the decision that has been made against their clients. In such circumstances, the accused may as well be deaf, in terms of understanding whether they have been sentenced to a longer period of incarceration, or just for a short spell while bail or bond is being prepared.

As Lord Reading CJ stated in *The King V Lee Kun*:[7]

> 'The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceeding; and having heard the case made against him have the opportunity, having heard it, of answering it.'

Justice Williams put it quite succinctly, when he said:[8]

> 'Ultimately, the decision whether or not a witness should have an interpreter will be answered in the light of the fundamental proposition that the accused must have a fair trial.'

The failure to provide adequate interpreting services is just one of many impediments to justice in our legal system that disproportionately affect indigenous people. Similar reservations apply to the availability of adequate translation services to non-English speaking defendants in criminal proceedings.[9] ■

**Notes:** **1** ALRC Report 57, *Multiculturalism and the Law* ,1992 -3. **2** *R v Scobie* [2003] SASC 85. **3** *Frank v Police* [2007] SASC 288. **4** *Police v Frank* [2007] SASC 418. **5** A stay is not to be confused with a discontinuation of proceedings. A stay is an old English remedy which invokes the principle that the continuation of proceedings (either on an interim or on a final basis) would be an abuse of any process before the court, to ensure that the accused receives a fair trial. **6** *Royal Commission into Aboriginal Deaths in Custody Annual Report 1994-1995*, pp154-56. **7** *The King v Lee Kun* [1916] 1 KB 337. **8** *Gradidge v Grace Bros Ltd.* [1988] 93 FLR 414, p440. **9** See *R v Rostom* [2007] SASC 210.

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