

ANTI-DISCRIMINATION COMMISSION
NORTHERN TERRITORY

GAVIN ANKIN First Applicant
AND:
REGGIE BARA Second Applicant
AND:
MARCUS CAMERON Third Applicant
AND:
STANLEY KERR Fourth Applicant
AND:
CLARENCE MAMARIKA Fifth Applicant
AND:
DESMOND MAMARIKA Sixth Applicant
AND:
NORTHERN TERRITORY OF AUSTRALIA Respondent

REASONS FOR DECISION

BACKGROUND

1. These proceedings concern complaints of discrimination made by six Aboriginal men and their legal representatives employed by the North Australian Aboriginal Legal Aid Service. The complaints arise because the men allege that the Northern Territory Interpreter Service failed or refused to provide each of them with interpreters of their own language for the purposes of understanding and responding to various criminal charges that had been laid against them.
2. The complaints allege that:
 - (a) the Respondent through the Northern Territory Interpreter and Translation Service ("NTITS") refused or failed to provide interpreters in Anindilyawka, Burarra and Kunwinjku to enable NAALAS lawyers to communicate with their clients;

- (b) the Respondent through NTITS, refused or failed to provide interpreters in these languages for the Complainants' appearances in Court; and
 - (c) by refusing or failing to provide interpreters the Respondent has failed to accommodate a special need of the Complainants.
3. The background to the complaints is a very unfortunate failure by the Government of the Northern Territory over many years to provide an adequate interpreter service for Aboriginal people. A failure which persisted despite the creation of the NTITS until 10 April 2000 when the Aboriginal Interpreter Service was created and became part of the Office of Aboriginal Development: Paragraph 53 Affidavit of Janicean Price Sworn on 12 July 2000.
4. The essence of the complaints is a very powerful moral and practical argument that the Respondent should have provided an interpreter service for Aboriginal people. Not only were the decisions of the Government not to do so in the past wrong but they were unjustifiable as the provision of an Aboriginal interpreter service has always been feasible.
5. However, when considering such complaints it is important to have regard to what Justice Burchett said in *Re Limbo* (1989) 84 ALJR 241 at 242. He said:

"... when one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce. It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform another. One can readily understand that there may be disappointment in the performance by one branch or another of government of the functions which are allocated to it under our division of powers. But it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be overcome."

THE ISSUES

6. The following issues arise for determination in these proceedings:

- (a) What was the nature of the service provided by NTITS?
- (b) Did NTITS refuse or fail to provide interpreters to the NAALAS lawyers to communicate with their clients and, if so, did such a refusal or failure amount to discrimination?
- (c) Did NTITS refuse or fail to provide interpreters in the above languages for the Complainants' appearances in Court and, if so, did such a refusal or failure amount to discrimination?
- (d) Did the Complainants have a special need and, if so, was there a failure to accommodate the special need as required by s 24(2) of the *Anti-Discrimination Act (NT)*?
- (e) Did the services provided by NTITS constitute a special measure and, therefore, did the conduct of NTITS have the protection of s 57 of the Act?

THE FACTS

7. As to the complaint made by Gavin Ankin, having considered all of the evidence, I make the following findings of fact:
- (a) Gavin Ankin is an Aboriginal man from Maningrida. His first language is Burarra.
 - (b) On 1 August 1999, Mr Ankin was arrested in Maningrida. He was charged with having sexual intercourse without consent contrary to section 192(3) of the *Criminal Code* and refused bail: Respondent's Book ("RB") 41.
 - (c) On 3 August 1999, Mr Ankin appeared in the Magistrates Court in Darwin before Wallace SM. Ms Gowans, a solicitor employed by NAALAS appeared for Mr Ankin. The Court file indicates that an interpreter was required for the committal: RB 50. There is no evidence that Ms Gowans made a request to the DPP in accordance with its policy to provide an interpreter.
 - (d) On 4 August 1999, Ms Gowans sent a fax to the NTITS requesting the services of an interpreter in 'Burarra' (*Maningrida*): RB pages 27-28. The request was for an interview to obtain instructions in relation to bail to be held at the Berrimah Gaol on 5 August 1999 and then for an interview and

court appearance on 13 August 1999.

- (e) On 6 August 1999, Ms Price, the Director of the office of Ethnic Affairs, wrote to Ms Gowans acknowledging receipt of her request dated 4 August 1999: RB page 29. Ms Price stated that she had *'advised on several recent occasions, the NTITS does not provide interpreting services in Aboriginal languages'*. The letter refers Ms Gowans to the *'Office of Aboriginal Development which has information on Aboriginal people who have interpreting skills that may be of assistance to NAALAS'*.
- (f) On 9 August 1999, NAALAS undertook its own inquiry in relation to identifying an interpreter. It was not until 11 August 1999, that Ms Smith from NAALAS spoke to Ms Burns, the Coordinator of the Victim's Support Unit of the Director of Public Prosecutions ("DPP") and requested that she assist in finding a Burarra interpreter. The note indicates that Ms Burns phoned back that afternoon with a list of possible interpreters which are then set out in the memorandum: RB page 32.
- (g) On 13 August 1999, Mr Ankin appeared in Court before Wallace SM. Mr Strickland represented him and Mr Perry appeared for the Crown. The file note, which is set out at RB page 36, indicates that no application for bail was made on 13 August 1999. Mr Strickland sought that the matter be adjourned for the purpose of obtaining a psychiatric report. Mr Strickland did not give evidence before the Commission but the file note indicates that an interpreter was available for Mr Ankin for his court appearance on 13 August 1999: RB 34.
- (h) Mr Ankin was next before the Court on the adjourned application for bail on 20 August 1999. Ms Gowans appeared for him on this occasion and Mr Perry appeared for the Crown. There appears to have been no attempt made by NAALAS to arrange an interpreter for this date. There was no request made to any person at either the NTITS or the DPP. The bail application was adjourned and as a result of discussions between Ms Gowans and the Prosecutor, the Prosecutor agreed to provide an interpreter.
- (i) On 23 August 1999, the DPP wrote to NAALAS indicating that they would provide an interpreter but not pay the costs of the interpreter assisting them to obtain instructions from their client.
- (j) On the same day, Mr Ankin lodged a complaint of race discrimination.

- (k) On 25 August 1999, Mr Ankin was again before the Court. Mr Strickland appeared for him. Bail was granted with a \$25,000 a surety and the file indicates that an interpreter was present. The matter was then adjourned for an oral committal to 13 September 1999.
- (l) There were then a number of further Court appearances between 16 November 1999 and 19 May 2000. On 19 May 2000, Mr Ankin came before the Supreme Court for sentencing by Chief Justice Martin. He was represented by Mr Strickland and an interpreter was present. He was sentenced to three years imprisonment commencing from 16 November 1999: RB pages 43-48.
- (m) In the complaint Mr Ankin alleges at RB page 16 that he was not provided with the assistance of an interpreter in the Darwin Magistrates Court on 3 August 1999. However, there was no request for an interpreter until 4 August 1999. This request was refused by the NTITS on 6 August 1999.
- (n) In relation to the effect of the alleged discrimination (RB page 16), Mr Ankin alleges that he could not be represented without an interpreter and that NAALAS was unable to obtain instructions in relation to making an application for bail. It is alleged that his detention between 3 August and 13 August was solely attributable to the lack of an interpreter. It was further alleged that his detention from 20 August to 25 August is also attributable to a lack of an interpreter. However, the days spent in custody were taken into account during sentencing: RB 48.
- (o) There is no evidence that the time spent in detention between 3 - 13 August and 20 - 25 August 1999 was a direct or indirect result of not having an interpreter. There is evidence that an interpreter was provided when a request was made to the DPP. An interpreter was available on 13 August 1999. It is clear that it was possible for an interpreter to be organised prior to each court appearance. There is no basis for the claim that the Government refused to provide an interpreter on those occasions.
- (p) In relation to the claim that Mr Ankin had a 'special need' on 3, 13 and 20 August 1999, there was no evidence to lead to establish his particular need nor that it was a special need because of his race. On 13 August 1999, he did have the assistance of an interpreter. For the appearances on 3 and 20 August 1999, no request had been made for an interpreter.

8. As to the complaint made by Reggie Bara, having considered all of the evidence I make the following findings of fact:
- (a) Reggie Bara is from Groote Eylandt. His first language is Anindilyawka.
 - (b) Following Mr Bara's failure to attend at Court on 16 March 1999, a warrant was issued for his arrest. Mr Bara was arrested on 17 March 1999 at Groote Eylandt and refused bail.
 - (c) On 18 March 1999, Mr Bara was before the Court and Mr Batton, a solicitor employed by NAALAS, appeared for him. Mr Peach appeared for the Crown. No application for bail was made and Mr Batton sought an adjournment. No request was made for an interpreter and there is no notation on the Court file about the need for an interpreter. Mr Batton was not called to give evidence.
 - (d) The matter was next in Court on 22 March 1999 and Mr Batton again appeared for Mr Bara. Again no application for bail was made. No request for an interpreter was made.
 - (e) On 24 March 1999, Mr Bara was in Court represented by Mr Kenna, a solicitor employed by NAALAS. He did not make an application for bail. He did not refer to the need for an interpreter.
 - (f) On 5 May 1999, Mr Bara appeared in Court. Ms McClintic, who did not give evidence before this Commission, appeared for Mr Bara. The Court files indicate that Mr Bara would require an interpreter: RB page 95. There is no evidence that Ms McClintic made a request for an interpreter to the DPP.
 - (g) On 10 May 1999, Ms Gowans advised the Registrar of the Court of the need for an interpreter for Mr Bara. There was no request made to the NTITS and no request to the DPP.
 - (h) On 12 May 1999, Mr Bara attended in Court before Cavanagh SM. Ms Gowans appeared for Mr Bara. During the committal proceeding, Ms Gowans made an application to abort the committal proceedings on the basis that no interpreter was present in Court. Ms Musk opposed the application and Cavanagh SM agreed reluctantly to adjourn the proceedings part heard: RB page 96. There was an issue about whether

Mr Bara required an interpreter. The matter was adjourned to 17 May 1999 to hear argument about whether he required an interpreter.

- (i) On 13 May 1999, the Registrar contacted Ms Gowans about the request for an interpreter.
- (j) On 16 May 1999, Mr Sheldon attended the Berrimah Correctional Centre and undertook an interpreter test for Mr Bara. A copy of the interpreter test for Mr Bara is Exhibit C. The purpose of the test being to demonstrate that Mr Bara did require an interpreter. It was prepared to respond to Cavanagh SM's query about the need for an interpreter.
- (k) On 17 May 1999, the matters were stood over to 21 May 1999 because of other Court commitments of Ms Gowans and Ms Musk.
- (l) On 21 May 1999, Mr Bara and Mr D Mamarika appeared in Court. Ms Gowans appeared for both defendants. An interpreter was organised and paid for by the DPP to assist both defendants in the proceedings that day.
- (m) On 7 June 1999, Mr Bara appeared in the Supreme Court by way of video when his matter was mentioned.
- (n) On 7 July 1999, Mr Bara attended at the Supreme Court when his matter was mentioned. The matter was adjourned.
- (o) On 22 July 1999, Mr Strickland and Mr Brown of NAALAS visited Mr Bara and Mr D Mamarika at Berrimah. An interpreter was present for the purpose of obtaining instructions.
- (p) On 8 September 1999, Mr Bara attended at the Supreme Court and pleaded guilty to five charges. He was represented by Mr Strickland and the matter was adjourned for sentencing. On that occasion an interpreter was present, arranged and paid for by the DPP.
- (q) On 22 September 1999, Mr Bara lodged a complaint of race discrimination.
- (r) On 22 October 1999, Mr Bara appeared in the Supreme Court for sentencing before Martin CJ. The judge noted that Mr Bara had been in custody since 17 March 1999. The Court sentenced Mr Bara to 18 months plus three months mandatory sentence with a non-parole period

of nine months with the sentence commencing on 17 March 1999. Mr Bara was also ordered to pay compensation of \$435: RB 115-122.

- (s) No request was ever made to the NTITS for an interpreter for Mr Bara.
 - (t) The only requests for an interpreter were made to the DPP. All of those requests were met. There is no evidence to support the claim of a refusal of the NTITS to provide interpreter services.
 - (u) There was no evidence lead in relation to the nature of Mr Bara's special need on 18 March, 22 March, 24 March, 5 May, 12 May, 21 May 1999.
9. As to the complaint made by Desmond Mamarika, having considered all of the evidence, I make the following findings of fact:
- (a) Desmond Mamarika is from Groote Eylandt. His first language is Anindilyawka.
 - (b) Following his failure to appear in Court on 16 March 1999, a warrant was issued for his arrest. Mr D Mamarika was arrested on 17 March 1999 at Groote Eylandt and refused bail.
 - (c) On 18 March 1999, Mr D Mamarika appeared in Court and Mr Batton appeared for him. Mr Peach appeared for the Crown. No application for bail was made and Mr Batton sought an adjournment: RB 337. No request was made for an interpreter and there is no notation on the Court file about the need for an interpreter. Mr Batton was not called to give evidence before the Commission.
 - (d) The matter was next in court on 22 March 1999 and Mr Batton again appeared for Mr D Mamarika. Again, no application for bail was made. No request for an interpreter was made: RB 338.
 - (e) On 24 March 1999, Mr D Mamarika was in Court represented by Mr Kenna who did not make an application for bail. Mr Kenna did not refer to the need for an interpreter. The matter was adjourned for a hand up committal: RB 338.
 - (f) On 4 May 1999, Mr D Mamarika appeared in Court. Ms Gowans appeared for Mr D Mamarika. The Court file indicates that Mr Mamarika required an interpreter: RB page 338. On that occasion, Ms Gowans told

the prosecutor, Ms Musk, that NAALAS would arrange for an interpreter. There was no request made pursuant to the DPP policy.

- (g) On 12 May 1999, Mr D Mamarika appeared in Court before Cavanagh SM. During the committal proceeding, Ms Gowans made an application to abort the committal proceedings because no interpreter was present in Court. Ms Musk opposed the application. Cavanagh SM agreed reluctantly to adjourn the proceedings part heard. There was an issue about whether Mr D Mamarika required an interpreter. The matter was adjourned to 17 May 1999 to hear argument about whether he required an interpreter.
- (h) On 16 May 1999, Mr Kenna attended the Berrimah Correctional Centre and undertook an interpreter's test for Mr D Mamarika. A copy of the interpreter test for Mr D Mamarika is Exhibit D and Exhibit E in these proceedings. The purpose of the test being to demonstrate that Mr D Mamarika did require an interpreter.
- (i) On 17 May 1999, the matters were stood over to 21 May 1999.
- (j) On 21 May 1999, Mr D Mamarika appeared in Court. Ms Gowans appeared for both he and Mr Bara. An interpreter was organised and paid for by the DPP to assist both defendants on that day.
- (k) On 12 July 1999, Mr D Mamarika attended at the Supreme Court when his matter was mentioned. The matter was adjourned.
- (l) On 22 July 1999, Mr Strickland and Mr Brown of NAALAS visited Mr D Mamarika at the Berrimah Gaol. An interpreter was present for the purposes of obtaining instructions.
- (m) On 18 August 1999, Mr D Mamarika attended at the Supreme Court before Riley J. He was presented by Mr Strickland. On that occasion an interpreter was present: RB 355. The judge noted that Mr D Mamarika had been in custody since 17 March 1999. The sentence took into account the time spent in custody: RB 380.
- (n) On 22 September 1999, Mr D Mamarika lodged a complaint of race discrimination: RB 318-325.

- (o) The complaint that was lodged by NAALAS makes allegations that there had been discrimination or prohibited conduct with respect to appearances between 5 May to 21 May 1999.
10. As to the complaint made by Marcus Cameron, having considered all of the evidence, I make the following findings of fact:
- (a) Marcus Cameron is a 25 year old man from Jabiru. His first language is Kunwinjku.
 - (b) On 11 May 1999, Mr Cameron was arrested in Jabiru for escaping lawful custody: RB 158.
 - (c) On 24 May 1999, he appeared in the Darwin Magistrates Court before Wallace SM, represented by Mr Kenna. Mr Peach appeared for the Crown. A bail application was made but it was opposed. He was then remanded in custody. There is no indication on the Court file that a request for an interpreter was made by Mr Kenna on that occasion: RB 158, 161.
 - (d) On 26 May 1999, Mr Cameron again appeared in the Magistrates Court. On this occasion Ms Gowans represented him and Mr Peach appeared for the Crown: RB 161. There was no application for bail and no indication that he required an interpreter. The matter was adjourned to Jabiru for 13 July 1999.
 - (e) On 4 June 1999, the matter was mentioned in Court by Mr Kenna. The purpose of the mention was to vary the date for hearing 14 July 1999 at Jabiru.
 - (f) On 5 July 1999, Mr Cameron appeared in Court represented by Mr Kenna. The matter was adjourned to 7 July 1999 for mention with other matters at Darwin. No bail application was made.
 - (g) On 5 July 1999, Mr Kenna wrote to the NTITS requesting an interpreter be provided for his client in Kunwinjku: RB pages 137-138.
 - (h) On 6 July 1999, 'Tim' of the NTITS advised Mr Kenna by telephone that his request for an interpreter for Mr Cameron could not be provided because NTITS did not provide interpreters in Aboriginal languages.

- (i) Mr Kenna did not make a request to the DPP.
 - (j) On the same day, NAALAS arranged for an interpreter for Mr Cameron to be present for his Court appearance on 7 July 1999.
 - (k) On 7 July 1999, NAALAS lodged a complaint of race discrimination: RB page 136.
 - (l) On 12 July 1999, the NTITS confirmed in writing that it was unable to provide an interpreter for Mr Cameron as requested on 7 July 1999: RB 152.
 - (m) On 15 July 1999, Mr Cameron appeared in Court represented by Mr Kenna. Mr Peach appeared for the Crown. There was no application for bail and the matter was adjourned to 16 July 1999.
 - (n) On 16 July 1999, Mr Cameron appeared in Court again represented by Mr Kenna. He pleaded guilty. He was sentenced to two months imprisonment commencing on 21 May 1999. His parole was revoked and the prior convictions in relation to resisting arrest, escaping lawful custody, aggravated assault, aggravated unlawful entry and assault and criminal damage were taken into account. By 20 July 1999, Mr Cameron's sentence was completed.
 - (o) A second complaint of race discrimination was lodged on 20 September 1999: RB pages 141-146.
 - (p) In relation to the allegations of race discrimination, it is clear that no request was made to the DPP for an interpreter to be present on 7 July 1999. In any event an interpreter was present on that day. In relation to his appearance on 16 July 1999, there was no request made to NTITS or the DPP for an interpreter to be present.
 - (q) There was no evidence lead to establish Mr Cameron's special need based on his race.
11. As to the complaint made by Stanley Kerr and Clarence Mamarika, having considered all of the evidence, I make the following findings of fact:
- (a) Stanley Kerr and Clarence Mamarika are juveniles who live on Groote Eylandt. Their first language is Anindilyawka.

- (b) They first appeared in Court on 2 July 1999, represented by Mr Jones of NAALAS. Mr Jones advised the Court of their need for an interpreter on this occasion. A note was made on the file by Wallace SM and no application for bail was made. There is no evidence whether a request for an interpreter was made to the prosecutor. Mr Jones did not give evidence in the Commission. I conclude that no request for an interpreter was made to the DPP.
- (c) On 6 July 1999, Mr Kerr and Mr C Mamarika appeared in Court. Mr Kenna appeared for Mr Kerr and Ms Gowans appeared for Mr C Mamarika. They advised the Court of the need for interpreters. It appears nothing was done by NAALAS between 2 and 6 July to secure an interpreter.
- (d) On 6 July 1999, Ms Gowans contacted the NTITS and requested an interpreter for both Mr Kerr and Mr C Mamarika. She indicated that it was an urgent request because they were juveniles in custody. It appears that no action was taken by NAALAS prior to this mention to organise an interpreter for 6 July 1999. The request was faxed to NTITS at 11.15am indicating that an interpreter was required for 10.00am that morning. NTITS advised that they were unable to assist and suggested that they contact the Office of Aboriginal Development.
- (e) Ms Gowans then attempted to organise an interpreter through the interpreters that NAALAS used on a regular basis and was advised that none were available.
- (f) Notwithstanding that no interpreter was available, Ms Gowans and Mr Kenna proceeded with their application and Wallace SM unconditionally released both of the defendants into the care of NAALAS for the purposes of repatriation to Groote Eylandt. The matters were then adjourned to Groote Eylandt for mention on 20 July 1999.
- (g) Complaints of race discrimination was lodged that day without instructions.
- (h) On 12 July 1999, Mr Kerr was again arrested at Groote Eylandt on new charges. He was refused bail by the police. He then appeared in Court on 14 July 1999. Ms Gowans appeared for Mr Kerr on that occasion and advised the Court of the need for an interpreter.

- (i) On 16 July 1999, Mr Kerr again appeared in Court represented by Ms Gowans and she again advised of the need for an interpreter. No application was made for bail or for release.
 - (j) On 20 July 1999, Mr Kerr again attended at Court. He was represented by Mr O'Connell from NAALAS and an interpreter was present. He pleaded guilty and was sentenced to four months which was suspended after four weeks from 20 July 1999.
 - (k) Mr C Mamarika was also arrested on 10 July 1999 at Groote Eylandt and charged with further offences. The telephone bail application was refused.
 - (l) On 12 July 1999, Mr C Mamarika attended at Court. Mr Kenna appeared for him. An interpreter had been located by NAALAS for the purposes of obtaining instructions and to appear at Court.
 - (m) On 12 July 1999, Ms Gowans made a request to the NTITS to have an interpreter in Anindilyakwa language available for Mr C Mamarika. Again on 12 July 1999, NTITS advised that NAALAS did not provide interpreters in such Aboriginal languages and suggested that they contact the Office of Aboriginal Development at Bachelor College.
 - (n) On 13 July 1999, Mr C Mamarika appeared in Court. He was represented by Mr O'Connell and an interpreter was provided.
 - (o) On 16 July 1999, Mr C Mamarika again appeared in Court and the matter was adjourned. There was no application made for his release.
 - (p) On 16 July 1999, Ms Gowans requested the DPP provide an interpreter for Mr Kerr and Mr C Mamarika for their appearances on 20 July 1999.
 - (q) On 20 July 1999, Mr C Mamarika appeared in Court. He was represented by Mr O'Connell and an interpreter was present. He pleaded guilty and was convicted to three months detention suspended after one month to commence on 20 July 1999.
12. In making the above findings of fact in relation to each of the Complainants it will be noted that I have largely accepted the Respondent's Summary of the Facts. The Respondent's Summary of Facts is supported by the evidence.

13. As to the NTITS I accept the evidence of Janicean Price contained in her Affidavit sworn on 12 July 2001 and I find that:

- (a) NTITS was formally established in the Department of Health and Community Service in 1986/87 with 100% funding by the Commonwealth Department of Immigration and Ethnic Affairs ("DIEA"). This service was established to provide free on-site interpreting and translating service to migrants and ethnic people when accessing Northern Territory Government services.
- (b) NTITS was established on a cost sharing agreement with the Commonwealth contributing 100% for the first three years and thereafter on a reducing scale of 25% per year. This funding did not include funds for the provision of Aboriginal languages to be included in the interpreter services.
- (c) Since 1993/94 NTITS has been fully funded by the Northern Territory Government. NTITS was moved with the Office of Ethnic Affairs to the Department of the Chief Minister in 1993. In 1999/2000, NTITS offered services in 40 languages with 155 registered interpreters and translators.
- (d) The aim of NTITS is to facilitate Northern Territory Government Agencies to communicate with migrant and ethnic people accessing their services. The program was targeted for the benefit of migrants and refugees in the Northern Territory. Such people are a group of people with a particular disadvantage compared to the rest of the community.
- (e) NTITS does not and has never provided interpreters in Aboriginal languages. NTITS has never advertised or held itself out as providing interpreter or translation services in Aboriginal languages.
- (f) The nature of the NTITS service was limited to specific languages which did not include the Anindilyawka, Burarra and Kunwinjku languages: paragraphs 9 and 18 of the Affidavit of Janicean Price sworn on 12 July 2002.
- (g) NTITS was not a relevant service provider. Neither the funding nor the infrastructure existed for NTITS to provide interpreters for speakers of the Anindilyawka, Burarra and Kunwinjku languages with respect to:
 - the NAALAS lawyers taking instructions;

- the Complainants understanding legal advice; and
- understanding Court proceedings.

14. Indeed, it was the evidence of Ms Barbara Weis that an extension of the services provided by the NTITS to include Aboriginal languages was considered by the Respondent but was rejected because of the limited scope of the services provided by NTITS, its limited resources and because it was determined that an Aboriginal Interpreter Service was a very different service to that which NTITS provides: paragraph 23 Affidavit of Barbara Weis sworn on 13 July 2001. Ms Weis opined that through all her research and attendance at working parties, it was clear that the Office of Aboriginal Development was the only agency which was in the position to manage efficiently and effectively the establishment of a permanent Aboriginal Interpreter Service: paragraph 46. I accept her evidence.

CONSEQUENCES OF THE ABOVE FACTUAL FINDINGS

15. Given the above factual findings it is apparent that each of the complaints is misconceived. There was no discrimination against the applicants within the meaning of the *Anti-Discrimination Act (NT)*.
16. The reason that the Complainants were not provided with an interpreter for the relevant Aboriginal languages was because the NTITS did not provide interpreters in these languages. The race of the person requesting an interpreter did not determine whether an interpreter was provided by NTITS. NTITS did not provide the services because it was not part of its mandate, it was not funded to provide the services, it did not have the staff to provide the services and simply was not in a position to provide the services it was requested to provide.
17. There is no evidence that the Complainants were treated less favourably in accessing the services that were, in fact, provided by the NTITS. The evidence was that if a non Aboriginal person requested NTITS to provide an Aboriginal interpreter, their request would also be refused. (See also *Boehringer Ingelheim Pty Ltd v Reddrop* [1984] 2 NSWLR 13 at 20; *Waters v Public Transport Corporation* (1991) 173 CLR 348 at 363).
18. The fact that NTITS did not provide interpreters of Aboriginal languages did not involve 'distinction' or 'restriction' or 'exclusion' or 'reference' by NTITS: *Macedonian Teachers Association v Human Rights and Equal Opportunities Commission* (1998) 91 FCR 8; *Australian Medical Council v Wilson* (1996) 68 FCR 46. The affidavit of Janicean Price explains the history and development of NTITS and the scope of its services.

19. The obligation imposed by the Act is not to discriminate against persons with particular attributes in particular areas. The Act has limited operation and is not the vehicle to challenge Government policy: *Tullamore Bowling and Citizens Club v Lander* [1984] 2 NSWLR 24 at 48 and at 51 to 52.
20. I accept the submission of Ms Eastman who was Counsel for the Respondent that as NTITS never provided "services" of the nature sought by the Complainants and the NAALAS lawyers, there can be no refusal or failure to provide a service. There can be no refusal or failure to provide a service which does not exist.
21. The Act only applies to 'services' that are actually provided or contemplated. The Act does not require a person to provide a new or different 'service': *Scott v Telstra Corporation* (1995) EOC 92-717 at 78,398.
22. I also accept Ms Eastman's submissions that:
 - (a) in relation to the appearances in Court, on each occasion that a timely request was made to the Office of the Director of Public Prosecutions ("DPP") for an interpreter, an interpreter was provided;
 - (b) there is no evidence that the Complainant had a special need based on *race*. The Complainants have not identified any special need based on *race* and an inability to speak English is not the attribute of "race": *Gwynedd County Council v Jones* [1986] ICR 833 at 386. Further, a failure to accommodate a special need based on *language* or *non English speaking status* is not an attribute covered by section 19(1) of the Act; and
 - (c) there was no basis for the Complainants to contend that NTITS knew or ought to have known that the Complainants required interpreters for their dealings with their own lawyers.
23. There is also some force in Ms Eastman's submission that as the provider of legal services, it was NAALAS that bore the responsibility of being able to communicate with its clients.
24. As to the issue of special needs and the defence of special measures pursuant to s 57 of the Act, I again accept the Respondent's Submissions.
25. At paragraphs 47 to 68 of the Respondent's Submissions, Counsel for the Respondent stated:

"Duty to accommodate special needs

47. *The Points of Claim do not disclose how the Complainants contend that there has been a failure to accommodate a special need by NTITS. It is not clear how it is said that the NTITS had a duty to accommodate a special need and how it failed to do so.*
48. *The Act does not define a 'special need'. However, the Act does require the special need to be because of a person's race. The Respondent submits that on a proper construction of section 24(1) of the Act, the 'special need' would be a need which applies to all people of the particular race. The special need is not a need based on personal circumstances but because of inherent features of the race. It must be a common feature for any person of the particular race. It is submitted that it is not an inherent feature of Aboriginality that a person requires an interpreter.*
49. *The first step in considering whether section 24(1) applies is the identification of a special need. There has been no evidence of the special need of the Aboriginal race for the purpose of these complaints. As far as the Respondent can discern, the only special need appears to be that the Complainants required interpreters on some occasions because they spoke English as a second language. It is submitted that English as a second language is not the attribute of race. There is no evidence to establish that the inability to speak English fluently comprises a person's race: Gwynedd County Council v Jones [1986] ICR 833 at 836. Section 24(1), unlike section 20(2), does not provide for characteristics which appertain or are imputed because of race.*
50. *Further, even if there was a special need because of race, there has been no evidence of the nature of the failure to accommodate any special needs as required by section 24(2) of the Act.*
51. *Section 24(3) of the Act indicates the nature and level of the accommodation that is required. Section 24 must also be read with section 58 of the Act. Section 58 provides a general exemption to section 24 where accommodating the special needs is unreasonable.*

52. *There is nothing in sections 24 or 58 which can be construed as meaning that the failure to accommodate a special need amounts to an obligation to provide a new or different service. The Respondent submits that the obligation to accommodate a special need is to accommodate that need within the existing services provided.*
53. *Further, the duty to accommodate must be read in the context of the obligation not to discriminate against a person. This limits the nature of the duty to accommodate as a duty to accommodate to the extent that the failure to accommodate the special need would result in discrimination.*
54. *The Respondent submits that it was unreasonable to expect the NTITS to accommodate any special need of the Complainants.*
55. *First, even if NTITS could have provided interpreters in Aboriginal languages, the nature and timing of the particular requests made by the Complainants were unreasonable. The requests for interpreters were not made in a timely manner. In relation to Stanley Kerr and Clarence Mamarika the requests made on 6 July 1999 were made at 11.15am in relation to an interpreter who was required for 10am that morning. The requests were made without any adequate time for interpreters to be organised. In other cases, it can hardly be said that NTITS failed to provide services when, in the case of Desmond Mamarika or Reggie Bara, there was never a request to NTITS.*
56. *Secondly, it was not unreasonable for NTITS not to accommodate any special need of the Complainants where there was a policy existing within the DPP under which an interpreter would be provided for Court appearances if a request was made in a timely manner and in accordance with the policy. The evidence of Colleen Burns, Russell Perry and Sharleena Musk make it clear that an interpreter would be provided. The evidence also shows that when such requests were made by the NAALAS lawyers, they were accommodated. The existence of the DPP police was a means of accommodating the needs of an accused person in Court. There is no evidence that there was no assistance.*

57. *Thirdly, if it is the Complainants' case that the NTITS should have been in a position to provide interpreters for Aboriginal languages on the same terms as it provides interpreters in other languages, then the Respondent submits that this is unreasonable. In 1999, the evidence makes it clear that neither the funding nor the infrastructure existed for NTITS to provide such services: see Prince Affidavit. Ms Weis' evidence also illustrates the difference between the nature of the services provided by the current Aboriginal Interpreter Services and the NTITS.*
58. *The Respondent reserves its right to respond to the oral submissions of the Complainants on this issue, as the written submissions do not identify why the acts of NTITS were unreasonable.*

Defences: Special Measures

59. *Assuming that there is a finding of discrimination and/or a finding of a failure to accommodate a special need, as an overall defence to the complaints, the Respondent submits that section 57 provides a defence based on special measures.*
60. *A special measure is a program, plan or arrangement designed to promote equality of opportunity for a group of people who are disadvantaged. The Act intends that the measures be for a limited duration until equality is achieved.*
61. *the operation of a special measure has been considered in the context of section 8(1) of the RDA. "Special measures" involve action taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals because they require such protection. The measure must be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.*
62. *The nature of special measures was considered by the High Court in Gerhardy v Brown (1985) 159 CLR 70. Brennan J considered the content of a special measure and identified four characteristics:*
- (1) *confers a benefit on some or all members of a class;*

- (2) *the membership of which is based on race, colour, descent, or national or ethnic origin;*
 - (3) *for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and fundamental freedoms;*
 - (4) *in circumstances where the protection given to the beneficiaries by the special measure is necessary in order that they may enjoy and exercise equally with others human rights and fundamental freedoms.*
63. *Having regard to all these requirements, the services provided by NTITS constituted a special measure. While the race of a person does not determine who may access and use the services, the purpose of the service is to assist a group of persons who faced disadvantage within the community. It should be noted that the definition of 'race' in section 4(1) includes 'immigrant status'.*
64. *NTITS provided a service with the sole purpose of ensuring access and equity in accessing NT Government services and agencies. The program was targeted for the benefit of migrants and refugees. It is a group with a particular disadvantage compared to the community generally.*
65. *Ms Price's evidence addresses the history leading to the establishment of NTITS starting with the activities of the Commonwealth Department of Immigration, Local Government and Ethnic Affairs ('DILGEA'). She referred to the Galbally Report. Acting on this report, the Commonwealth provided funding to the Northern Territory Government to establish an interpreter and translation service.*
66. *It was a condition of the Commonwealth funding in the initial establishment of the program that such services be provided to non-English speaking immigrants and refugees who are considered to be disadvantaged and who have a special need for such services when they arrive in Australia.*
67. *The correspondence and policy papers concerning the Northern Territory and Commonwealth agreements between 1986 and 1988, show that the agreement does not restrict the language program*

to migrants and refugees, although it is clear that as an initiative of DILGEA, its principal concern was migrants. The underlying assumptions in the funding arrangements concern assistance to migrants.

68. *So by 1999, NTITS, operating through the Office of Ethnic Affairs, provided limited interpreter/translator services to non-English speaking immigrants and refugees in the Northern Territory."*
26. The Complainants failed to establish a special need of the Aboriginal race for the purposes of these complaints. Further, there was no failure to accommodate a special need.
27. The services provided by NTITS constituted a special measure.

ORDERS

28. Each of the complaints is dismissed.
29. It is the usual practice in this jurisdiction to make no order as to costs. However, this matter does have certain features which may require a different order. In the event that the parties are not able to agree the question of costs, I will hear them further on the question of costs. Alternatively, the parties may wish to mediate the question of costs through an appropriate officer of the Commission.

Dated: 13 March 2003



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S R SOUTHWOOD QC