

AFFORDING PROCEDURAL FAIRNESS: CULTURE AND INTERPRETERS IN TRIBUNAL HEARINGS

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COAT Victoria Conference

22 April 2016

Introduction

Cultural diversity is the mainstay of Australia's population. Since even before Federation, Australia experienced constant migration from a multitude of places and by a multitude of people. Historically, the majority of migration has come from Europe; however, as the Census data has shown, there are increasingly more Australians who were born in Asia and other parts of the world.

This pattern of migration is evident in the diversity of Australian society which has been recorded in the 2011 Census. That Census data showed that 26% of the population was born overseas and a further 20% had at least one overseas-born parent. In regards to languages, 19% of the Australian population spoke a language other than English at home, while 2% of the population did not speak English at all.¹

Of course, it is not only on the basis of language that such diversity exists. With migration has come a multitude of cultures, which has accompanied these diverse people. The Macquarie Dictionary defines culture as:

*The sum total of ways of living built up by a group of human beings, which is transmitted from one generation to another.*²

Language and culture contribute considerably to the way in which we, as individuals, interact with each other and our community both public and private. An individual's language ability, whether they are able to communicate in English and their proficiency in English, can have a central role in their ability to participate in many social and formal settings. In addition to the barriers that language places on our ability to communicate, culture can also influence the manner in which our communication occurs. It is not limited to the contributions from migrants. Indigenous Australians also experience these challenges. Even if a person has a sufficient competency in English, their interaction in formal and informal settings may be influenced by their culture: that is by the sum total of their particular way of living.

¹ABS, 2011 Census, QuickStats: Australia
http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0?opendocument&navpos=220.

²Macquarie Dictionary Online, 2015, Macquarie Dictionary Publishers, an imprint of Pan Macmillan Australia Pty Ltd, www.macquariedictionary.com.au.

These issues, which can present challenges with many facets of daily life, have particular significance in an individual's participation and communication in more formal settings, such as interactions with administrative decision-makers, of which tribunals form an important part. Even without the difficulties of language, an individual may still have difficulty interacting with administrative decision-makers, due to cultural issues. This paper explores the difficulties that exist, with reference to the requirements of procedural fairness and the issues relating to the use of interpreters, with particular reference to tribunals.

Culture, Language and the Law

This interaction of culture and the law is not new. On 2 August 1989, the Attorney-General, the honourable Lionel Bowen, referred the issue of multiculturalism to the Australian Law Reform Commission (ALRC) to investigate and report, by way of wide community and organisational consultation, on the impact of multiculturalism on the legal system, in particular criminal, family and commercial aspects of the law.

The report stated that the court has a duty to remove any barriers to communication (that are within its power to remove) which may interfere with the person's right to the fair trial of a matter³. In this instance the ALRC was referring to the rights in criminal proceedings, but made similar statements in respect of civil proceedings, and recognised the provision of interpreting services by tribunals such as the then SSAT and Immigration Review Tribunal as examples. In relation to culture, the report considered that education was the key to overcoming the issues of what has been described as "pluralistic ignorance"⁴.

Many of the recommendations in the ALRC report were also considered and incorporated in the Access to Justice Report⁵, commissioned by the then Attorney-General, the honourable Michael Lavarch and Minister for Justice, the honourable Duncan Kerr, including steps to enhance access to interpreters in Federal proceedings and the treatment of Aboriginal and Torres Strait peoples and people from non-English speaking Background before the law. These inquiries have laid down the foundation for the manner in which Courts and tribunals interact with parties who have insufficient language proficiency to participate in the proceedings.

Procedural Fairness

The historical context of the development of the rules of procedural fairness have been widely documented and discussed by many commentators⁶. It has been stated that procedural fairness, or natural justice, is a fundamental element of administrative law and of administrative decision-making in Australia⁷.

³Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) at [3.19].

⁴See generally Justice RS French, 'Speaking in Tongues – Courts and Culture' (2007) *25th Australian Institute of Judicial Administration Annual Conference – Culture and the Law*, for a discussion of this concept and the role of culture within the legal system.

⁵Australia. Access to Justice, Advisory Committee, Sackville, Ronald. (1994) *Access to justice: an action plan*. [Canberra: [Australian Government Public Service].

⁶See generally Aronson, M & Groves, M, *Judicial Review of Administrative Action*, Chapter 7 & 8 (Lawbook Co., 5th Ed, 2013); Pearce, D, *Administrative Appeals Tribunal*, Chapter 8 (LexisNexis, 4th Ed, 2015).

⁷Jamieson, P, 'The psychology of procedural fairness' (2009) 19 *Journal of Judicial Administration* at 127.

The rules relating to procedural fairness have been derived by reference to the common law rather than from any constitutional guarantees⁸. While a number of statutes prescribe the observance of procedural fairness⁹, the content of the obligation is provided by the common law. How the rules of procedural fairness apply is dependent upon the circumstances of each individual case.

In *Kioa v West*,¹⁰ the duty to act fairly and accord procedural fairness, was stated by Mason J as follows:

*“The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.”*¹¹

While there was a clear articulation of the duty to be afforded in proceedings, debate was raised as to whether the duty was a common law duty or whether the duty could be founded on the implied or express intent of legislation, as stated by Brennan J:

*At base, the jurisdiction of a court judicially to review a decision made in the exercise of a statutory power on the ground that the decision-maker has not observed the principles of natural justice depends upon the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power. That is clear enough when the condition is expressed; it is seen more dimly when the condition is implied, for then the condition is attributed by judicial construction of the statute.*¹²

These opposing views about the foundation of the duty to observe procedural fairness have essentially fused. Only its scope remains open to interpretation as discussed in the *Offshore Processing Case*.¹³

The Hearing Rule

The Hearing Rule requires a decision-maker to hear a person before making a decision affecting the interests of a person. In regard to its application, it has long been settled that the question is not whether the rule applies but rather what is required. As Aronson and Groves' state, the issue of content is difficult to determine due to the reluctance of Courts to reduce it to a fixed set of rules¹⁴.

In regard to decisions before the AAT, section 39 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) recognises that an applicant must be given an opportunity to present his or her case. The courts have stated that the requirements of procedural fairness also apply and those rights are not limited by this provision, but rather it is a statutory recognition of the common law requirements to observe the

⁸As opposed to the United States which guarantees these right with the Fifth and Fourteenth Amendments of the *Constitution of the United States of America*, which prescribe the requirement of “due process”.

⁹ For example, section 39, *Administrative Appeals Tribunal Act 1975* (Cth).

¹⁰(1985) 159 CLR 550.

¹¹(1985) 159 CLR 550 at 584.

¹²(1985) 159 CLR 550 at 609.

¹³*Plaintiff M61/2010E v Commonwealth (Offshore Processing Case)* (2010) 243 CLR 319 at 352.

¹⁴Aronson, M & Groves, M, as above at no. 6, page 491.

rules of procedural fairness. While section 39 of the AAT Act is recognition of the hearing rule, it does not require that the tribunal ensure a party takes the best advantage of the opportunity¹⁵. In hearings before the Social Services Child Support Division (SSCS Division), the requirements of procedural fairness are subject to specific provisions¹⁶ but the common law right to be heard must still be followed.

In connection with the requirement to hear a person before making a decision which affects their interests, the disclosure rule creates a requirement for the decision-maker to alert the person affected to any critical issues to be addressed. The mere giving of notice will not exhaust this requirement. There is a presumption that the parties are fully informed and given the opportunity to respond to any critical issues. While there may not be a requirement to provide the actual evidence to be relied upon by a decision-maker, in circumstances where confidentiality is necessary, there is a requirement that for the purpose of ensuring procedural fairness at the very least they are provided with the substance of the material to be relied upon¹⁷.

In *PJ & Child Support Registrar*¹⁸ the issue of disclosure was considered in the context of a tribunal decision¹⁹ regarding a departure determination for child support. Prior to these proceedings being initiated, the mother had accepted a voluntary redundancy package in November 2001. The Federal Magistrates Court had previously determined that she was unable to work and dismissed the appellant's application for a departure from the child support assessment.

On 19 July 2006 the appellant commenced a period of sick leave. He took leave without pay preferring to preserve his significant sick leave entitlements as he believed that he would have ongoing issues with illness. As a result, his child support assessment was reduced to nil. On 28 July 2006 the mother applied to increase the child support assessment to account for orthodontic expenses for the eldest child and on the basis that the appellant had paid sick leave entitlements that he was not accessing. In October 2006 the children were in the full time care of the appellant father.

The mother was firstly unsuccessful in her request for a change in the level child support payable by the liable father. The mother sought further review. On 17 January 2007 an objections officer of child support accepted that the orthodontic expenses were a special circumstance and that the appellant's income amount should have regard to his paid sick leave. The objections officer however did not consider that it was just and equitable to retrospectively increase the assessment payable by the liable father to the mother as the children were now living with the appellant and he was not receiving child support. The objections officer's decision was that for the period 15 January 2007 (the date appellant returned to work) to 29

¹⁵*Teuila v Minister for Immigration and Citizenship* [2012] FCAFC 171 at para [14].

¹⁶Section 39AA of the *Administrative Appeals Tribunal Act 1975* (Cth) allows a party to make written and oral submissions and discusses Agency parties can be granted the opportunity to make submissions and the manner in which the submissions will be provided.

¹⁷See *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72.

¹⁸[2007] FMCAfam 829.

¹⁹A decision of the SSAT which is now the Social Services Division of AAT.

February 2008 the child support income amount be set at \$99,000. This had no effect on the amount of any assessment.

The father sought further review with the SSAT (now SSCS Division). The mother did not wish to participate in the tribunal review and was removed as a party. The tribunal determined the child support payable should be changed from an earlier date.

In relation to procedural fairness, the court concluded that the appellant was not accorded procedural fairness with respect to the period before 15 January 2007. The Federal Magistrate referred to the tribunal's statement at the outset of the hearing regarding the possibility of an adverse outcome.²⁰ The court stated that:

It was open to the Tribunal to make a decision adverse to the appellant... Whilst decisions adverse to the applicant or appellant are open in many contexts, it is incumbent upon a tribunal or court to ensure that the parties affected are aware the tribunal is considering issues beyond those on which the parties have conducted the case.²¹

The rules of procedural fairness, the requirements of the hearing rule and the disclosure rule in particular, and the interaction of these rules with applicants from linguistically and culturally diverse backgrounds is integral to the process before tribunals, including the Administrative Appeals Tribunal. Language, in the context of tribunal hearings, and the manner in which it affects the conduct of hearings is an often delicate balance. The importance of understanding from a linguistic and cultural perspective can have profound effect on the participation in the process. The use of interpreters is an essential measure to enable this to occur.

Interpreters and Procedural fairness

The hearing rule, including the requirements relating to disclosure, has a direct bearing in the context of interpreters in hearings to enable parties the opportunity to be heard. For those with limited or no English proficiency, interpreters make participation possible. In Australia, there are over 300 languages, including indigenous languages, spoken. NAATI²² offers accreditation in 112 languages.

While there are over 300 languages spoken in Australia, this does not include the prevalence of dialects within languages. My own experience with the Italian language and dialects reflects the inherent difficulties in understanding language and its many varieties. My parents were born in Italy. I am one the 38.1% of Victorians who has at least one parent born overseas²³. While a there is a standard Italian language spoken throughout the country, there are many dialects. To give an idea of the breadth of dialects spoken, consider that there are around 20 regions of Italy;

²⁰[2007] FMCAfam 829 at paragraph [48]

²¹[2007] FMCAfam 829 at paragraph [47]

²²National Accreditation Authority for Translators and Interpreters is the organisation responsible for accreditation for interpreters and translators.

²³ABS, 2011 Census, QuickStats: Australia

http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/2?opendocument&navpos=220.

each region is divided into provinces with a multitude of cities. The majority of these parts have their own dialect of Italian. Even though as a child I was proficient and familiar in both Italian and the local dialect of my parents, the province of the city of Messina in northern Sicily, I still was unable to understand my uncle, who was a native of the city of Palermo, also in Sicily, which approximately 185 kms west of Messina.

In hearings before the tribunal, an interpreter is provided if a person requires an interpreter. This requires the assessment of whether their English language skills are sufficient and reliance is placed on the individual to determine their own needs²⁴. Generally, NAATI accredited interpreters are used: the preference is for interpreters at the 'professional level' or above. If an interpreter at the 'professional' level is not available then the tribunal will use an interpreter at the 'paraprofessional' level. If neither is available, then a recognised interpreter will be used²⁵.

In the SSCS Division, the tribunal utilises interpreters in about 10% of the hearings undertaken in the social security jurisdiction and around 2% of child support hearings. Interpreters have been utilised to interpret into 66 different languages. This is much lower than what occurs in the migration and refugee division, which is around 60% in migration matters and around 90% in refugee matters.

The minimum level recommended in legal settings is the 'professional' level in most tribunals and courts. This is not always possible. In some languages, interpreters at the professional level are not available. Even if an interpreter is not available at the recommended level, this will not lead to a hearing being considered unfair and there being a denial of procedural fairness. As his honour, Allsop CJ, stated in *SZRMQ v Minister for Immigration and Border Protection* ²⁶:

*To the extent that interpretation or translation is necessary, it must be adequate to convey the substance of what is said, to a degree that the hearing can be described both as real and fair.*²⁷

The Full Court also held that to establish a denial of procedural fairness, it is necessary to show that the applicant has had "*a real and fair opportunity to put what she or he wanted to put, understand what was being said to her or him, and to participate in the hearing in a way from which it can be concluded that the hearing was fair, and thus that administrative justice was done*"²⁸.

In *Perera v Minister for Immigration & Multicultural Affairs* [1999] FCA 507, at paragraph[38] Kenny J made reference to the interpretation being so incompetent as to prevent the provision of evidence.²⁹

In *Soames v Secretary, Department of Social Services*³⁰ the issue of the availability of interpreters in proceedings before the AAT was discussed. Mr Soames applied for

²⁴AAT General Direction, clause 2.9.

²⁵AAT General Direction, clause 2.10.

²⁶[2013] FCAFC 142.

²⁷[2013] FCAFC 142 at paragraph 9.

²⁸[2013] FCAFC 142 at paragraph 9

²⁹*Perera v Minister for Immigration & Multicultural Affairs* [1999] FCA 507, at paragraph [38]

disability support pension and special benefit in April and May 2013 which was refused. He sought review of the decision by the SSAT (now SSCS Division) in July 2013 and the decision was affirmed. He applied to the AAT but his application was dismissed in December 2013. The AAT made further directions that Mr Soames was not to make any application to the tribunal without leave of the tribunal. Mr Soames sought to appeal the decision of the AAT to the Federal Court on, amongst other grounds, denial of procedural fairness due to issues relating to interpreting.

It was accepted by the Court that as a general proposition a person does not have a meaningful opportunity to be heard if he does not understand questions being put and an opportunity to answer those questions.³¹ However, Flick J determined that any absence of an interpreter being present at the proceeding before the tribunal did not deny Mr Soames either procedural fairness or a reasonable opportunity to present his case as required under section 39 of the AAT Act. It was determined that Mr Soames had little difficulty responding to questions and making submissions, notwithstanding his hearing and interpreting difficulties that he claimed, by reference to the transcript of proceedings as well as Mr Soames' ability to participate in the appeal hearing before the Court without much participation from the interpreter.

Issues with Interpreting

Interpreting is not merely a mechanical exercise³². Conveying a meaning from English to another language and from another language into English is not always a straightforward exercise. It is often the case that there is no precise or similar equivalent word or phrase to enable literal translation. It may require more than what Sandra Hale describes as "semantic translation" but rather "pragmatic translation"³³. This requires consideration of the content, intention, force and likely effect of the utterance. The competency of an interpreter to be able to perform this function, sometimes contemporaneously, is the key to effectiveness of the interpreting. After all, language is crucial in the context of a hearing, in particular with assessing credibility. There are often issues with the competency of interpreters.

If I were to interpret the following phrase: "*In bocca al lupo*", it would be interpreted literally to mean "*in the mouth of the wolf*". This is the semantic meaning of this phrase but what it more closely translates to is "*break a leg*" which is a more pragmatic interpretation of this phrase. When legal concepts and language are the subject of interpretation, there can be greater difficulty in effecting a pragmatic interpretation of what is spoken.

As Sandra Hale makes the point:

No matter how well educated and capable an interpreter is, s/he will not be able to interpret faithfully if the working conditions are not suitable, if the speakers speak at the same time, too quickly or for too long, if the interpreter

³⁰[2014] FCA 295

³¹[2014] FCA 295 at paragraph [48]

³²*Perera v Minister for Immigration & Multicultural Affairs* [1999] FCA 507, at paragraph [25].

³³Hale, S, 'The Challenges of Court Interpreting, Intricacies, responsibilities and ramifications', (2007) 32(4) *Alternative Law Journal* 198 at 198.

*is not provided with relevant material to prepare for a difficult assignment, or if the other participants expect interpreters to perform tasks that are not within their role.*³⁴

Interpreting, as Barnett states, “*is a complex human interaction with an interpreter needing a thorough knowledge of the subject languages including grammatical and linguistic competence as well as knowledge of cultural factors and discourse practices.*”³⁵ They are not merely a “bilingual transmitter” or “translation machine”.³⁶ It has been noted that proper opportunity for preparation and familiarity with both the content and the context of the proceedings would facilitate the work of an interpreter.³⁷

Other issues relating to interpreters relate to their impartiality and acting as advocates in proceedings, or in extreme cases, unethically³⁸. Cultural factors can also play a part in the accuracy, competency and ability of interpreters. Commentators have stated that there is a need for the development of a regulatory body for interpreters and in improving pay and conditions which will assist in capacity and skills of interpreters³⁹. This snapshot of concerns and problems gives an indication of the many issues which affect the opportunity of a party to be heard through an interpreter.

Conclusion

The diversity inherent in Australian society, both linguistically and culturally, remains an integral feature of daily life. It is reflected in many aspects, including our interaction with the legal system. This richness creates obstacles for the participation of those who are culturally and linguistically diverse. The use of interpreters, particularly in the tribunal setting, allows for participation in these proceedings and the opportunity to be heard, which is an essential requirement of procedural fairness.

It is evident that there are inherent difficulties in interpreting but the availability of interpreters for those who not suitably proficient in English is paramount in allowing the duty to be heard to be discharged adequately. Notwithstanding this importance, there are inherent difficulties in the use of interpreters which can cause this opportunity to be heard to be denied. Competency and proficiency are the two keys to this occurring, but improvements can still be achieved to allow both Courts and particularly tribunals from discharging the common law duty for the opportunity to be heard.

³⁴Hale, S, ‘The Challenges of Court Interpreting, Intricacies, responsibilities and ramifications’, (2007) 32(4) *Alternative Law Journal* 198 at 201.

³⁵Barnett, Michael, ‘Mind Your Language - Interpreters in Australian Immigration Proceedings’ (2006) 10(1) *University of Western Sydney Law Review* 109 at 115.

³⁶ *Gaio v The Queen* (1960) 104 CLR 419.

³⁷Hale, S, ‘The Challenges of Court Interpreting, Intricacies, responsibilities and ramifications’, (2007) 32(4) *Alternative Law Journal* 198 at 202.

³⁸Commonwealth Attorney General’s Department, *Access to Interpreters in the Australian Legal System*, (1991) AGPS Canberra, para 5.6.10.

³⁹See generally the comments in: Barnett, Michael, ‘Mind Your Language - Interpreters in Australian Immigration Proceedings’ (2006) 10(1) *University of Western Sydney Law Review* 109; The Hon Justice Perry, M and Zornada, K, ‘Working with interpreters: Judicial perspectives’ (2015) 24 *Journal of Judicial Administration* 207; Hale, S, ‘Helping interpreters to truly and faithfully interpret the evidence: The importance of briefing and preparation materials’ (2013) 37 *Australian Bar Review* 307.