Reviews

Cross-cultural Communication In Legal Settings

edited by Anne Pauwels; Community Languages in the Professions Unit, Language and Society Centre, National Languages and Literacy Institute of Australia and Faculty of Law Monash University, Melbourne, 1992; 112 pp; $20.00.

This report aims to address the problems of communicating across cultures. It is a practical resource for lawyers with clients from non-English speaking backgrounds (NESB). Pitched at legal practitioners, it is part of an ongoing project which also involves the development of community language courses for a range of professionals. The report is the work of an interdisciplinary team with an impressive and useful range of backgrounds — academic specialists in communication and linguistics, a clinical legal educator, a language studies scholar who has worked as a translator and lectured in translation at university, an experienced solicitor with a background in community legal centres and a degree in linguistics, and the distinguished specialist in communication with Aboriginal people, Diana Eades.

The report introduces the issues, presents a generally cogent and persuasive case for the importance of effective communication with NESB clients, and outlines a range of basic strategies for use in relevant professional settings such as initial and subsequent interviews, conferences with counsel, court appearances and letters. It has helpful lists of further readings in a number of areas. It contains good information about interpreting services.

The contributors are generally strongly in favour of using properly accredited interpreters and critical of untrained 'language aides'. While one chapter illustrates potential practical and ethical problems if you do not use professionals, and suggests how to minimise the potential damage if you cannot, the chapter specifically on legal interpreting suffers from an uncritical and insufficiently practical endorsement of this principle. After all, as the report acknowledges, the main inhibitor of using interpreters is cost. Particularly in the current economic climate with high legal fees, you need more than assertions about the desirability of interpreters and the complexity of the interpretation process to get more lawyers to use them. Statements like 'you have as much right as your client to insist on working with professional interpreters only' (p.72) are not the best way. And the practical problems of using professional interpreters deserved space — like the difficulty in getting hold of interpreters who can work effectively with dialect speakers, or finding women interpreters for women clients from particular ethnic groups who are able to attend evening meetings (as is often needed at community legal centres).

There is the issue, too, of managing interpretation in the client's best interests when he or she is functionally illiterate in both the first language and English. Strategies for dealing with this would have been helpful, as would strategies for dealing with NESB clients whose limited competence in English makes them reluctant to co-operate with the interpretation process in the courtroom setting, and risking antagonising the tribunal and contributing to the general hostility of some judicial officers to the use of interpreters.

This report has some difficulty in finding its level. It seems best suited to the needs of trainee or junior lawyers, or those with little practical exposure to NESB clientele or to multicultural issues. This is emphasised by Susan Campbell's chapter on 'Communicating with Clients in Legal Settings', which (like much of Chapter 7) seems general rather than crosscultural in focus; Campbell assumes almost no exposure to client servicing.

The report is also limited by its insistence that issues of language and culture — specifically legal culture — can be readily separated. The various contributors, and particularly Chapter 2, frequently revealed this as the profoundly problematic presumption that current theoretical work on language and culture suggest it is. On the other hand, Diana Eades' section on communicating with Aboriginal clients was both technically informed and practical in approach, and would be useful to practitioners (and judicial officers) of a wide degree of experience.

In short, this is a promising start to addressing the problems lawyers have in adequately serving the needs of NESB clients. It would make an excellent text for law students in communications skills and legal writing courses. Materials which effectively address the needs and experience of practising lawyers and judicial officers will hopefully follow from this work — particularly material designed for those who are neither 'converted' to the desirability of lawyer responsibility for effective crosscultural communication or client, witness and litigant communication generally, nor sensitised to multicultural issues.

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The Modern Contract of Guarantee

by J. Phillips and J. O'Donovan; Law Book Company, Sydney; 1992; $145, hardback.

The second edition of 'The Modern Contract of Guarantee' by Dr John Phillips and Dr James O'Donovan, is a weighty tome — 3.5 kilograms to be precise — and considerably expanded from the first edition only a few years ago. As any good credit lawyer will tell you, working with guarantees is a recession-proof practice. It would appear the same is true for academics.

The objective of this book is to provide a statement of 'the law' in relation to guarantees. Within the limits of this focus it is worthy and informative, providing a rigorous overview of the law. There is little statutory intervention in the area of guarantees, leaving most principles to be teased out through case law. The research in this respect is thorough, and the analysis detailed and only occasionally dense for the lawyer unfamiliar with this area.

Its objective is, however, limited. The central relationship between guarantor and lender is not subjected to critical scrutiny. For many years now the con-

sumer movement has criticised this relationship as profoundly unequal and open to abuse. The guarantor, having no immediate interests in the transaction and receiving no benefit from it, usually takes a passive role in any negotiations. The guarantor is therefore peculiarly susceptible to being misled by either the borrower or the lender, whether actively or by omission. The law in this area has encouraged this 'conspiracy of silence'; the lender is usually best able to protect its own interests by telling the guarantor as little as possible.

The widespread use of guarantees, especially in the 1980s, enabled financial institutions to avoid the more dire consequences of poor lending decisions. Obtaining a guarantee from a person with solid security (typically the family home of the borrower's parent/s) was a substitute for proper credit assessment techniques. While institutions vary in their practice, in my years of experience as a credit lawyer I have seen clear evidence of this. Cases include the bank which lent $200,000 to a 20-year-old business whizz kid for share market speculation, and the bank which lent money to a person called 'Monsieur Le Phone Fun'. (An extremely favourable settlement was negotiated by shaming the bank involved about lending money to someone with such a name.)

Lenders have adopted a number of practices to procure guarantees in situations perhaps not as extreme as these, but nevertheless very disadvantageous to the guarantor. These practices range from the careless or indifferent to the fraudulent. They include not explaining 'all moneys' guarantees where the guarantee is not simply for one advance, as the guarantor commonly believes, but for any advance to the borrower in the future whatsoever. (This is known as 'Love Never Dies'.) They include denying the guarantor access to financial information about the borrower when this same information has led the lender to require a guarantee. Other common scenarios are the lender arming the debtor with the documents to procure the guarantor's signature (the 'Poisoned Chalice'), or the lender bullying the guarantor into signing in order to redeem a failing loan (the 'Python').

In general, lenders have endeavoured to meet the legal obstacles to these practices, not by altering their procedures, but by exploiting the consumer's lack of bargaining power. Most guarantees now sprawl over oceans of words, as the lawyers serving banks and financial institutions draft exclusion clause upon exclusion clause. These clauses are the armour of battle, one between unequal forces.

While there are rounded references in the text to 'The Merchant of Venice', for example, an important part of the history of guarantees has been omitted from this book. In the 19th century the courts, exercising a jurisdiction in equity, were protective of the rights of guarantors. They would readily set aside or discharge guarantees by finding that the bargain had been unfairly struck. Implicit in this approach was a recognition that the relationship between guarantor and lender was one that embodies public policy considerations as to fairness. In the interests of equity, the courts would intervene to imply terms into the contract of guarantee.

These protections have been eroded. The myriad clauses of the modern standard form contract of guarantee represent the response to this history. Lenders have imposed detailed and specific written contractual terms that emasculate these protections. The courts have reverted to the fiction that a contract is a bargain freely negotiated between equals.

It is disappointing that these issues receive no attention in this text. While O'Donovan and Phillip do make some suggestions for reform in other areas, they do not acknowledge the considerable and sustained criticisms of guarantees by the consumer movement. The book uncritically adopts the concept that the consumer will be empowered and informed by reading their text, and to be able to negotiate equally and critically with a lender over the content of any guarantee.

At a time of standard form contracts and a lack of competition in the financial marketplace, this legal fiction disadvantages consumers, and is urgently in need of a new approach.

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Administrative Law Does The Public Benefit?

edited by John McMillan; Australian Institute of Administrative Law, Canberra, 1992; $35.

This book is a collection of papers from the proceedings of the Australian Institute of Administrative Law Forum held in April 1992. It is a diverse and engaging account of the current operation of federal administrative law.

As the title suggests, the focus of the balance of the papers in the volume is individuated justice and the issue of access. As Jill Huck puts it 'the issue of access is intrinsically linked to the issues of individual and general public benefit'.

William de Maria is among the more vocal critics of Australian administrative law. De Maria argues that the AAT's proposed fee increases, which may impede access to the AAT are 'obscene' (p.120) and that its 'legal-managerialist' approach has meant that 'the AAT has now left its community of origin, and is circulating social reality in its own judicial orbit' (p.119).

A less strident tone is adopted by Julian Dine, who argues that improving access is about adopting a 'bottom-up' approach to administrative review (pp.3-4). He redirects the focus of reform onto 'simple, perhaps mundane, practicalities' such as plain English material, 'hot lines' and videos to inform potential users about the system. Concern with ways of improving access also dominate other contributions: Michael Raper considers the importance of costs to the consumer in social security appeals; Jill Huck considers access issues for consumers in remote areas; and Denis Tracey and Loula Rodopoulos, in separate contributions, discuss the operation and implications of the ALRC's Multicultural Project and the AAT's Access and Equity Program.

How critical should we be of our administrative law? Is the AAT out of touch or just in need of fine-tuning? Although this volume covers a diverse range of matters, it does not answer these questions. Rather, it discloses an apparent lack of consensus in the administrative law community as to what problems exist and what reforms are necessary to address these problems.