

The Right to A Fair Trial

Joint ATSILS Submission to the Commonwealth Attorney-General Regarding
the Expansion of Aboriginal and Torres Strait Islander Interpreter Services

March 2011



Victorian Aboriginal Legal Service Co-operative Ltd



Aboriginal Legal Service of Western Australia



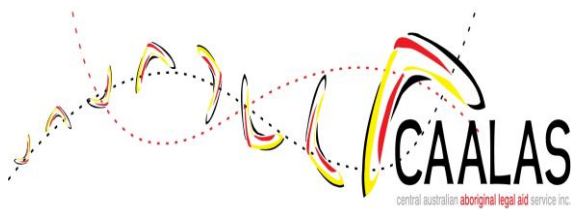
Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd



Aboriginal Legal Rights Movement Inc



NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY



Aboriginal Legal Service (NSW/ACT) Limited



Kimberley Interpreting Service

Northern Territory Aboriginal Interpreter Service

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List of Acronyms Used

ACT	Australian Capital Territory
ALRM	Aboriginal Legal Rights Movement Inc
ALS (NSW/ACT)	Aboriginal Legal Service (NSW/ACT)
ALSWA	Aboriginal Legal Service of Western Australia
ARDS	Aboriginal Resource and Development Service
ATSILS	Aboriginal and Torres Strait Islander Legal Services
ATSILS (Qld)	Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd
AUSLAN	Australian Sign Language
CAALAS	Central Australian Aboriginal Legal Aid Service
CERD	International Convention on the Elimination of all Forms of Racial Discrimination (1965)
COAG	Council of Australian Governments
CRC	Convention on the Rights of the Child (1989)
DIAC	Department of Immigration and Citizenship
FAHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
ICCPR	International Covenant on Civil and Political Rights (1966)
ITC	Interpreting and Translating Centre
JAG	Department of Justice and Attorney-General (Qld)
KIS	Kimberley Interpreting Service
NAAJA	North Australian Aboriginal Justice Agency
NAATI	National Accreditation Authority for Translators and Interpreters Ltd.
NPA	COAG National Partnership Agreement on Remote Service Delivery
NTAIS	Northern Territory Aboriginal Interpreting Service
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
TIS	Translation and Interpreting Service National
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples (2007)
VALS	Victorian Aboriginal Legal Service Co-operative Limited
WADIA	Western Australian Department of Indigenous Affairs

1. Introduction and scope of submission

This is a joint ATSILS submission in support of the increased provision of Aboriginal and Torres Strait Islander interpreter services to cover metropolitan, regional and remote areas within Australia. The ATSILS prepared this submission to address the need for increased provision of interpreter services to Aboriginal and Torres Strait Islander peoples to ensure that members of these communities can have more equitable access to justice.

The COAG National Partnership Agreement on Remote Service Delivery (NPA) states that it is the Commonwealth's responsibility to introduce "a national framework, working with the States and the Northern Territory, for the effective supply and use of Indigenous language interpreters and translators (both technical and non-technical), including protocols for the use of interpreters and translators" (national framework).¹ The NPA also sets out the respective funding responsibilities for each party. The NPA has been signed by the Commonwealth of Australia, the State of New South Wales, the State of Queensland, the State of Western Australia, the State of South Australia and the Northern Territory of Australia.

The ATSILS welcome the commitments made by State, Territory and Commonwealth governments under the NPA and urge them to adhere to the implementation timelines outlined within it. It is hoped that the establishment of the NPA's national framework will be completed before cross-border legislation further increases the need for Aboriginal and Torres Strait Islander interpreter services within the justice system.

This submission outlines the current provision of Aboriginal and Torres Strait Islander interpreter services throughout Australia, the constraints faced by these services and the measures that the ATSILS recommend be incorporated into the future expansion of these services under the national framework specified in the NPA.

While this submission specifically relates to access to Aboriginal and Torres Strait Islander interpreter services within the justice system, progress made in this area will also greatly benefit other sectors such as health, housing and welfare when interacting with Aboriginal and Torres Strait Islander peoples.

The provision of interpreters is of central importance to affording access to justice and as such, it is hoped that this submission is given the level of consideration that it deserves. Furthermore, it is hoped that the Commonwealth, State and Territory governments accept the recommendations contained herein and take action to establish culturally appropriate Aboriginal and Torres Strait Islander interpreter services throughout metropolitan, rural and remote areas of Australia.

¹ COAG *National Partnership Agreement on Remote Service Delivery* (2008) [19 (g)].

2. About the ATSILS

ALSWA

ALSWA is a community based organisation that was established in 1973. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil and human rights law, family law and legal policy and advocacy. ALSWA also offers community education and prisoner support programs to men, women and juveniles. ALSWA services are available throughout Western Australia via seventeen regional and remote offices and one head office in Perth.

ALSWA is a representative body with sixteen executive officers elected by Aboriginal peoples from their local regions to speak on law and justice issues. ALSWA is a legal service provider solely for Aboriginal peoples living in WA and makes submissions on that basis.

Senior Management of ALSWA consists of a Chief Executive Officer, Executive Officer, Director of Legal Services and Deputy Director of Legal Services. Each of the units and most regional offices (but not all) are managed by a Managing Solicitor and staffed by Solicitors, Aboriginal Court Officers and administrative support staff. The Law and Advocacy Unit of ALSWA employs a Policy Officer, International Law and Human Rights Solicitor, Community Legal Education Solicitor, Media Officer and Prisoner Support Team.

VALS

VALS was established as a community owned and controlled co-operative society in 1973. VALS plays an important role in providing legal aid and assistance to Aboriginal and Torres Strait Islander peoples in the areas of criminal, civil and family law and is also actively involved in community development, research and law reform. VALS maintains a strong client service focus and provides services from its head office in Melbourne, and seven regional offices located at Bairnsdale, Heywood, Mildura, Morwell, Shepparton, Swan Hill and Ballarat.

Membership is open to all Aboriginal and Torres Strait Islander peoples resident in Victoria aged 18 and over. Members elect seven Aboriginal or Torres Strait Islander people to the Board of Directors at the Annual General Meeting. The Board, which meets monthly, is responsible for the operation of the organisation.

The internal management of VALS consists of the Chief Executive Officer, who is responsible for the day to day operation of the organisation, and three Executive Officers each responsible for the operations of the Legal Practice Unit, Research, Planning & Development Unit, and the Corporate and Financial Services Unit.

CAALAS

Founded in 1973, CAALAS provides high quality, culturally appropriate criminal, civil and family legal advice and representation to Aboriginal and Torres Strait Islander peoples living in Central Australia. Additionally, the organisation advocates for the rights of Aboriginal and Torres Strait Islander peoples, provides community legal education and assists released prisoners and their families in their reintegration into the community.

CAALAS has grown over the years and now has around thirty-five full-time employees based in Alice Springs and Tennant Creek. In addition to providing representation in the Alice

Springs and Tennant Creek sittings of various courts, CAALAS lawyers and field officers also regularly attend bush court sittings in the communities of Ali Curung, Elliott, Hermannsburg, Kintore, Mutitjulu, Papunya, Ti Tree and Yuendumu.

ALRM

Founded in 1973, ALRM is an independent Aboriginal community controlled organisation governed by an all Aboriginal Board. The Board of ten members is appointed from Aboriginal communities from metropolitan and country centres across South Australia.

Through the provision of legal services and associated activities, ALRM promotes legal, cultural, economic, political and social rights for Aboriginal peoples as dispossessed peoples within South Australia. ALRM provides comprehensive legal advice and assistance in the areas of criminal and civil law to people of Aboriginal descent and their spouses. ALRM has its head office in Adelaide and three regional offices in Ceduna, Murray Bridge, Port Lincoln and Port Augusta.

ALRM's major aim is to advance the legal interests of Aboriginal peoples in South Australia and to ensure that those interests and rights are protected by the law and not adversely affected by abuse or misuse of any powers under the law. ALRM also acts as a lobby group and, where able, implements support programs that assist in addressing some of the issues known to contribute to Aboriginal people coming into contact with the criminal justice system.

NAAJA

NAAJA is a non-profit private company established in 2006. It involved the merger of three existing Aboriginal Legal Services in Darwin, Nhulunbuy and Katherine, which had existed since the early 1970s, from community council based organisations into a single entity company called NAAJA. NAAJA employs a staff of seventy-one people, including thirty-eight lawyers, over its three offices in Darwin, Katherine and Nhulunbuy, with 46 per cent of staff being Aboriginal.

NAAJA delivers quality and culturally appropriate Aboriginal Legal Services to the Top End of the Northern Territory in the areas of criminal law, family law and civil law. NAAJA is also heavily involved in the advocacy of a range of systemic legal issues affecting Aboriginal people and the provision of community legal education.

NAAJA has an experienced and dedicated Board comprised of twelve Board Directors, with four representatives from each of the three regions that NAAJA services – Darwin, Katherine and Nhulunbuy. The Board is entirely Aboriginal controlled, and determines the direction of its membership.

ATSILS (Qld)

Established in its present form in 2005, but with roots stretching back to 1972, ATSILS (Qld) is a non-profit, community based organisation that provides criminal, civil and family law services to Aboriginal and Torres Strait Islander Australians and their families in Queensland. ATSILS (Qld) also provides services in the programme areas of law reform and community education, deaths in custody monitoring, and prevention, diversion and rehabilitation.

With a team of over 170 staff across the State, fifteen regional offices, and nine satellite offices, in addition to the head office in Brisbane, ATSILS (Qld) brings together a wealth of experience in the fields of criminal, civil and family law. Growth in the areas of law reform, social work and prison support in recent years has also allowed ATSILS (Qld) to provide a more diverse range of related services to communities across the State.

ATSILS (Qld) has a Board comprised of nine directors elected from its Aboriginal and Torres Strait Islander membership. A specialist director is also appointed to provide additional guidance in the areas of finance and corporate governance. The operational management team is comprised of a Chief Executive Officer, Principal Legal Officer and Finance Manager who look to the Board of Directors for strategic direction and advice.

ALS (NSW/ACT)

The ALS (NSW/ACT) was created in 2006, when the six ATSILS that had previously served NSW and the ACT merged to form one service. ALS (NSW/ACT) seeks to achieve justice for Aboriginal people and communities through the provision of culturally appropriate legal advice and representation.

ALS (NSW/ACT) is predominantly a criminal law practice which provides advice and representation for both Aboriginal and Torres Strait Islander adults and young persons via its head office in Parramatta and twenty regional offices located around NSW and ACT. In addition, ALS (NSW/ACT) also provides services in child protection matters. In the past, ALS (NSW/ACT) was also able to provide clients with representation in civil matters and family law, however, a reduction in real funding means that it cannot provide any assistance in these matters at present.

3. Summary of recommendations

The ATSILS recommend that under the NPA the Commonwealth Government work with State and Territory governments to:

Recommendation 1:

Develop, in consultation with respective communities in rural and remote areas of identified need, proposals for community courts that reflect the linguistic and cultural needs of the community, in order to assist with the provision of the right to a fair trial for Aboriginal and Torres Strait Islander defendants.

Recommendation 2:

Increase the provision of Aboriginal and Torres Strait Islander interpreter services through the implementation of the national framework prescribed in the NPA.

Recommendation 3:

Implement strategies to attract and recruit more Aboriginal and Torres Strait Islander interpreters.

Recommendation 4:

Amend legislation governing the operation of the criminal justice system to support the increased use of high quality, fully trained interpreters.

Recommendation 5:

Provide adequate funding to relevant service providers in the justice system to accommodate the use of interpreters.

4. Background

4.1. Evidence of need

As a Commonwealth Parliamentary Inquiry stated in 1991, the failure to provide adequate Aboriginal and Torres Strait Islander interpreter services

is a prime example of the insensitivity of a government department to Aboriginal and Torres Strait Islander people. It continues the denigration of ATSI people and their languages by behaving as though they do not exist.²

It is disappointing that almost 20 years later this situation is still yet to be resolved by government. The most recent census information reveals that there is still a great need for Aboriginal and Torres Strait Islander interpreters:

- Approximately 11 percent of Aboriginal and Torres Strait Islander peoples speak an Aboriginal or Torres Strait Island language as their main language at home.³ This percentage increases to 42 percent in many remote areas of Australia.⁴
- Almost one in five (19 percent) Aboriginal and Torres Strait Island language speakers report that they do not speak English well or at all.⁵
- Aboriginal and Torres Strait Islander peoples suffer ear disease and hearing loss at ten times the rate of non-Aboriginal and Torres Strait Islander people and arguably at the highest rate of any people in the world.⁶
- Given that many Aboriginal and Torres Strait Islander peoples speak English as a second, third or fourth language, if at all, and the growing over-representation of Aboriginal and Torres Strait Islander peoples within the criminal justice system, the need for high quality Aboriginal and Torres Strait Islander interpreter services within the criminal justice system is paramount.
- Many of the ATSILS' clients have little or no comprehension of what happens inside a court room.⁷ A vast number encounter the mainstream justice system with an entirely different conceptual framework. For example, as described in the ARDS document, *An Absence of Mutual Respect*, 95 percent of the Yolngu people from north-east Arnhem Land do not understand the meaning of the words 'bail', 'consent', 'remand', 'charge', 'illegal', 'comply', 'appear' and 'fine'.⁸

² Standing Committee on Aboriginal Affairs, Australian Parliament House of Representatives, *A Matter of Survival: Report of the Inquiry into Aboriginal and Torres Strait Islander Language Maintenance* (1992) [4.79].

³ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey* (2008) Australian Bureau of Statistics

<<http://abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4714.0Main%20Features52008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=#PARALINK4>> at 4th May 2010.

⁴ Ibid.

⁵ Australian Bureau of Statistics, *Population Characteristics, Aboriginal and Torres Strait Islander Australians* (2006)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/70E4BD21542AAD18CA257718002A7CC1?opendocument>> at 4th May 2010.

⁶ Senate Community Affairs References Committee, Parliament of Australia, *Hear Us: Inquiry into Hearing Health in Australia* (2010) xv.

⁷ See Christopher J Charles, 'A Few Words on Culture Shock' (2010) Ed 22, *Your Legal Rights Quarterly Newsletter Magazine of Aboriginal Legal Rights Movement Inc.*, 6.

⁸ Aboriginal Resource and Development Service, *An Absence of Mutual Respect* (2008) 20-21

Where people participate in court proceedings but do not fully understand them, the prospects of them complying with any order of the court are substantially impaired.

- It is important to consider incarceration rates in the context of (the lack of) comprehension of court proceedings of many Aboriginal and Torres Strait Islander defendants. Between 2000 and 2008, the Aboriginal and Torres Strait Islander adult imprisonment rate in Australia rose by approximately 40 percent.⁹ The rate of imprisonment for Aboriginal and Torres Strait Islander peoples was 14 times higher than the rate for non-Aboriginal and Torres Strait Islander peoples at 30 June 2009.¹⁰ In 2008 this difference was 13 times higher for Aboriginal and Torres Strait Islander peoples.¹¹

4.2. Types of interpreter services needed

There is a massive unmet need for more and more highly trained interpreters in numerous Aboriginal and Torres Strait Islander languages. This is particularly the case in regional and remote parts of Australia. It is not uncommon for interpreters to not be available and for defendants to be remanded in custody pending an interpreter being ordered and becoming available. It is also not uncommon for interpreters to be used in complicated court proceedings when they do not have the skills or level of experience required to adequately interpret for our clients. Unfortunately, because of the shortfall of highly qualified Aboriginal interpreters and the imperative of 'getting people through the system', most legal services seek to do the best with the resources available, an outcome that benefits no one and is of great detriment to our clients.

In addition to interpreters in traditional Aboriginal and Torres Strait Island languages, there is also a need for interpreters of Aboriginal English. While more traditional Aboriginal and Torres Strait Island languages may be easily identified, many people are not aware that Aboriginal English exists and often mistake it for proficiency in Standard Australian English (please see Appendix A for a guide to Aboriginal English). This can lead to serious miscarriages of justice with evidence and testimony being dangerously misunderstood. In addition, language difficulties often exist in conjunction with even greater cultural differences which can further muddy the waters of effective and accurate communication.

There is also a need for greater awareness of the need for interpreters for hearing impaired Aboriginal and Torres Strait Islander peoples. Hearing loss can result in the same communication barriers as those produced by language difficulties and cross-cultural differences. Given the high rate at which Aboriginal and Torres Strait Islander peoples suffer from hearing loss this is an issue that must be addressed. A recent parliamentary inquiry has found that there is a causal relationship between hearing impairment and a person's engagement with the criminal justice system. The Senate Community Affairs References Committee in its Inquiry into Hearing Health in Australia found that "for Indigenous people with hearing loss, whose first language - if they have one - is not English, this relationship can be disastrous".¹² For example, the Committee

⁹ Australian Bureau of Statistics, *Prisoners in Australia* (2008) 38
<[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F618C51B775B2CF7CA25751B0014A2D5/\\$File/45170_2008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F618C51B775B2CF7CA25751B0014A2D5/$File/45170_2008.pdf)> at 6th May 2010.

¹⁰ Australian Bureau of Statistics, *Prisoners in Australia* (2009)
<<http://www.abs.gov.au/ausstats/abs@.nsf/Products/CA5ACE72DF796D05CA257687001CDDA8?opendocument>> at 6th May 2010.

¹¹ Ibid.

¹² Senate Community Affairs References Committee, above n 6, xvi.

noted that “engagement between Indigenous people with a hearing loss and police can spiral into confrontation, as police mistake deafness for insolence”.¹³ The confusing nature of such engagement can also lead to increased aggression.

Poor communication at a person's first point of contact with the criminal justice system can have enormous implications for that person, and indeed for the integrity of the system as a whole.¹⁴ Language difficulties and hearing loss can affect an Aboriginal or Torres Strait Islander person's demeanour leading them to avoid eye contact, not answer questions or turn away.¹⁵ When language and communication difficulties go undetected such actions can be mistaken for indications of guilt and during police interviews or in the court room this can have dire consequences for the individual involved. Alternatively, as noted above, it can mean that the defendant has no comprehension of the proceedings taking place around them. These factors threaten the integrity of the system as a whole. If interpreters are not used, or not used meaningfully, serious miscarriages of justice can result. For example, during the parliamentary inquiry mentioned above one witness testified about the potential consequences of poor communication caused by hearing loss:

One audiologist talked to me about dealing with a client who had recently been convicted of first-degree murder and had been through the whole criminal justice process. That had happened and then she was able to diagnose him as clinically deaf. He had been through the whole process saying, ‘Good’ and ‘Yes’—those were his two words—and that process had not picked him up. Given the very high rates of hearing loss, you have to wonder about people's [sic] participation in the criminal justice system as being fair and just if in cases like that people simply are not hearing or understanding what is going on.¹⁶

(Please see Appendix B for an additional list of relevant case studies).

A lack of awareness about the need to determine whether an interpreter is needed can lead to language and communication difficulties going undetected. Moreover, even after such difficulties are identified a scarcity in the provision and routine use of Aboriginal and Torres Strait Islander interpreters ultimately results in many Aboriginal and Torres Strait Islander peoples not being provided with an interpreter. The overall effect is that Aboriginal and Torres Strait Islander peoples are being locked out of court proceedings and the criminal justice system in general.

4.3. Legal obligation to provide interpreter services

Beyond the pressing need for Aboriginal and Torres Strait Islander interpreter services, the Commonwealth Government is also bound by numerous international obligations that require the provision of these services. These obligations to uphold a person's right to an interpreter in legal proceedings stem from commitments Australia has made to international human rights instruments including the *UDHR*, the *ICCPR*, the *CERD*, the *CRC* and the *UNDRIP*. Australia's obligation to provide interpreters, where required, in legal proceedings has also been specifically spelt out by the UN Human Rights Committee and the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (please see appendix C for a list of Australia's international human rights obligations).

¹³ Ibid.

¹⁴ Ibid 148.

¹⁵ Ibid 141.

¹⁶ Evidence to Senate Community Affairs References Committee, Parliament of Australia, Alice Springs, 18 February 2010, 1 [Tristan Ray]

Domestically, the Commonwealth Government is also bound by the *Racial Discrimination Act 1975* (Cth) which gives all persons despite race, colour or ethnic or national origin the right to equality before the law. A person's right to an interpreter, including interpreters for the deaf, to ensure their understanding of criminal law proceedings against them, and the fact that the absence of an interpreter may result in an unfair trial, has also been repeatedly upheld in Australian case law (please see Appendix D for a list of relevant domestic legislation and case law).

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) made several very specific recommendations regarding a person's right to an interpreter and the steps that need to be taken to address the inadequate provision of interpreters to Aboriginal and Torres Strait Islander peoples.

Recommendation 99 states 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 are reservations as to these matters proceedings should not continue until a competent interpreter is provided to the person without cost to that person.¹⁷

Recommendation 100 states 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.¹⁸

State and Territory governments are also bound by their respective language services policies to ensure that all people, irrespective of their language background, are able to access government services in a fair and equitable manner.

4.4. Costs associated with not providing interpreter services

The adequate provision of Aboriginal and Torres Strait Islander interpreter services is not only vitally important to address access to justice concerns, it is also a sound economic path. There are high hidden costs associated with having to adjourn and reconvene court sittings to enable lawyers to attempt to clarify and obtain clear instructions from their clients.¹⁹ The absence of qualified interpreters also multiplies the risk of litigation arising from miscarriages of justice.²⁰ Costs due to time delays and compensatory litigation and appeals arising from unfair proceedings are significant and not solely limited to the justice sector. Litigious action is also common in the health sector due to the lack of Aboriginal and Torres Strait Islander interpreters and consequent misdiagnoses and mistreatment. The potential cost to government of failing to engage and provide access to Aboriginal and Torres Strait Islander interpreters far exceeds the expense of providing them.²¹

While economic arguments do need to be highlighted, the greatest cost of not providing Aboriginal and Torres Strait Islander interpreter services is the injustice of

¹⁷ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (1991) Vol. 3, 79.

¹⁸ *Ibid* 80.

¹⁹ Kimberley Interpreting Service *Indigenous Language Interpreting Services* (2004) 7.

²⁰ *Ibid*.

²¹ *Ibid*.

having to remedy a deficient court process through a criminal appeal with the obvious hurdle of having to establish an error in the making of the original decision. There is also the enormous ongoing and pointless cost of reimprisonment that results from an individual not understanding what happened in court, the specifics of their sentence, especially in regards to reporting requirements and bail conditions, complicated concepts like general deterrence and specific deterrence, and the sanctity of court orders (such as Domestic Violence Orders), where breaches are routinely said to call for condign punishment because they are a direct disobedience of an order of the court.

4.5. Summary of current situation

As a result of the current lack of Aboriginal and Torres Strait Islander interpreter services those involved in the justice system can be forced to use unaccredited and unqualified lay people as interpreters. In the past, defence counsel have occasionally even been forced to call on other prisoners to serve as interpreters for accused persons.²² Such an arrangement has the potential to result in serious miscarriages of justice and violations of human rights. The formal court environment and the use of technical legal language are likely to be overwhelming for an untrained person serving as an interpreter and might impact upon their ability to perform their task. Additionally, a situation in which an accused person is accompanied by a prisoner acting as interpreter, wearing prison issue clothing, might bias members of the jury and be detrimental to the accused person's defence.

Also, the ATSILS frequently appear for clients, especially in regional and remote areas, who face the unjust situation of being remanded in custody (sometimes for weeks) awaiting availability of an interpreter in their language. Further, the ATSILS also act for many clients (such as those facing relatively minor charges) who need an interpreter but for whom no interpreters are available. In this situation, our clients often wish to have their matter dealt with immediately rather than face more inconvenience or disadvantage by having to return to court at a later date. This situation must be urgently addressed. It is unacceptable that Aboriginal and Torres Strait Islander defendants are in this predicament yet other defendants in need of a foreign language interpreter have ready access to high quality interpreters through the Commonwealth funded Translating and Interpreting Service (TIS).

There is clear evidence of the critical need for, and obligation to provide, adequate Aboriginal and Torres Strait Islander interpreter services. Despite this however, the provision of these services in Australia is haphazard. Only a handful of Aboriginal and Torres Strait Islander interpreter services exist and those that do exist are insufficiently resourced to operate beyond limited geographical areas or provide interpreters in all necessary situations. This is an unacceptable situation given that in comparison the Commonwealth Government provides twenty four hour seven days a week interpreter services for hundreds of foreign languages and dialects through the TIS. This situation cannot be permitted to continue. The ATSILS welcome the development of the NPA and the commitments made by the relevant governments involved to introduce the national framework. The ATSILS discuss below the key factors that require consideration during the development and implementation stages of the national framework.

²² See *R v Njana* (1998) 99 A Crim R 273

5. Current provision of Aboriginal and Torres Strait Islander interpreter services

Before a national framework is introduced, base mapping of current service provision must occur to identify service gaps. The current provision of Aboriginal and Torres Strait Islander interpreter services is scattered at best. Only the Northern Territory and Western Australia have interpreting services specifically dedicated to Aboriginal and Torres Strait Island languages. While all States and Territories have mainstream interpreter services which provide for a vast array of international languages, only a few of these offer interpreters for Aboriginal and Torres Strait Island languages. A summary of the current provision of Aboriginal and Torres Strait Islander interpreter services throughout Australia on a national, State and Territory basis is provided below.

5.1. Nationally

The Department of Immigration and Citizenship (DIAC) provides the Translating and Interpreting Service (TIS) National twenty-four hours a day, seven days a week, mostly on a user pays basis, for any person or organisation in Australia requiring interpreter services.²³ TIS National has access to over 1500 contracted interpreters across Australia, speaking more than 160 languages and dialects.²⁴ TIS National does not list any Aboriginal or Torres Strait Island languages among the languages for which it is able to provide translation and interpreting services.

The National Accreditation Authority for Translators and Interpreters (NAATI) has an online directory where individuals can search for interpreters within Australia who speak their language.²⁵ The directory lists the names and in some cases contact details of a number of interpreters of different skill levels including those who interpret some Aboriginal and Torres Strait Island languages. While this service can be useful, each interpreter determines the cost for their interpreting services which can sometimes make them inaccessible. Additionally, the location of individual interpreters will also impact upon their capacity to service certain clients. This system places pressure on interpreters as they have to negotiate all the booking and invoicing details themselves and provides interpreters with no support if things go wrong during the job and clients are unable or refuse to pay. Also of concern is the fact that the online directory has been known to publish interpreter's contact details without their permission and has also failed to remove the names and contact details of deceased interpreters.

Many Aboriginal and Torres Strait Islander peoples with hearing loss do not have access to hearing aids and other hearing assistive devices. Thus the provision of such technologies in police stations and court rooms is essential. However, the provision of hearing assistive devices in such settings is not universally comprehensive across Australia.²⁶

²³ Australian Government Department of Immigration and Citizenship, *Translating and Interpreting Service (TIS) National*, Australian Government Department of Immigration and Citizenship <http://www.immi.gov.au/living-in-australia/help-with-english/help_with_translating/> 11 May 2010.

²⁴ Ibid.

²⁵ National Accreditation Authority for Translators and Interpreters, *Online Directory*, National Accreditation Authority for Translators and Interpreters <<http://www.naati.com.au/pdsearch/pdsearch.aspx>> 11 May 2010.

²⁶ Senate Community Affairs References Committee, above n 6, 148.

5.2. Northern Territory

The Northern Territory Aboriginal Interpreter Service (NTAIS) was established in 2000 and provides a twenty-four hour, seven days a week predominantly oral interpreter service for Aboriginal people in the Northern Territory.²⁷ The NTAIS delivers a mix of fully funded interpreter services for the legal, justice and health sectors and user pays services for Northern Territory and Commonwealth government agencies that deliver programs and services to Aboriginal and Torres Strait Islander peoples. As of August 2010, the NTAIS employs 390 interpreters in 104 Aboriginal languages and dialects including the fifteen core languages necessary to ensure geographical coverage of all areas.²⁸ The NTAIS is one of the biggest interpreter services, and one of the biggest employers of Aboriginal and Torres Strait Islander peoples, within Australia. The NTAIS receives funding from the Commonwealth and Northern Territory governments and has recently received additional Commonwealth funding for the development of 15 satellite offices in remote locations throughout the Northern Territory over the next three years. Three of these offices are already up and running in Wadeye, Maningrida and Yuendumu.

In addition to providing interpreters, the NTAIS also offers free training to its clients regarding the use of interpreters and how to identify when one is needed. The NTAIS also plays a leading role in the development of para-professional and professional level accreditation tests for Aboriginal and Torres Strait Island languages. In addition, the NTAIS has also developed their own introduction to the legal system training program so as to better equip their interpreters to work in courts and other legal settings.

Following the introduction of the NTER, the NTAIS has also been used as an agent for change by being asked to communicate government policy through both interpretation and translation to affected Aboriginal and Torres Strait Islander individuals and communities. This requires that NTAIS interpreters be trained in government policy to ensure their understanding first before they go on to explain it to Aboriginal and Torres Strait Islander peoples. The NTER has resulted in a significant increase in demand for NTAIS interpreters and translators given that the NTAIS' client base includes legal services, police, Centrelink and medical services.

5.3. Western Australia

The Kimberley Interpreting Services (KIS) is the only established Aboriginal interpreting service in Western Australia. KIS is attached to the Mirima Dawang Woorlab-Gerring Language and Cultural Centre, and provides interpreting services in the Kimberley region. KIS began operating in 2000 when the Department of Training provided a one-off grant, and continued its operations through additional funds provided by the Western Australian Department of Indigenous Affairs (WADIA), the Department of Justice and the Department of Health. In May 2004 eight public sector agencies combined to commit funding to the service for three years. This arrangement ceased in June 2007 and WADIA then took over funding responsibilities. As of last year KIS received funding from WADIA and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) through the NPA to operate and support COAG sites. As of July 2010 the KIS has 170 interpreters in 27 Kimberley

²⁷ Australian Government Attorney-General's Department, *Aboriginal Interpreter Service (AIS)* (2009)

Australian Government Attorney-General's Department

<[http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Indigenoulawprograms_Aborigin alInterpreterService\(AIS\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Indigenoulawprograms_Aborigin alInterpreterService(AIS))> at 11 May 2010.

²⁸ Ibid.

and Central Desert Aboriginal languages registered for work throughout Western Australia.²⁹ KIS is also currently in completing the final block releases of the Diploma of Interpreting which has been accessed through Central TAFE and funded by FaHCSIA. In addition to the provision of Aboriginal interpreters, the KIS also plays an important role in the identification and recruitment of, and provision of training to, potential interpreters as well as the identification and recruitment of suitable trainers. KIS also advocates for policy change, provides support for interpreters and provides language and cultural awareness training for government and non-government departments and organisations.

5.4. South Australia

South Australia has no specific Aboriginal and Torres Strait Islander interpreter service. However, the Interpreting and Translating Centre (ITC) was established in 1975 and provides interpreting services to public and private sector agencies and to individuals in over 112 international languages, twenty-four hours a day, seven days a week.³⁰ As of May 2010, ITC provides fourteen interpreters for speakers of Pitjantjatjara and seven interpreters for speakers of Yankunytjatjara, the two main Aboriginal languages spoken in South Australia.³¹

Multilingua Pty Ltd also provides Aboriginal interpreting and translating services in South Australia, and Ngura Wiru Winki Aboriginal Corporation assists in brokering the services of Pitjantjatjara and Yankunytjatjara interpreters in Adelaide.

5.5. Queensland

Queensland has no specific Aboriginal or Torres Strait Islander interpreter service. It is currently very difficult to locate Aboriginal and Torres Strait Islander interpreters within Queensland. At present, the ATSILS are only aware of three accredited interpreters in Aurukun. Currently, on days when the Magistrate Court is sitting in Aurukun, at least one interpreter is present for the first two days and presents on the third if required.

These interpreters are part of the Court Interpreters Training and Accreditation Project commenced in 2008 by NAATI and the Queensland Department of Justice and Attorney-General (JAG) in Aurukun for speakers of the Wik Mungkan language.³² This pilot project is set to conclude at the end of June 2010, at which time JAG will decide whether to continue the project and whether to widen it to cover other Aboriginal and Torres Strait Island languages.

At present the three accredited interpreters that the project has produced are engaged by JAG and are paid at two different rates; \$239.00 for work that takes less than four hours and \$477.00 for work that takes more than four hours. If other organisations wish to engage the interpreters they can do so through the Courts Innovation Program of JAG. This requires prior payment of the appropriate amount to JAG for the interpreters work and the payment of all necessary travel and accommodation costs.

²⁹ Kimberley Interpreting Service, *KIS Home*, Kimberley Interpreting Service <<http://www.kimberleyinterpreting.org.au/index.html>> at 11 May 2010.

³⁰ Government of South Australia, *Interpreting Services-An Overview*, Government of South Australia Interpreting and Translating Centre <http://translate.sa.gov.au/saite_web/drupal/?q=node/8> at 11 May 2010.

³¹ Email from Paul Hellander Manager Interpreting and Translating Centre to Rachel O'Brien, 11 May 2010.

³² Queensland Department of Justice and Attorney-General, *08-09 JAG Annual Report (2009)* Department of Justice and Attorney-General <<http://www.justice.qld.gov.au/corporate/general-publications/annual-report/08-09-jag-annual-report/court-and-tribunal-services-output-performance>> at 30th April 2010.

Another interpreter service also exists in Cairns and is known as the Language Help: All Languages Translating and Interpreting Service. This service provides translation and interpretation in a number of Aboriginal and Torres Strait Island languages as well as numerous international languages. Essentially, this service receives requests for interpreters and translators and then subcontracts accredited interpreters and translators to do the work.

5.6. New South Wales

There are no Aboriginal and Torres Strait Islander interpreter services within New South Wales. The NAATI online directory lists zero Aboriginal or Torres Strait Islander interpreters within New South Wales.

5.7. Victoria

There are no Aboriginal and Torres Strait Islander interpreter services within Victoria. The NAATI online directory lists zero Aboriginal or Torres Strait Islander interpreters within Victoria.

5.8. Tasmania

There are no Aboriginal and Torres Strait Islander interpreter services within Tasmania. The NAATI online directory lists zero Aboriginal or Torres Strait Islander interpreters within Tasmania.

5.9. ACT

There are no Aboriginal and Torres Strait Islander interpreter services within the ACT. The NAATI online directory lists one interpreter in the ACT for Djambarrpuyngu speakers.

6. Constraints faced by current services

The current lack of Aboriginal and Torres Strait Islander interpreter services stems from numerous constraints faced by both existing Aboriginal and Torres Strait Islander interpreter services and individual Aboriginal and Torres Strait Islander interpreters. Such constraints will need to be addressed by the national framework introduced under the NPA in order for the framework to be effective. These constraints are discussed below.

6.1. Lack of funding and funding arrangements

Not all Aboriginal and Torres Strait Islander interpreter services are funded equally. In fact, a very significant funding gap exists between current Aboriginal and Torres Strait Islander interpreter services such as the NTAIS and the KIS. Despite this, Aboriginal and Torres Strait Islander interpreter services overall suffer from a significant lack of funding which constrains their ability to meet their potential clients' needs. A lack of recurrent funding also undermines long term service capacity and strategic planning.

A lack of funding means that these services struggle to provide interpreters everywhere they are needed over the large geographical expanse of their respective State or Territory. Given the high cost of travel and accommodation that can be associated with sending an interpreter to an area where they are needed, it is often unaffordable and therefore impossible.

A lack of funding also affects the work conditions of many Aboriginal and Torres Strait Islander interpreters. For example, the lack of funds provided to the KIS impinges on the level of support it is able to provide to its interpreters in relation to communicating job opportunities and commitments, ensuring that they are briefed appropriately before the job, supporting them to get to the job, provision of face to face debriefing and feedback and ensuring that they are treated appropriately in court proceedings.

In regards to the nature of employment, the NTAIS employs all its interpreters as public servants on a casual or permanent part-time basis which entitles interpreters to superannuation and provides them with status in terms of career path development. Interpreters registered with the KIS are similarly employed on a casual basis. The largely casual and part-time nature of employment can mean that Aboriginal and Torres Strait Islander interpreters seek additional employment to supplement their income which can impact upon their availability for interpreting work.

While the provision of increased funding so as to enable the employment of Aboriginal and Torres Strait Islander interpreters on a full time basis may be appropriate in some circumstances, the reluctance of some Aboriginal and Torres Strait Islander interpreters to work full-time due to the demanding nature of the work must also be taken into account.

An array of salary arrangements also exists within current Aboriginal and Torres Strait Islander interpreting services. While the NTAIS and KIS pay all their interpreters at at least a professional rate, due to a lack of funding the KIS in particular cannot offer non-interpreting staff a corresponding professional wage. While the payment of a professional level wage seems attractive, existing qualified and experienced interpreters are still often recruited for in-house use by other organisations and government departments who can offer permanent employment, better work conditions and a more competitive wage. This decreases the already limited pool of Aboriginal and Torres Strait Islander interpreters from which existing services, service providers and the public, can draw.

Overall, the lack of funding provided to existing Aboriginal and Torres Strait Islander interpreter services results in an unacceptable shortage of interpreters being available to Aboriginal and Torres Strait Islander peoples in the justice system. Clients represented by the ATSILS often suffer due to such gaps in service delivery. The ATSILS have repeatedly been unable to find an appropriate interpreter or one is booked but fails to turn up. The 2008 Evaluation of the Legal Aid for Indigenous Australians Program states that the ATSILS' ability to effectively meet client needs and deliver improved outcomes to Aboriginal and Torres Strait Islander peoples is constrained by a number of significant factors including "access, cost and language issues (including lack of interpreters) affected by such factors as location of client groups, language and cultural barriers and lack of available facilities"³³.

This situation inevitably results in one of three outcomes:

1. Criminal proceedings are unacceptably delayed while an interpreter is sourced, often resulting in extended periods in remand for accused persons;
2. Matters are proceeded despite defendants being unable to fully understand the proceedings or instruct their lawyers in order to avoid indefinite periods of remand; or

³³ Office of Evaluation and Audit (Indigenous Programs) *Evaluation of the Legal Aid for Indigenous Australians Program* (2008) 33.

3. Qualification standards are ignored and defendants are forced to use an interpreter who is wholly inappropriate.

All of these outcomes have been repeatedly witnessed by the ATSILS. However, given the current situation there is little the ATSILS are able to do to address the deplorable situation.

6.2. Accreditation

Accreditation requirements for interpreters can differ between States and Territories. The National Accreditation Authority for Translators and Interpreters (NAATI) is the nationally recognised body for accreditation of interpreters in Australia but not all States and Territories require that interpreters have NAATI accreditation. There are two main avenues through which interpreters can become qualified: by completing a Diploma or Advanced Diploma of Interpreting (which can sometimes also qualify a person for NAATI accreditation) or by completing intensive interpreter workshops delivered by a reputable organisation (such as the NTAIS) and then successfully passing the relevant NAATI test in conjunction with a NAATI approved consultant. Until recently Aboriginal and Torres Strait Islander interpreters could only be accredited by NAATI up to the paraprofessional level which does not qualify them for interpreting work in more technical settings such as legal and medical situations. The NTAIS has recently developed the first NAATI approved professional level test for Aboriginal and Torres Strait Islander interpreters and in doing so has had to develop their own component covering legal and court training.

Associated with both these avenues for accreditation are the high costs incurred by Aboriginal and Torres Strait Islander interpreter services. For example, in Western Australia, the continued delivery of the Diploma of Interpreting (Diploma) has come at a significant cost to the KIS. Previously, Aboriginal and Torres Strait Islander interpreters in Western Australia acquired the Diploma through the Bachelor Institute of Indigenous Tertiary Education until enrolment of interstate students was no longer permitted due to Northern Territory Government restrictions on Vocational and Educational Training Courses. Following this the Perth Campus of the Central Metropolitan College of TAFE (now Central TAFE) delivered the Diploma through funding obtained from the Commonwealth Attorney General's Office (1993 to 1998) and the Western Australian Ministry of Justice (1998 to 2003) in response to Recommendations 97 and 98 of the RCIADIC. As this funding came to an end so did the delivery of the Diploma, until this year when the KIS received a commitment from Central TAFE in Perth to deliver the Diploma in the Kimberley. Unlike in the past, a relative lack of government funding now exists which has meant that the KIS has needed to fund this process itself. The KIS was able to negotiate for some funds, to be provided by FaHCSIA and the Western Australian Department of Indigenous Affairs to support service delivery in Kimberley COAG sites, to be put towards the delivery of the Diploma. In addition to providing funding, the KIS also identified suitable trainers, conducted recruitment campaigns and organised the actual training.

In regards to the second avenue for gaining qualification as an interpreter, NAATI offers accreditation testing on a user pays basis. This means that the user, which in the context of this submission are Aboriginal and Torres Strait Islander interpreter services, has to organise and pay for everything associated with the training and testing process up until the point where the completed test is sent to NAATI for approval. This process involves identifying and recruiting potential candidates, assisting with travel and accommodation costs where required in order to get identified candidates to the training and testing location or the relevant training and testing personnel to the identified candidates (this can be a significant issue given the regional and remote

location of potential candidates), delivering the necessary training to identified candidates, developing a test if NAATI does not already have one for the relevant Aboriginal or Torres Strait Island language, providing the testing facilities, providing the test moderator and filming the test. Hence getting potential Aboriginal and Torres Strait Islander interpreters accredited by NAATI comes at a significant cost to Aboriginal and Torres Strait Islander interpreter services.

The high costs associated with securing qualification and accreditation can restrict the number of interpreters that Aboriginal and Torres Strait Islander interpreter services can afford to put through the process and thus, limit the amount of actual Aboriginal and Torres Strait Islander interpreters available. The resulting lack of appropriately trained Aboriginal and Torres Strait Islander interpreters, especially in the legal field, forces existing services to heavily rely on a small pool of appropriately trained interpreters placing them at risk of burnout. Interestingly, the KIS has reported that they have more Aboriginal people interested in becoming an interpreter than there is capacity to train them. Down the line, expenses such as these restrict service capacity in regards to Aboriginal and Torres Strait Islander interpreter services' core business, the provision of actual interpreters. Given that government agencies are required by law to provide interpreter services to those in the criminal justice system in need of them, it seems reasonable that governments should provide funding to ensure the effective functioning of such services, including in relation to ensuring that potential interpreters have access to the necessary training and accreditation.

6.3. Services connecting with those in need

Currently there is no adequate uniform test in place to determine a person's proficiency in Standard Australian English post-arrest amongst Australia's various legal jurisdictions. There is no widely established objective way to measure the extent to which a language disability must be demonstrated before an interpreter is deemed necessary in criminal proceedings.³⁴ Apparent fluency in Standard Australian English can be misleading and often the need of some Aboriginal and Torres Strait Islander peoples for an interpreter can go undetected. The potential for this to happen to Aboriginal English speakers is especially high. In criminal proceedings for example, the capacity of the accused to understand or speak English is usually ascertained

...by a series of questions along the lines of 'where do you live', 'how old are you', 'how long have you been in Australia' and so on, which can generally be answered reasonably well. It is quite a different thing all together for the accused then to be able to understand the whole course of the evidence and the addresses; and to do so sufficiently well to defend him or herself or give proper instructions to counsel.³⁵

While the NTAIS covers how to identify when an Aboriginal and Torres Strait Islander person needs an interpreter in their client training program, much more work needs to be done in this area. Police personnel recently interviewed in the Kimberley Region were of the view that plain English spoken slowly would be understood by all Aboriginal peoples. They claimed that while all Aboriginal peoples understand English, for strategic reasons some of them pretend that they do not. A police representative suggested that it was likely that police officers fell into the trap of thinking that Aboriginal people understood English because they spoke Kriol or Aboriginal English. As the service possessing the police tender for the use of Aboriginal interpreters in the region, the KIS estimates that over the past six years they have only been utilised four times by police. The KIS has also repeatedly offered to provide the police with

³⁴ V Taylor, 'Interpreting the Legal Process' (1989) Vol 14 *Legal Service Bulletin* 284, 286.

³⁵ L Roberts-Smith, 'Communication Breakdown' (1989) Vol 14 *Legal Services Bulletin* 75, 75-6.

language and cultural awareness training that is relevant to their region in regards to interacting and communicating with Aboriginal peoples, but they have never been taken up on their offer. Thus, even in a region which has an established Aboriginal and Torres Strait Islander interpreter service, and where the Anunga Rules require police to use interpreters during interviews with Aboriginal peoples where necessary, a recognition of the need to accurately determine an Aboriginal person's need for an interpreter has failed to take hold.

Beyond police, there appears to be a resistance among service providers in general, particularly in the government sector, to use Aboriginal and Torres Strait Islander interpreters. This likely stems from the misunderstanding of Aboriginal and Torres Strait Islander peoples' proficiency in English as described above and the fact that service providers can find the cost associated with engaging interpreter services prohibitive.

A lack of awareness amongst Aboriginal and Torres Strait Islander communities about a person's right to an interpreter and how interpreter services can be accessed when necessary further compounds this situation.

The absence of an effective language proficiency test, resistance amongst service providers and a lack of awareness within Aboriginal and Torres Strait Islander communities create a barrier between the needs of clients and the ability of current interpreter services to meet those needs. It creates a break in the circuit. The result of repeated and ongoing failure to detect Aboriginal and Torres Strait Islander language disabilities and the lack of consistency in the provision of interpreter services to Aboriginal and Torres Strait Islander peoples means that the perceived demand for Aboriginal and Torres Strait Islander interpreter services can be misleading.

6.4. Cultural constraints

Current Aboriginal and Torres Strait Islander interpreter services face constraints in that individual interpreters may not be able or willing to interpret in certain matters because it would be culturally inappropriate to do so, or because they fear that the community might view them as taking sides in the matter or being at fault in regards to the outcome of proceedings.³⁶ Interpreters are somewhat justified to hold such a fear as they can suffer punishment and 'pay back' at the hands of family and community members given the lack of knowledge surrounding the role of an interpreter within some Aboriginal and Torres Strait Islander communities.³⁷ This can have serious consequences when one considers the fact that the only interpreter of a particular Aboriginal or Torres Strait Island language may often be from the same community as the client who is in need of such an interpreter.

The cultural practices and avoidance relationships prevalent among remote Aboriginal and Torres Strait Islander communities can further shrink the pool of available Aboriginal and Torres Strait Islander interpreters. Factors such as an Aboriginal or Torres Strait Islander interpreter's age, gender, family background and ceremonial status can constrain their ability to interpret in certain circumstances.³⁸ For example, while younger people may be able to interpret for good order offences such as drink driving charges, they are often not able to interpret for cases that involve serious

³⁶M Cooke, *Caught in the middle: Indigenous interpreters and customary law*, Background Paper 2 Aboriginal Customary Law Project Law Reform Commission of Western Australia (2004) 116.

³⁷ Interview with Ms Dagmar Dixon, Coordinator of Aboriginal Interpreting Programs, TAFE, Perth, 5 May 2001 in Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (2002) 6:23.

³⁸ Cooke above n 35, 89, 90, 91, 118.

crimes such as rape or murder.³⁹ Interpreters for these more serious cases must generally be older people with the cultural authority to deal with such matters,⁴⁰ and even where that is the case, many interpreters still feel in an invidious position of having to interpret in the face of horrible allegations. The limited pool of available Aboriginal and Torres Strait Islander interpreters that currently exists is not large enough to accommodate such cultural practices which results in one of two outcomes: an interpreter not being provided or cultural rules being forced aside and interpreters subsequently being placed in very difficult situations.

The level of accuracy required by all interpreters, including Aboriginal and Torres Strait Islander interpreters, can also be challenging when traditional law demands that a person adopt a particular speaking style that does not match how the non-Aboriginal and Torres Strait Islander interviewer is addressing the client.⁴¹ This can affect the manner of speaking adopted by both the interpreter and the client. An Aboriginal and Torres Strait Islander interpreter may be required to interpret not only words but also cultural matters that affect how testimony is given. Thus, when an Aboriginal and Torres Strait Islander interpreter has to interpret what a client means, rather than what they said verbatim, it may seem to some that they are violating the traditional interpreting principle of accuracy.

The lack of recognition and understanding evident in the criminal justice system in relation to the cultural constraints faced by Aboriginal and Torres Strait Islander interpreters impacts upon the effective use of such interpreters. This has been vocalised by numerous Aboriginal and Torres Strait Islander interpreters, and is evident in the example of interpreters transferring from the ITC to Multilingua in South Australia as outlined above at 5.4. It is unacceptable that as a result of the shortage of Aboriginal and Torres Strait Islander interpreters such interpreters be required to breach cultural rules and flout cultural avoidance relationships because they are the only interpreters available. In addition, failure to effectively manage such cultural constraints can make Aboriginal and Torres Strait Islander interpreters liable to challenge in court on the basis of bias or incompetence. For example, Section 14(1a) of the *Evidence Act 1929* (SA) allows for a party to the proceedings to request a judge to disqualify an interpreter for bias or incompetence.

Suggestions have been proffered that to avoid these issues non-Aboriginal and Torres Strait Islander interpreters should be used. The ATSILS are concerned however that this practice would be inappropriate due to the dangers associated with a lack of cultural understanding and the potential for cross-cultural miscommunication. While this is the position taken by the ATSILS, there seems to be no consensus on the use of non-Aboriginal and Torres Strait Islander interpreters among existing Aboriginal and Torres Strait Islander interpreter services with the NTAIS making use of them and the KIS making the decision not to. If there is no interpreter available in the client's first language the KIS will use an interpreter trained in the client's second language who is assisted by a traditional speaker of the first language.

6.5. 'Legalese'

In addition to language and other communication difficulties, Aboriginal and Torres Strait Islander interpreter services also have to combat the low level of education provided to some Aboriginal and Torres Strait Islander communities in relation to how the legal system works and the language frequently used within it. 'Legalese' is a term

³⁹ Ibid 90.

⁴⁰ Ibid 89.

⁴¹ Cooke, above n 36, 119.

used to refer to the technical language commonly used by the legal system both verbally and in writing. While it is designed to avoid misinterpretation, it can be extremely difficult to understand and interpret without professional legal help. 'Legalese' needs to be explained clearly in plain English in order to address equity of access. Thus Aboriginal and Torres Strait Islander interpreters sometimes not only have to interpret words but also meanings which can be very difficult when common modern legal concepts are foreign to a client. In addition to translating legalese into words and concepts that their clients can understand, Aboriginal and Torres Strait Islander interpreters may also need to explain other elements of the wider court environment in order to help their clients deal with the culture shock that they may experience when coming into contact with the formal justice system.

6.6. Interpreters for the hearing impaired

There are numerous difficulties in providing interpreters for hearing impaired Aboriginal and Torres Strait Islander peoples. Communication difficulties caused by hearing loss are often falsely diagnosed as communication difficulties arising from language difficulties or cross-cultural differences and hence often go undetected in the first place. When hearing loss is correctly identified, the subsequent use of interpreters is complicated by three factors. Firstly, Aboriginal and Torres Strait Islander peoples from remote areas, especially among those who suffered hearing loss at a young age, often have low levels of English language and literacy skills which limits the capacity of many AUSLAN interpreters to assist them. Secondly, even if an AUSLAN interpreter can be found that has Aboriginal or Torres Strait Island language skills, they would need to understand the particular language of the person they have been called to assist, which is not always the case. And thirdly, as described above, only a limited amount of Aboriginal and Torres Strait Islander interpreters exist, let alone Aboriginal and Torres Strait Islander interpreters for the hearing impaired.⁴² Much more research needs to be done in this area in order to identify possible solutions.

⁴² Senate Community Affairs References Committee, above n 6,144.

7. Recommendations

The ATSILS recommend that under the NPA the Commonwealth Government work with State and Territory governments to:

Recommendation 1

Develop in consultation with respective communities in rural and remote areas of identified need, proposals for community courts that reflect the linguistic and cultural needs of the community, in order to assist with the provision of the right to a fair trial for Aboriginal and Torres Strait Islander defendants.

In order to provide for locations that do not meet this criteria, the ATSILS submit the following recommendations in relation to the provision of Aboriginal and Torres Strait Islander interpreter services:

Recommendation 2

Increase the provision of Aboriginal and Torres Strait Islander interpreter services through the implementation of the national framework prescribed in the NPA.

In order to increase the provision of Aboriginal and Torres Strait Islander interpreters in the justice system, the ATSILS recommend that the following measures be incorporated into the national framework that is to be implemented under the NPA:

- Through increased monetary and operational support, the expansion of existing Aboriginal and Torres Strait Islander interpreter services, such as NTAIS and KIS, and the establishment of new services as required, in order to address identified gaps in service delivery in metropolitan, regional and remote areas. Given the number and geographic distribution of language speakers, a national framework utilising existing Aboriginal and Torres Strait Islander interpreter services and language resources where possible, would be the most appropriate option.⁴³ This process should be conducted in consultation and collaboration with existing services and stakeholders, rather than in competition with them, including NTAIS, KIS, training institutions, the ATSILS and Aboriginal and Torres Strait Islander communities.
- The completion of detailed mapping of need in regards to locations and languages before the expansion of services so as to determine where funding would be best directed. Existing Aboriginal and Torres Strait Islander interpreter services and legal services, including the ATSILS, should assist in such determinations.
- The provision of increased and recurrent funding to existing and newly established Aboriginal and Torres Strait Islander interpreting services as part of the expansion outlined above.
- The increased use of technology including video conferencing to assist in the provision of services. The training of interpreters in relation to working effectively with this equipment would necessarily be associated with this initiative.⁴⁴
- That hearing assistive devices, including hearing loops, be provided in all police interview rooms, front desks of police stations and court rooms and that loop receiver

⁴³ Standing Committee on Aboriginal Affairs, above n 2, rec 10.

⁴⁴ Kimberley Interpreting Service, above n 19, 18.

devices should be made available to people without hearing aids. This is especially important in regards to jurisdictions which have high numbers of Aboriginal and Torres Strait Islander peoples from remote areas engaging with police and the courts.⁴⁵

- Outside of existing services' arrangements, the national framework be established as a user pays service.
- The undertaking of strategic and business planning to identify areas where the services could generate their own additional funds.⁴⁶
- While the NPA is focused on remote service delivery, in order to effectively provide for Aboriginal and Torres Strait Islander peoples' right to an interpreter in legal proceedings, any national framework will need to be extended beyond the initial sites identified for investment. The framework will need to cover regional and metropolitan areas also because people who come into contact with the justice system in remote areas are often moved to regional and metropolitan centres during the legal process. The governments of Victoria, Tasmania and the Australian Capital Territory may also need to be incorporated into the NPA depending on the level of identified need.

Recommendation 3

Implement strategies to attract and recruit more Aboriginal and Torres Strait Islander interpreters

In order to fill the increased job vacancies resulting from the service expansion outlined in Recommendation 1, strategies will need to be developed to attract more Aboriginal and Torres Strait Islander interpreters. The ATSILS recommend that the following attraction and recruitment strategies be incorporated into the national framework that is to be implemented under the NPA:

- Ensure increased and recurrent funding and operational support from the relevant training organisations and government departments, for the delivery of Diplomas and Advanced Diplomas of Interpreting and Interpreter Training for Aboriginal and Torres Strait Island languages at relevant educational and training institutions.
- The provision of more attractive employment opportunities, such as on a public servant basis, and payment of a professional level wage through increased funding and the expansion of services outlined in Recommendation 1.
- Support existing Aboriginal and Torres Strait Islander services to further develop and implement accreditation tests to the professional level for Aboriginal and Torres Strait Islander interpreters in jurisdictions where NAATI accreditation is required. The pilot accreditation program run by NTAIS could be used as a template.⁴⁷ The ATSILS could assist in developing the legal expertise section of such accreditation courses.
- The inclusion of a balance between Aboriginal and Torres Strait Islander cultural requirements and traditional interpreting and translating principles within accreditation structures. Consultation and collaboration with existing services and relevant communities will be necessary to identify the cultural constraints specific to different language groups. The establishment of a pool of interpreters for each language that

⁴⁵ Senate Community Affairs References Committee, above n 6, 151.

⁴⁶ Kimberley Interpreting Service, above n 19, 25.

⁴⁷ See Northern Territory Government Aboriginal Interpreter Service, *Report of the Professional Aboriginal Interpreter Accreditation Project Piloted in the Djambarrpuyngu Language* (2009).

includes individuals from different family groups, individuals from different communities and from both genders, would also help to accommodate cultural constraints.⁴⁸

- The recognition within accreditation structures of Aboriginal English as a distinct language in which interpreters can become accredited.
- The development and implementation of campaigns to recruit fluent speakers of Aboriginal and Torres Strait Island languages capable of acting as NAATI approved accreditation examiners at the professional level.
- The development and implementation of scholarships for undertaking Aboriginal and Torres Strait Islander interpreting and translating training. Mentoring programs should also be attached to training.
- The development and implementation of linkages between study courses and future employment through internship programs and relationships with service providers.
- The development and implementation of awareness raising recruitment campaigns about interpreter work as a viable career option.
- The development and delivery of community education campaigns regarding the role of interpreters so that prospective interpreters are not deterred by potential community reactions to their work.

Recommendation 4

Amend legislation governing the operation of the criminal justice system to support the increased use of high quality, fully trained interpreters

In order to support the better use of Aboriginal and Torres Strait Islander interpreters in the justice system, the ATSILS recommend that the following measures be incorporated into the national framework that is to be implemented under the NPA:

- That legislation be enacted in each State and Territory to protect a person's right to an interpreter in legal proceedings where such legislation does not currently exist.
- That legislation be enacted in each State and Territory that imposes an obligation on police and courts to determine a person's fluency in Standard Australian English in order to ascertain the need for an interpreter before the commencement of police questioning or court proceedings.⁴⁹ Such legislation would recognise the distinction between Standard Australian English and Aboriginal English. Enacting this legislation would be in line with Recommendation 99 of the RCIADIC.
- In determining whether a defendant requires an interpreter, that legislation be enacted in each State and Territory requiring a court to make an enquiry along the lines of the former section 49 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*. A court would be required to ascertain whether an Aboriginal defendant understands the charge(s) against them and the purpose of proceedings. The ATSILS consider that only by putting the onus back on the courts will systemic change be achieved.

⁴⁸ Cooke, above n 36, 118.

⁴⁹ Standing Committee on Aboriginal Affairs, above n 2, rec 11.

- That legislation be enacted in each State and Territory that requires a court to order a stay of proceedings in circumstances where an accused does not understand the charges against him or her or the purpose of the proceedings and an interpreter is not available, until such a time when an interpreter can be made available. Serious consideration of a stay of proceedings should also occur when a claimant or witness similarly does not understand proceedings.
- That guidelines for police interrogation of Aboriginal and Torres Strait Islander peoples in each State and Territory be amended to include a requirement that a hearing assessment be conducted for any Aboriginal or Torres Strait Islander person who is having communication difficulties, irrespective of whether police officers consider that the communication difficulties are arising from language and cross cultural issues.⁵⁰
- The development and implementation of policies within the relevant justice organisations and departments that enshrine a commitment to the use of interpreters⁵¹ and detail how to, why to and when to access interpreters. These policies should stipulate that the use of an interpreter must always be offered rather than waiting for an individual to request one.
- The development and implementation of better protocols across the justice system regarding how to determine whether an Aboriginal or Torres Strait Islander person requires an interpreter, especially where identifying situations in which a person's apparent fluency in English may be misleading (e.g. Aboriginal English speakers).
- That organisations and government departments within the justice system set aside funds within their respective annual budgets for the use of interpreters.⁵²
- The development and delivery of education campaigns to Aboriginal and Torres Strait Islander communities regarding a person's right to an interpreter.⁵³
- The development and increased delivery of education campaigns to Aboriginal and Torres Strait Islander communities in relation to common concepts, processes and terminology used within the justice system.
- The development and delivery of region specific cultural and language awareness campaigns amongst those organisations and government departments involved in the justice system on the effects of cultural, linguistic and hearing impairment constraints on Aboriginal and Torres Strait Islander peoples' engagement with the criminal justice system, and effective evidence based techniques for engaging effectively with Aboriginal and Torres Strait Islander peoples experiencing these constraints.

Recommendation 5

Provide adequate funding to the relevant service providers in the justice system to accommodate the use of interpreters

The ATSILS welcome the funding commitments in regards to the expansion of Aboriginal and Torres Strait Islander interpreter services made by the parties to the NPA. The NPA

⁵⁰ Senate Community Affairs References Committee, above n 6, 150.

⁵¹ Kimberley Interpreting Service, above n 19, 26.

⁵² Ibid.

⁵³ Ibid.

states that the Commonwealth will contribute \$19.8 million to this part of the package, and that the States and Territories will contribute \$18.9 million, for a total funding pool of \$38.6 million.⁵⁴ The NPA further states that these funds will not be diverted from other services.⁵⁵ In addition to this, the ATSILS recommend that the following funding measures be incorporated into the national framework that is to be implemented under the NPA:

- The provision of additional funds from the Attorney-General's Department to the ATSILS in order to pay for the use of Aboriginal and Torres Strait Islander interpreters.
- The provision of additional funding from respective funding bodies to the relevant State, Territory and Commonwealth government departments and funded service providers specifically for the engagement of Aboriginal and Torres Strait Islander interpreters.
- That such funding also provide for training for these bodies in *how* to use Aboriginal and Torres Strait Islander interpreters.

8. Conclusion

It is clear that the establishment of a national network of Aboriginal and Torres Strait Islander interpreters that effectively provides for both Aboriginal and Torres Strait Islander peoples' international and domestic rights throughout the legal process is long overdue. In fact, such action has been recommended to the Commonwealth Government for almost 20 years.⁵⁶

Under the umbrella of the national framework, existing services need to be better supported and expanded in order for service provision to cover metropolitan, regional and remote areas. These developments must be undertaken in consultation and collaboration with existing services, relevant stakeholders such as the ATSILS, and Aboriginal and Torres Strait Islander communities. Such expansion will necessitate the development and implementation of a number of associated initiatives including recruitment campaigns, the redesign of accreditation structures, community education campaigns, amendment of the wider justice system to support the use of interpreters, and a significant and long overdue injection of funding.

The ATSILS urge the Commonwealth Government to work with State and Territory governments to fulfil their obligations under the NPA in regards to the provision of adequate Aboriginal and Torres Strait Islander interpreter services. The ATSILS further urge the above parties to fulfil the relevant funding commitments they made under the NPA in recognition of the fact that investment in Aboriginal and Torres Strait Islander interpreter services will result in cost savings for these parties within their respective legal jurisdictions.

⁵⁴ COAG, above n 1, [31].

⁵⁵ COAG, above n 1, [34].

⁵⁶ See Standing Committee on Aboriginal Affairs, above n 2, rec 5-11.

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Appendix A

A Guide to Aboriginal English

Many Aboriginal and Torres Strait Islander peoples speak a dialect of Aboriginal English rather than Standard Australian English. However, speakers of Aboriginal English are often mistaken for having proficiency in Standard Australian English. Such a mistake can have dire consequences for these peoples within legal and medical settings. While there are numerous dialects of Aboriginal English, they all have common systematic differences from Standard Australian English in regards to sound system, grammar, vocabulary, meaning and appropriate use of language. It is arguable that the differences are so substantial as to necessitate an interpreter being provided.

Gratuitous Concurrence

Gratuitous concurrence refers to the pattern of communication in Aboriginal English whereby the speaker will answer “yes” to polar yes/no questions in an attempt to appease the questioner rather than as a genuine expression of affirmation or consent to the meaning expressed by the questioner. It is a well known fact that Aboriginal English speakers will simply say “yes” in an automatic way without necessarily meaning it, to questions posed by an authority figure, especially when they do not have the assistance of an interpreter. Gratuitous concurrence can also reflect feelings of insecurity in relation to proficiency in Standard Australian English.

Conceptual Differences

Sometimes linguistic usages relate to underlying conceptual differences in the ways in which Aboriginal English and Standard Australian English speakers relate to experience. For example, when asked “what is court” an Aboriginal English speaker might answer “it’s straight across the road there”, not understanding that the word court, without the article, in Australian Standard English, refers to an abstraction rather than a particular building.

Further, people generally do not understand that for many English words and concepts there are no equivalents in Aboriginal and Torres Strait Islander languages. Hence, Aboriginal and Torres Strait Islander users of mainstream legal and health systems are presented with concepts with which they are completely unfamiliar.

Vocabulary

An English word may have one or more meanings in Aboriginal English and vice versa. For example, the word ‘kill’ may mean ‘hit’ and ‘hurt’ as well as, literally, ‘to kill’. In one reported case an Aboriginal suspect stated that he intended to “kill” the complainant but after further questioning it became clear that his intention was not to murder the complainant, but to “kill her a little bit”, “kill her on the leg”.⁵⁷

Cultural Differences

Aboriginal and Torres Strait Islander peoples have different cultural communication conventions than those used by speakers of Standard Australian English. For example, the avoidance of eye contact and periods of silence even when asked a question, are normal conventions used by Aboriginal and Torres Strait Islander peoples in conversation, however,

⁵⁷ *R v Johnson* (1987) 25 A Crim R 433, 442.

within the courtroom setting these can be mistaken for rudeness, evasion or even guilt.⁵⁸ Periods of silence in particular may be required by Aboriginal cultural convention in regards to the fact that for cultural reasons the person cannot speak on the topic being discussed or in the presence of certain people in the room. It may also be because they are extremely uncomfortable and embarrassed, they are having thinking time or simply that they do not understand what is being asked. For these same reasons an Aboriginal or Torres Strait Islander person may also just answer 'yes' to questions they do not understand in order to hurry along the uncomfortable process.

A number of other features of court room questioning are also very foreign to Aboriginal and Torres Strait Islander peoples such as, direct questioning (especially where the questioner is known to already know the answer), the exact quantification of time, number, direction and talking about or naming dead people.⁵⁹ This can lead to evidence being dangerously misunderstood.

⁵⁸ Standing Committee on Aboriginal Affairs, Australian Parliament House of Representatives, *A Matter of Survival: Report of the Inquiry into Aboriginal and Torres Strait Islander Language Maintenance* (1992) [4.89].

⁵⁹ *Ibid* [4.88].

Appendix B

Consequences in the Criminal Justice System of Poor Communication Caused by Hearing Loss: Case Studies

Case Study - N

The following case study was provided by NAAJA to the Senate Community Affairs References Committee 2010 Inquiry into Hearing Health in Australia and was included in the Committee's final report.¹

N is charged with several serious driving offences, including driving under suspension. He is deaf, and does not know sign language. N has significant difficulties explaining himself and will often nod during conversations, which leads to people to believe he is replying 'yes', when, in fact, he does not understand. He has a very limited and idiosyncratic form of sign language. Every now and then he does something that resembles signing.

N is not able to communicate with his lawyer. An AUSLAN interpreter has been utilised, but because N cannot sign, he is not able to convey instructions to his lawyer of any complexity. N's lawyer sought to arrange a Warlpiri finger talker through the Aboriginal Interpreter Service, but the interpreter concerned was not willing or able to come to court. It was also not known if N would even be able to communicate using Warlpiri finger talking.

The witness statements disclosed to defence included a statement from a police officer describing how she came upon a group of men in a park drinking. She ran a check on N, to discover he had warrants for his arrest, at which time she arrested him. Her statement reads: "It is my belief that he understood as he looked at me and became quite distressed. I asked (N) verbally if he understood and he nodded and turned his head away from me while raising his arms in the air."

N is currently on bail, but has spent significant periods on remand at Darwin Correctional Centre. His charges are yet to be finally determined, and an application for a stay of proceedings is pending. N is effectively trapped in the criminal justice system. He cannot plead guilty or not guilty because he is not able to communicate with his lawyer and provide instructions. He had previously been granted bail, but after failing to attend court as required, his bail was revoked. Significantly, his inability to convey information (or to understand what his lawyer was trying to tell him) in relation to his charges has also been highly problematic in relation to bail. For example, when he was explaining to his lawyer with the assistance of the AUSLAN interpreter where he was to reside, both the interpreter and lawyer understood N to be referring to a particular community. It was only when the interpreter was driving N home, with N giving directions on how to get there, that it was discovered that he was actually referring to a different community altogether.

It has arguably been the case that N was not able to comply with his bail because he did not understand what his bail conditions were. N has subsequently spent a lengthy period of time remanded in custody as a result. Whilst in custody, N is not provided appropriate services or assistance. He relies heavily on relatives who are also in custody. He is unable to hear bells, officers' directions and other essential sounds in the prison context. At one point, it was alleged that N was suicidal and he was moved to a psychiatric facility as a result. N denied the allegation but was unable to properly explain himself to resist his transfer.

¹ Senate Community Affairs References Committee, Parliament of Australia, *Hear Us: Inquiry into Hearing Health in Australia* (2010) 145.

Case study - Barry: A Rehabilitation Success Story

The following case study was provided by Phoenix Consulting to the Senate Community Affairs References Committee 2010 Inquiry into Hearing Health in Australia and was included in the Committees final report.²

Barry was in his forties and suffered from persistent middle ear disease in both ears which caused severe hearing loss which continued to as he got older. He also had a long history of involvement with the criminal justice system, had been to jail a number of times, and had a very negative relationship with police. Police who had pulled Barry over in his car would tend to raise their voices when it was clear Barry had trouble understanding them. However, this often provoked anger and aggression from Barry who felt they were shouting at him. On a number of occasions this resulted in his arrest.

Barry was often excluded from family conversations, sitting with family members but rarely included in the discussion. He had found it too stressful to join in Community Development Employment Program activities, because of the communication difficulties he experienced in working in teams.

Barry had been trying to get a hearing aid for 20 years without success. When his hearing loss was first identified as an adult, he was too young to qualify for a free hearing aid and too poor to afford to buy one. When Barry finally became eligible to receive a free hearing aid, the complex bureaucratic processes involved were a major obstacle, because it required literacy and phone communication skills that Barry did not have. Barry was given a personal amplification device while he waited hopefully for a hearing aid, which a year later had yet to happen. After Barry had used the relatively inexpensive hand held or 'pocket talker' amplification device for a month, he and his wife described the changes that the device had made in Barry's life. He was generally much less stressed. He was able to participate in family discussions, and was now much more engaged in family life. He was able to establish a more positive relationship with local police, as he could now have a conversation with them. He was able to participate more easily in culturally important hunting and fishing activities because he could hear people when they called out in the bush.

When Barry was finally fitted with hearing aids he was a changed man. He found the hearing aid even better than the portable amplification device. He was successful in gaining a supervisory position in his workplace. He described how both he and his family experienced much less stress and frustration now he had a hearing aid.

² Senate Community Affairs References Committee, above n 1, 143-4.

Appendix C

Australia's International Human Rights Obligations

Under international law the Commonwealth Government has numerous human rights obligations that it has committed itself to fulfilling. Under international law the Commonwealth Government is also required to fulfil such obligations on a nationwide basis regardless of Australia's federal political organisation. Below is a summary of the most relevant international law instruments to which Australia is a party, that compel the Commonwealth Government to provide for a person's right to an interpreter in judicial proceedings.

- *The Universal Declaration of Human Rights 1948* states that everyone has the right to equality before the law, the right to equal protection of the law without discrimination, and the right to a fair hearing in the determination of any criminal charges against him or her.³
- *The International Convention on the Elimination of All Forms of Racial Discrimination 1965* states that everyone has the right to equal treatment before tribunals and all other organs administering justice without distinction as to race, colour or national or ethnic origin. The Convention was ratified by Australia on 30 September 1975.⁴
- *The International Covenant on Civil and Political Rights 1966* provides for numerous rights associated with the use of interpreters. These include, the right upon arrest to be informed in a language that one understands of the reasons for their arrest and any charges laid against them, the right to communicate with counsel, the right to the free assistance of an interpreter if one cannot understand or speak the language used in court in criminal proceedings, the right to equality before courts and tribunals and the right to the equal protection of the law.⁵ This Convention was ratified by Australia in August 1980.
- General Comment No 32 by the Human Rights Committee, the treaty body attached to the Covenant, states that the right to equality before courts and tribunals encompasses the principles of equal access to courts and tribunals and equality of arms. This second principle, that of equality of arms, means that "the same procedural rights must be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant".⁶ The Committee states that this principle applies not only in criminal proceedings, but in civil proceedings also, in that "each side must be given the opportunity to contest all the arguments and evidence adduced by the other party".⁷ Furthermore, the Committee states that fulfilling the principle to equality of arms may "require the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined".⁸ The Committee finally states that failure to provide an interpreter may also violate the equality of arms principle enshrined in the right to a fair

³ *The Universal Declaration of Human Rights*, adopted 10th December 1948, arts 7, 10.

⁴ *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 1249 UNTS 13, art 5(a) (entered into force 4 January 1969).

⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, arts 9 (2), 14 (3) (b)(f), 26 (entered into force 23 March 1976).

⁶ *General Comment No. 32*, UN Human Rights Committee, 90th sess, [13], UN Doc CCPR/C/GC/32 (2007)

⁷ *Ibid.*

⁸ UN Human Rights Committee, above n 4, [13].

trial in regards to a person's right to communicate with counsel in the preparation of their defence at both the *pre-trial* and *trial* phases of criminal proceedings.⁹

- In 2009 the United Nations Human Rights Committee stated that in order to ensure equal access to justice for all, the Commonwealth Government should provide adequate funding for Aboriginal and Torres Strait Islander legal aid, including for interpreter services.¹⁰
- The *Convention on the Rights of the Child 1990* states that a child has the right to be protected against all forms of discrimination, the right to be heard in judicial and administrative proceedings and to understand any charges laid against him or her and have adequate assistance in placing a defence.¹¹ This Convention was ratified by Australia in December 1990.
- The *United Nations Declaration on the Rights of Indigenous Peoples 2007* states that States shall take effective measures to ensure that Indigenous peoples' right to use their own languages is protected and to also ensure that Indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.¹² On 3 April 2009 the Commonwealth Government formally gave its support for the Declaration.
- In 2010 the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor James Anaya, noted that the lack of interpreter services for Aboriginal and Torres Strait Islander criminal defendants within Australia was a major concern.¹³ He also stated that additional funds should be immediately provided so as to ensure that access to an interpreter is guaranteed in all criminal proceedings and, where necessary for a fair hearing, in civil matters also.¹⁴

⁹ Ibid [32].

¹⁰ *Concluding Observations of the Human Rights Committee: Australia*, UN Human Rights Committee, 95th sess, [25], UN Doc CCPR/C/AUS/CO/5 (2009).

¹¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, arts 2 (1), 9 (2), 12, 40 (b)(vi) (entered into force 2 September 1990).

¹² *United Nations Declaration on the Rights of Indigenous Peoples*, adopted 13 September 2007, art 13.

¹³ James Anaya The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *The Situation of Indigenous Peoples in Australia*, Human Rights Council, 15th sess, [50], UN Doc A/HRC/15/ (2010).

¹⁴ Ibid [104].

Appendix D

Relevant Domestic Legislation and Case Law

The following is a summary of relevant legislation and Australian case law in regards to Australia's legal obligation to provide for Aboriginal and Torres Strait Islander peoples' right to an interpreter in legal proceedings.

Legislation

- The *Racial Discrimination Act 1975* (Cth) gives all persons despite race, colour or ethnic or national origin the right to equality before the law.¹
- Subsection 14 (1) of the *Evidence Act 1929* (SA) entitles a witness to the assistance of an interpreter where the native language of a witness who is to give oral evidence is not English and where the witness is not reasonably fluent in English.
- Section 131A of the *Evidence Act 1977* (Qld) states that a court may order that an interpreter be provided for a complainant, defendant or witness, in a criminal proceeding if the court is satisfied that the interests of justice so require.
- Subsection 63A (1) of the *Evidence Act 1971* (ACT) states that if a party or a witness in proceedings is unable to communicate effectively in English or is unable to hear or speak effectively than the court shall permit that they be assisted by an interpreter. Further, subsection 63A (3)(a) states that in criminal proceedings it is the responsibility of the prosecutor to provide an interpreter where deemed necessary under subsection 63A (1).
- Section 30 of the *Evidence Act 1995* (Cth), the *Evidence Act 2008* (VIC), the *Evidence Act 1995* (NSW) and the *Evidence Act 2001* (Tas) state 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.
- Section 43J of the *Criminal Code Act* (NT) states that a person charged with an offence is unfit to stand trial if the person is unable to understand the nature of the charge against him or her; unable to plead to the charge and to exercise the right of challenge; unable to understand the nature of the trial; unable to follow the course of the proceedings; unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or unable to give instructions to his or her legal counsel.
- Section 59 (2) of the *Criminal Procedure Act* (WA) states that for matters dealt with in the Magistrates Court (either simple offences or indictable offences dealt with summarily) before requiring the accused to plead to the charge, the court must be satisfied the accused understands the charge and the purpose of the proceedings.

Case law

It is a fundamental principle of the criminal law that not only should an accused person be physically present for their case, but that they should also be able to understand the

¹ *Racial Discrimination Act 1975* (Cth) s 10.

proceedings and the nature of the evidence against them. This has become evident throughout Australian case law.

- In *Ebatarinja v Deland*² the accused was facing a committal hearing in the High Court of Australia in relation to a charge of murder. He was a deaf mute Aboriginal man from Central Australia who was not capable of understanding committal proceedings and was unable to communicate with lawyers. It was accepted that it would not be possible to find a suitable interpreter.

The High Court stated that:

“On trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her. In *Kunnath v The State*, the judicial committee of the Privy Council said:

‘It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him’.

If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial. In *R v Willie*, Cooper J is reported to have ordered four Aboriginal prisoners to be discharged on a charge of murder when no interpreter could be found competent to communicate the charge to them.”³

In *Ebatarinja v Deland*, the High Court held that as the defendant was not capable of understanding the proceedings, the Court had no power to continue with the committal proceedings.⁴ The effect of the decision was that the murder charge was permanently stayed.⁵

- In *Frank v Police*⁶, the Supreme Court of South Australia overturned an earlier sentence against a 27-year old Aboriginal man from the APY Lands on the basis that repeated failures to provide the man with a qualified interpreter meant that he had not received a fair hearing.⁷

The Supreme Court stated that:

The State has a responsibility to ensure that persons who are charged with offences understand the nature of the charge, are able to instruct their legal representatives and are able meaningfully to obtain advice from their legal representatives. The fact that an interpreter was not available and that a prisoner was asked to interpret are matters of grave concern.⁸

² (1998) HCA 62.

³ *Ebatarinja v Deland* (1998) HCA 62, [26-7].

⁴ *Ebatarinja v Deland* (1998) HCA 62, [33].

⁵ *Ebatarinja v Deland* (1998) HCA 62, [33].

⁶ (2007) SASC 288.

⁷ *Frank v Police* (2007) SASC 288, [70].

⁸ *Frank v Police* (2007) SASC 288, [22].

The Supreme Court also stated that:

It is a fundamental right which must be afforded to all defendants who face criminal prosecutions to have an interpreter who can explain the nature of the proceedings and ensure that a defendant understands what is being said in court. It is not uncommon during counsels' submissions on sentence that a defendant will correct counsels' submissions, or instruct counsel to add something that has not been put to the Court which is of relevance. A failure to afford a defendant an interpreter, in circumstances where the defendant cannot understand the proceedings, will render proceedings unfair. If the Court is unable to provide an interpreter and the defendant is, therefore, unable to receive a fair hearing, the Court possesses the power to stay the proceedings.⁹

In *Frank v Police*, due to the failure to provide the defendant with a qualified interpreter the Supreme Court held that the sentence of the Magistrate be set aside and that the re-sentencing of the appellant be adjourned until an interpreter became available.¹⁰ Furthermore, the Supreme Court held that if an interpreter did not become available within a reasonable time, a stay of the proceedings would be ordered.¹¹

- In 1976, the Northern Territory case of *R v Anunga*¹² provided judicial recognition of the need for interpreters in police interviews. In particular, *R v Anunga* highlighted the need for an interpreter if an Aboriginal suspect did not have the understanding of English at the same level as a non-Aboriginal person of "English decent".¹³ The principles established in *R v Anunga* have been recognised in other jurisdictions around Australia as measure of a fair interrogation.¹⁴

⁹ *Frank v Police* (2007) SASC 288, [70].

¹⁰ *Frank v Police* (2007) SASC 288, [75-6].

¹¹ *Frank v Police* (2007) SASC 288, [76].

¹² (1976) 11 ALR 412.

¹³ *R v Anunga* (1976) 11 ALR 412, [1].

¹⁴ See *R v Williams* (1992) 8 WAR 265, [273]; *R v Webb* (1994) 74 A Crim R 436, [445]; *R v Njana* (1998) 99 A Crim R 273; *R v Taylor* (1999) ACTSC 47; *R v Warrell* (1999) 1 VR 671, 678.