

## **Australian National Standards for Working with Interpreters in Courts and Tribunals**

***Public Consultation Draft – June 2016***

### **Consultation Paper**

#### **The Judicial Council on Cultural Diversity**

The Judicial Council on Cultural Diversity (JCCD) was established in 2014. It is an advisory body comprised of judicial officers from all geographical jurisdictions and court levels, as well as judicial education and community organisations. It is chaired by the Hon Wayne Martin AC, Chief Justice of Western Australia, and reports to the Council of Chief Justices. The JCCD's aim is to assist Australian courts and tribunals to develop policies and procedures aimed at making them more accessible to Indigenous Australians and migrants and refugees.

#### **Background to this project**

At the time of the last Census, 18.2% of Australian residents spoke a language other than English at home and 3% of Australian residents reported that they spoke English poorly or not at all. With over 300 languages spoken in Australia, it follows that a significant proportion of people coming before a court or tribunal require assistance to understand and be understood in legal proceedings. Interpreters therefore play an essential role in the administration of justice – they are fundamental to ensuring access to justice and procedural fairness for people with limited or no English proficiency.

This project arose out of the JCCD's recognition that there is a pressing need for nationally consistent standards and guidelines concerning working with interpreters in courts and tribunals. The JCCD has developed the attached framework – *Australian National Standards for Working with Interpreters in Courts and Tribunals* – to establish minimum and optimal practices for Australia. It aims to provide courts and tribunals with guidance on engaging and working with interpreters to ensure procedural fairness for people with limited or no English proficiency.

The framework was prepared by a specialist committee appointed by the JCCD, comprising:

- The Hon Justice Melissa Perry, Federal Court of Australia (Chair)
- The Hon Justice Jenny Blokland, Supreme Court of the Northern Territory
- Ms Susan Burdon-Smith, Deputy Head, Residential Tenancies List, Victorian Civil and Administrative Tribunal
- Professor Sandra Hale, Professor of Interpreting and Translation, UNSW Australia
- The Hon Justice François Kunc, Supreme Court of New South Wales
- The Hon Dean Mildren AM RFD QC, formerly a Judge of the Supreme Court of the Northern Territory
- Mr Mark Painting, Chief Executive Officer, National Accreditation Authority for Translators and Interpreters Ltd (NAATI)

- Ms Colleen Rosas, Director, Aboriginal Interpreter Service (NT)
- Ms Magdalena Rowan, Senior Lecturer, Foundation Skills, Interpreting and Translating, TAFE SA
- Professor Anne Wallace, School of Business & Law and Justice, Edith Cowan University
- Ms Carla Wilshire, Chief Executive Officer, Migration Council Australia

## **Overview of the framework**

### Standards

- The Standards include minimum (or baseline) standards – that must be complied with by courts in all circumstances – and optimal (or aspirational) standards – to be met if funding and other circumstances permit.
- Effective communication is a responsibility shared between judicial/tribunal officers, court/tribunal staff, interpreters and members of the legal profession. Recognising this, the Standards are directed to:
  - courts/tribunals as institutions;
  - judicial officers responsible for the day-to-day work of courts;
  - interpreters;
  - members of the legal profession.
- The Standards are intended to be flexible and are designed to apply across a range of court and tribunal settings with varying levels of resources.

### Model Rules and Model Practice Note

- The Model Rules and Model Practice Note give effect to the Standards and can be adopted and adapted by courts and tribunals to suit their needs and resources.
- They include a Court Interpreters' Code of Conduct.

### Supplementary Materials

- The Standards are to be read and applied with the accompanying Supplementary Materials. These materials provide an invaluable compendium of the current best learning and practice on the role of interpreters in the courts.

## **Responding to this paper**

The JCCD is seeking feedback on this framework. Copies have been sent to key stakeholders in the interpreting community, the judiciary, court and tribunal administrators and the legal profession. The framework is also available on the JCCD website – [www.jccd.org.au](http://www.jccd.org.au).

Written feedback can be emailed to the JCCD Secretariat – [secretariat@jccd.org.au](mailto:secretariat@jccd.org.au) – by **Friday 22 July 2016**.

Public forums will be held in Melbourne and Sydney at a date to be confirmed. More information about the forums will be sent at a later date.

## **Consultation questions**

The following questions may guide individuals and organisations in their consideration of the framework:

1. What are the biggest challenges you perceive in the provision of adequate interpreting services in the courts? Do the Standards address your concerns?
2. Are the minimum and optimal standards for courts, judicial officers, interpreters and legal practitioners comprehensive and appropriate?
3. Are there any amendments or additions you would propose to the Standards?

4. What are your comments on the approach taken in the Model Rules and the Model Practice Note?
5. What are your thoughts concerning the tiered approach to interpreting standards outlined in section 6 of the Supplementary Materials?
6. Are there any other comments you wish to make about the framework?

**Next steps**

Comments received as part of the consultation process will be collated by the JCCD secretariat and considered by the specialist committee in preparing the final version of the Standards. The committee will then submit that final version for approval by the JCCD.

If approved, the JCCD will then recommend to the Council of Chief Justices (CCJ) that the CCJ adopt the Standards and endorse their implementation by all Australian courts and tribunals. It is hoped that this process will be completed by December 2016 with the Standards being launched nationally early in 2017.

# **Australian National Standards for Working with Interpreters in Courts and Tribunals**

**Public Consultation Draft  
June 2016**

## Preamble

The work of interpreters is essential to ensure access to justice and procedural fairness for people with limited or no English proficiency in Australia's courts.

The Judicial Council on Cultural Diversity (JCCD) has developed these *Australian National Standards for Working with Interpreters in Courts and Tribunals* to establish minimal and optimal practices for Australia. The Standards are accompanied by Model Rules and a Model Practice Note to give effect to the Standards.

These Standards and the Supplementary Materials which accompany the Standards are intended to provide guidance to courts, judicial officers, interpreters and members of the legal profession.

It is proposed that all courts in Australia implement these standards, where necessary adapting them to meet the needs and legislative context of each jurisdiction.

## Acknowledgments

This document was prepared by a specialist committee appointed by the Judicial Council for Cultural Diversity (JCCD). The JCCD is an initiative of the Council of Chief Justices of Australia and New Zealand.

The committee comprised:

The Hon Justice Melissa Perry, Federal Court of Australia (Chair)  
The Hon Justice Jenny Blokland, Supreme Court of the Northern Territory  
Ms Susan Burdon-Smith, Deputy Head, Residential Tenancies List, Victorian Civil and Administrative Tribunal  
Professor Sandra Hale, Professor of Interpreting and Translation, UNSW Australia  
The Hon Justice François Kunc, Supreme Court of New South Wales  
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Ms Magdalena Rowan, Senior Lecturer, Foundation Skills, Interpreting and Translating, TAFE SA  
Professor Anne Wallace, School of Business & Law, Edith Cowan University  
Ms Carla Wilshire, Chief Executive Officer, Migration Council Australia

The committee expresses its gratitude to:

Professor Sandra Hale and The Hon Dean Mildren AM RFD QC for their primary authorship of the Supplementary Materials.

The Migration Council of Australia for its practical support for and involvement in the preparation of this document, especially Ms Carla Wilshire (CEO), Ms Veronica Finn (Policy Officer) and Ms Frances Byers (on secondment from the Commonwealth Department of Prime Minister and Cabinet).

The Northern Territory Magistrates Court for its permission to reproduce part of its Interpreter Protocols, which forms the material on pages 104-105 of this document.

AUSIT for its permission substantially to adapt and reproduce the AUSIT Code of Ethics as part of the Interpreters' Code of Conduct in the Model Rules.

The Aboriginal Interpreter Service for its permission to adapt its document – 'Do I need an interpreter? 4 step process – Legal' – which forms the basis of the material on pages 100-102 of this document.

Ms Allison Henry of Millwood Consulting for editorial and drafting assistance.

## Definitions

In this document:

"court" includes state and federal courts, tribunals and other decision-making bodies which conduct hearings, and includes any government agency responsible for providing administrative services and resources to a court;

"judicial officer" includes state and federal judges, magistrates, tribunal members and members of other decision-making bodies which conduct hearings; and

"party" includes an accused in criminal proceedings, so that "accused" is only referred to specifically in relation to criminal proceedings.

## Foreword

[This page has been left blank deliberately in this public consultation draft]

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# Australian National Standards for Working with Interpreters in Courts and Tribunals

## Introduction

Australia is one of the world's three most culturally diverse nations.<sup>1</sup> Aboriginal and Torres Strait Islanders have the longest continuing culture in the world and Australia's Indigenous population is nearing 700,000, or 3 per cent of the total population. One in four Australians was born overseas. These 5.3 million people include Australian citizens, permanent residents and long-term temporary residents.

While Australia benefits enormously from this diversity, it also presents systemic challenges, particularly in relation to issues of access to justice. The Australian legal system was established at a time when the population it served was more homogenous than it is today.

Proceedings in Australian courts are generally conducted in English. However, over 300 languages are spoken in Australian households,<sup>2</sup> meaning that a significant proportion of people coming before a court require assistance to understand and be understood in legal proceedings.

It is a fundamental duty of any judicial officer to ensure that proceedings are conducted fairly. Those involved in legal proceedings must be able to understand what is being said and be understood. In criminal cases, for example, the accused must be able to understand the nature of the case against her or him and have a real and effective opportunity to test the prosecution case and defend the charges. To achieve this, it is not sufficient that the accused be physically present: she or he must be linguistically present.

It follows, given the linguistic diversity of the Australian population, that interpreters play an essential role in the administration of justice. The Judicial Council on Cultural Diversity (JCCD) has developed these Australian National Standards for Working with Interpreters in Courts and Tribunals with the accompanying Supplementary Materials to establish minimal and optimal practices for Australia's courts. The Standards are accompanied by Model Rules and a Model Practice Note that give effect to the Standards. The Model Rules recognise and confirm the important role of interpreters by confirming their status as officers of the court, owing their paramount duty as such to the court.

The Standards are intended to provide courts with guidance on engaging and working with interpreters to ensure procedural fairness for people with limited or no English proficiency. It is recommended that all Australian courts apply the Standards and adopt the Model Rules and Model Practice Note with such adaptations as are necessary to meet the needs and legislative context of their jurisdiction.

The Standards are intended to be flexible, and are designed to apply across a range of court settings while recognising that varying levels of resources may be available in different jurisdictions. Reflecting this approach, the Standards include minimum (or baseline) standards – that must be complied with by courts in all circumstances – and optimal (or aspirational) standards, to be met if funding and other circumstances permit.

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<sup>1</sup> Thomson L (2014), *Migrant Employment Patterns in Australia: post Second World War to the Present*, Ames

<sup>2</sup> Australian Bureau of Statistics (2011), *Census Shows Asian Languages on the Rise in Australian Households*, Media Release – National. 21 June 2012 <http://www.abs.gov.au/websitedbs/censushome.nsf/home/CO-60>.

The Standards are to be read and applied with the accompanying Supplementary Materials. In addition to being an essential part of the Standards, those materials provide an invaluable compendium of the current best learning and practice on the role of interpreters in the courts.

Effective communication in courts is a responsibility shared between judges, court staff, interpreters and members of the legal profession. As such the Standards are directed to:

1. Courts as institutions (including those responsible for court administration)
2. Judges responsible for the day to day work of courts
3. Interpreters
4. Members of the legal profession

The Standards introduce a graded approach to choosing an interpreter or interpreting team by dividing languages in Australia into four tiers on the basis of National Accreditation Authority for Translators and Interpreters (NAATI) data on the number of accredited practitioners at professional and other levels for each language. The tiers recognise the current supply of interpreters, and are organised in such a way that courts should be able to meet the standards of each tier provided they make sufficient effort to do so. The four tiers are:

1. Tier A – Professional interpreters
2. Tier B – Professional and paraprofessional interpreters
3. Tier C – Paraprofessional interpreter available in majority of cases
4. Tier D Languages – Languages for which there are very few or no accredited interpreters

Implementation of these Standards is not only vital to promoting and ensuring compliance with the rules of procedural fairness. It is intended that they will promote a better working relationship between courts, the legal profession, and the interpreting profession, and will assist in ensuring that the interpreting profession in Australia can develop and thrive to the benefit of the administration of justice generally.

Implementing these Standards will have cost implications. It is essential that governments, in order to ensure equality and access to justice for all, provide courts with adequate funding to give effect to these Standards.

By implementing these Standards, courts will be supporting a sustainable and highly skilled interpreting and translating profession in Australia and contribute to system-wide improvements in interpreting.

In these Standards:

"court" includes state and federal courts, tribunals and other decision-making bodies which conduct hearings, and includes any government agency responsible for providing administrative services and resources to a court;

"judicial officer" includes state and federal judges, magistrates, tribunal members and members of other decision-making bodies which conduct hearings; and

"party" includes an accused in criminal proceedings, so that "accused" is only referred to specifically in relation to criminal proceedings.

## **Standards for Courts**

### **Minimum Standard 1 – Model Rules**

- 1.1 All Australian courts should so far as possible adopt the Model Rules and the Practice Note that give effect to these Standards.

### **Minimum Standard 2 – Proceedings generally to be conducted in English**

- 2.1 Proceedings in Australian courts are generally to be conducted in English.

### **Minimum Standard 3 – Engagement of interpreters to ensure procedural fairness**

- 3.1 Courts must accommodate the language needs of people with limited or no English proficiency in accordance with the requirements of procedural fairness.

### **Minimum Standard 4 – Provision of information to the public about the availability of interpreters**

- 4.1 Basic information about interpreters in the legal system, in languages commonly spoken by court users, should be readily available on court websites and in hard copy from court registries. This information should include the contact details of organisations through which interpreters may be engaged and the role of an interpreter as an officer of the court.
- 4.2 Information about the circumstances in which a court may provide an interpreter should be published on court websites and be available in hard copy from court registries.
- 4.3 A form allowing a court user to request an interpreter for themselves or a witness, in languages commonly spoken by court users, should be made readily available on court websites and in hard copy from court registries for use in cases in which the court is responsible for the engagement of an interpreter. The form should include an opportunity to request that particular cultural or other considerations are taken into account in selecting an interpreter.

### **Minimum Standard 5 – Training of Judicial Officers and Court Staff**

- 5.1 Judicial officers and court staff should be familiar with the role of the interpreter as an officer of the court.
- 5.2 Training should be provided for judicial officers on assessing the need for interpreters and working with interpreters in accordance with these Standards and the Model Rules and Practice Note as enacted in their jurisdiction.
- 5.3 Training should be provided for court staff on assessing the need for interpreters and working with interpreters in accordance with these Standards.

### **Minimum Standard 6 – Court budget for interpreters**

- 6.1 Courts should have dedicated budget allocations to provide and support interpreting services to court users with limited or no English proficiency.

## **Minimum Standard 7 – Coordinating the engagement of interpreters**

- 7.1 Courts should consider designating a registry staff member or members to be responsible for coordinating interpreting arrangements.
- 7.2 Courts should maintain a register of preferred competent interpreters, recording all accreditations, qualifications, experience and memberships of professional associations.
- 7.3 Courts should implement a booking system for interpreters to ensure that interpreting services are used efficiently and with appropriate consideration to providing interpreters with as much notice as possible in relation to the assignment of work.
- 7.4 To maximise the ability of interpreting services to provide an appropriate interpreter for a particular case, courts seeking to engage the services of the interpreter should give as much notice as possible.

## **Minimum Standard 8 – Support for interpreters**

- 8.1 Courts should provide appropriate working conditions to support interpreters to perform their duties to the best of their ability.
- 8.2 Interpreters should be provided with remuneration commensurate with their level of qualifications, skill and experience. Courts should agree a scale of fees for interpreters. Interpreters should be remunerated for preparation time, travelling time, travel and accommodation costs where relevant, and for the time contracted – regardless of whether the matter finishes earlier.
- 8.3 Courts should provide interpreters with a dedicated interpreters' room, where they can wait until called, leave their belongings, prepare materials, be briefed and debriefed. The room should be close to the court, and be equipped with a computer with wifi access, for interpreters to use online resources such as dictionaries and terminology banks to prepare for their cases.
- 8.4 In the courtroom, courts should provide interpreters with a dedicated location where they can see all parties in the court. Where a working station or booth is not feasible, interpreters should be provided with a chair and table and sufficient room to work, together with any necessary equipment such as, for example, headphones.
- 8.5 Courts should consider setting up an interpreters' portal to upload booking and briefing materials, and where both interpreters and legal personnel can provide feedback after each assignment.
- 8.6 Courts should provide interpreters with regular breaks during proceedings.
- 8.7 Courts should provide interpreters with debriefing and, if responsible for the engagement of the interpreter, any necessary counselling for any trauma arising from their performance as an officer of the court.
- 8.8 Courts should ensure there is a mechanism for the provision for two-way feedback on interpreting performance and associated matters, either coordinated through the interpreter service or through the court.
- 8.9 In order to respond to shortfalls in interpreter availability, Courts should report to NAATI when they have been unable to secure the services of an interpreter.



- 8.10 Court procedures should be adapted as required to ensure that best use is made of the interpreter. As outlined in Rule 1.18 in the Model Rules, the court may at any time make directions concerning a range of issues concerning the retainer and role of the interpreter in proceedings

### Minimum Standard 9 – Assessing the need for an interpreter

- 9.1 To ensure that proceedings are conducted fairly and there is no miscarriage of justice, in criminal cases courts should ensure an interpreter is provided to persons of no or limited English proficiency.
- 9.2 In determining whether a person requires an interpreter courts should apply the four-part test for determining need for an interpreter as outlined in Appendix 4.

### Minimum Standard 10 – Engaging an interpreter

- 10.1 Courts should give preference to practitioners with National Accreditation Authority for Translators and Interpreters (NAATI) Professional interpreter accreditation, as well as those who are engaged with professional associations and who have pursued formal training, especially legal interpreting training.
- 10.2 For languages in Tier A, a professional interpreter should be engaged, having regard to any particular cultural or other sensitivities.
- 10.3 For all other tiers, if a Professional interpreter is not available, then:
- a. For languages in Tier B:
    - i. a paraprofessional interpreter should be used if there is one available; or
    - ii. if a paraprofessional interpreter is not available, the judicial officer may grant leave for a person to carry out the office of interpreter in accordance with **Model Rule 1.8**
  - b. For languages in Tier C:
    - i. a paraprofessional interpreter should be used if there is one available; or
    - ii. if a paraprofessional interpreter is not available, the judicial officer may grant leave for a person to carry out the office of interpreter in accordance with **Model Rule 1.8**
  - c. For languages in Tier D:
    - i. a paraprofessional interpreter should be used if there is one available; or
    - ii. if a paraprofessional interpreter is not available, a recognised interpreter should be used if there is one available; or
    - iii. if neither a paraprofessional nor recognised interpreter is available, the judicial officer may grant leave for a person to carry out the office of interpreter in accordance with **Model Rule 1.8**

### Optimal Standard 1 – Booking interpreters

- 1.1 If practicable, parties should raise and the judicial officer should take into account the availability of the interpreter when considering hearing dates.

### Optimal Standard 2 – Simultaneous interpreting equipment

- 2.1 As part of improving the working conditions of interpreters, courts should review their equipment for interpreters and consider introducing simultaneous interpreting equipment to allow interpreters to interpret simultaneously from a distance, without the need to sit next to the party.

### **Optimal Standard 3 – Provision of team interpreting**

- 3.1 Two (or more in complex matters) interpreters working as a team is more satisfactory than a single interpreter, especially in trials. Whenever possible, but particularly in the case of Tier C and D languages when accredited interpreters may be difficult to locate and engage, courts should utilise team interpreting.

### **Optimal Standard 4 – Provision of professional mentors**

- 4.1 Professional mentors are professional interpreters who are members of AUSIT and experienced in court interpreting. In the case of Tier C or D languages, when accredited interpreters may be difficult to locate and engage, courts should endeavour to provide professional mentors who are qualified in other languages – to assist the bilinguals with ethical issues, to manage the interaction of parties in the court, and to assist with matters of clarification.

### **Optimal Standard 5 – Provision of professional development to interpreters on the Standards**

- 5.1 Interpreter services coordinating the supply of interpreters to courts should provide professional development to interpreters to ensure they understand their responsibilities under the Code of Conduct. Courts could also run induction courses for interpreters, which include briefing on the Code of Conduct.

## **Standards for Judicial Officers**

### **Minimum Standard 11 – Judicial Officers' duties**

- 11.1 All judicial officers should endeavour to give effect to the Standards and apply the Model Rules for working with interpreters as enacted in their jurisdiction.

### **Minimum Standard 12 – Plain English**

- 12.1 Judicial Officers should use their best endeavours to use plain English to communicate clearly and articulately during court proceedings. Judicial officers should speak at a speed and with appropriate pauses so as to facilitate the discharge by the interpreter of her or his duty to interpret.

### **Minimum Standard 13 – Training of judicial officers for working with interpreters**

- 13.1 Judicial officers should undertake training on assessing the need for interpreters and working with interpreters in accordance with these Standards and the Model Rules for working with interpreters as enacted in their jurisdiction.

### **Minimum Standard 14 – Assessing the need for an interpreter**

- 14.1 The fundamental duty of the judicial officer is to ensure that proceedings are conducted fairly and in accordance with the applicable principles of natural justice,

including by ensuring an interpreter is available to persons of no or limited English proficiency.

- 14.2 Judicial officers should satisfy themselves as to whether a person requires an interpreter in accordance with the four-part test for determining the need for an interpreter as outlined in Appendix 4.

#### **Minimum Standard 15 – Engaging an interpreter in accordance with these Standards**

- 15.1 Where an interpreter is engaged by the court, courts should endeavour to ensure that the interpreter is selected in accordance with Minimum Standard 10 of these Standards.
- 15.2 Courts should endeavour to ensure that any cultural or other sensitivities that are relevant to the selection of a particular interpreter are taken into account in the selection of an interpreter.

#### **Minimum Standard 16 – Proceedings with an interpreter**

- 16.1 To support interpreters to perform their duties to the best of their ability, judicial officers should ensure that the interpreter/s have been provided with appropriate working conditions, as outlined in Minimum Standard 8.
- 16.2 Judicial officers should consider whether and, if so, to what extent interpreters should be briefed on the nature of the matter prior to the commencement of proceedings including being provided with relevant materials such as those that the interpreter will need to either sight translate or interpret.
- 16.3 Interpreters should be afforded a reasonable amount of time to familiarise themselves with materials that are relevant for the process of interpretation in the particular case.
- 16.4 Judicial officers should ascertain the accreditation status, qualifications and experience of interpreters, as well as whether they are members of any interpreting associations and are bound by their Codes of Ethics, to assess the interpreter's competence. If the judicial officer is concerned about any of these matters, he or she may raise this with the parties to ascertain if a more qualified or experienced interpreter is available, and should consider adjourning the proceedings until one is available.
- 16.5 Judicial officers are to use their best endeavours to ensure that interpreters who are engaged are familiar with and understand the Interpreters' Code of Conduct and their role as officers of the court.
- 16.6 Judicial officers should inform the interpreter to alert the court, and if necessary to interrupt, if the interpreter:
- a. cannot interpret the question or answer for any reason;
  - b. did not accurately hear what was said;
  - c. needs to correct an error;
  - d. needs to consult a dictionary or other reference material;
  - e. needs a concept or term explained;
  - f. is unable to keep up with the evidence; or
  - g. needs a break.
- 16.7 At the start of proceedings, and before an interpreter commences interpreting, judicial officers should introduce the interpreter and explain their role as an officer of the court.

## **Standards for Interpreters**

### **Minimum Standard 17 – Interpreters as officers of the court**

17.1 Interpreters are officers of the court charged with the duty to interpret between the languages specified for the benefit of all or specified parties in the Court, as required, to assist in the proper administration of justice.

### **Minimum Standard 18 – Court Interpreter’s Code of Conduct**

18.1 Interpreters must comply with the Court Interpreters’ Code of Conduct (see Schedule 1 to the Model Rules).

### **Minimum Standard 19 – Duties of interpreters**

19.1 Interpreters are to use their best endeavours to interpret spoken and sight translate written communications in connection with a court proceeding ethically, as accurately and completely as possible, and with impartiality.

19.2 Interpreters must comply with any direction of the court.

19.3 There may be instances when the interpreter will need to ask for repetitions or seek clarifications and explanations. All requests should be addressed to the judicial officer rather than to the questioning counsel.

19.4 There may be occasions when the interpreter needs to correct a mistake. All corrections should be addressed to the judicial officer rather than to the questioning counsel.

19.5 There may be occasions when the interpreter may wish to alert the court to a potential cross-cultural misunderstanding. The interpreter should seek leave from the judicial officer to raise this issue.

19.6 Interpreters must keep confidential all information acquired, in any form whatsoever, in the course of their engagement or appointment in the office of interpreter (including any communication subject to client legal privilege) unless:

- a. that information is or comes into the public domain; or
- b. the beneficiary of the client legal privilege has waived that privilege.

## **Standards for Legal Practitioners**

### **Minimum Standard 20 – Assessing the need for an interpreter**

20.1 To ensure that proceedings are conducted fairly and there is no miscarriage of justice, legal practitioners should ensure an interpreter is provided to parties of no or limited English proficiency.

20.2 In determining whether a person requires an interpreter legal practitioners should apply the four-part test for determining the need for an interpreter as outlined in Appendix 4.

### **Minimum Standard 21 – Booking interpreters**

- 21.1 To maximise the ability of interpreting services to provide an appropriate interpreter for a particular case, the party seeking to engage the services of the interpreter should give as much notice as possible.

### **Minimum Standard 22 – Engaging an interpreter in accordance with these Standards**

- 22.1 Parties engaging an interpreter should select interpreters in accordance with Minimum Standard 10 of these Standards.

### **Minimum Standard 23 – Briefing Interpreters**

- 23.1 The legal representatives for a party are to use their best endeavours to ensure that interpreters who are engaged are familiar with and understand the Interpreters' Code of Conduct and their role as officers of the court.
- 23.2 The legal representatives for a party should ensure that interpreters are appropriately briefed on the nature of the case prior to the commencement of proceedings. The interpreter should be provided with all relevant materials, including those that the interpreter will need to either sight translate or interpret.
- 23.3 An interpreter should be afforded a reasonable amount of time to familiarise themselves with materials that are relevant for the process of interpretation in the particular case.

### **Minimum Standard 24 – Plain English**

- 24.1 Legal practitioners should use their best endeavours to use plain English to communicate clearly and coherently during court proceedings. Legal practitioners should speak at a speed and with appropriate pauses so as to facilitate the discharge by the interpreter of her or his duty to interpret.

# Model Rules

## Division 1: Definitions

1.1 In these Rules:

- (1) “accurately” means resulting in the optimal and complete transfer of the meaning of the other language into English and of English into the other language, preserving the content and intent of the other language or English (as the case may be) without omission or distortion and including matters which the interpreter may consider inappropriate or offensive.
- (2) “code of conduct” means the Court Interpreters’ Code of Conduct set out in Schedule 1.
- (3) “other language” means a spoken or signed language other than English.
- (4) “recognised agency” means the National Accreditation Authority for Translators and Interpreters and such other organisations as are approved by the Chief Justice.

## Division 2: Proceedings generally to be conducted in English

1.2 Subject to these Rules, proceedings in the Court are conducted in English.

## Division 3: When interpreters may be engaged

1.3 In any proceedings, if the Court is satisfied that a witness cannot understand and speak the English language sufficiently to enable the witness to understand, and to make adequate reply to, questions that may be put to the witness, then the witness may give:

- (1) their oral evidence in the other language which is interpreted into English by an interpreter in accordance with these rules;
- (2) evidence by an affidavit or statement in English which has been sight translated to the witness by an interpreter.

1.4 The party calling a witness who requires the services of an interpreter is responsible for engaging an appropriately qualified interpreter in accordance with these rules, unless that party is an accused person in criminal proceedings in which case the Court will cause an appropriately qualified interpreter to be engaged.

1.5 In any criminal proceedings, if the Court is satisfied that the accused cannot understand and speak the English language sufficiently to enable the accused:

- (1) to understand and participate in the proceedings; or
- (2) to understand, and to make adequate reply to, questions that may be put to the accused,

then the Court must ensure that the accused is provided with an interpreter.

- 1.6 In any civil proceedings, if the Court is satisfied that a party cannot understand and speak the English language sufficiently to enable the party to understand and participate in the proceedings, the Court must permit that party to utilise the services of an interpreter who must meet the standards and requirements imposed by these rules, if the interpreter is to be used by that party to communicate with the Court (but not otherwise).

**Division 4: Who may carry out the office of interpreter**

- 1.7 Subject to rules 1.6 and 1.8, to carry out the office of interpreter a person must:
- (1) be currently accredited, registered or recognised as an interpreter for the other language by a recognised agency or otherwise satisfy the Court that they are qualified to carry out the office of interpreter; and
  - (2) have read and agreed to comply with the code of conduct; and
  - (3) swear or affirm to interpret and sight translate accurately to the best of their ability; and
  - (4) not be a person who:
    - (a) is or may become a party to or a witness in the proceedings or proposed proceedings (other than as the interpreter); or
    - (b) is related to or has a close personal relationship with a party or a member of the party's family or with a witness or potential witness; or
    - (c) has or may have a financial or other interest of any kind whatsoever in the outcome of the proceedings or proposed proceedings (other than an entitlement to a reasonable fee for the services provided by the interpreter in the course of their engagement or appointment); or
    - (d) is or may be unable to fulfil their duty of accuracy or impartiality under the code of conduct for any reason including, without limitation, personal or religious beliefs, or cultural or other circumstances; and
  - (5) cease to carry out the office of interpreter if they become aware of any of the disqualifying matters referred to in sub-rule (4) during a hearing and immediately disclose this to the Court.
- 1.8 In exceptional circumstances or where all reasonable efforts have failed to identify a person who satisfies the requirements of r 1.7, the Court may grant leave for any person (whether or not related or known to the witness, a party or the accused) to carry out the office of interpreter under these rules even though that person may not satisfy one or more of the requirements of rule 1.7, provided that:
- (1) the Court is satisfied that because of their specialised knowledge based on their training, study or experience that person is able to interpret and, if necessary, translate at sight accurately to the level the Court considers satisfactory in all the circumstances from the other language into English and from English into the other language;
  - (2) the person swears or affirms to interpret and translate at sight accurately to the best of their ability;

- (3) the Court is satisfied that the person understands and accepts that in carrying out the office of interpreter they are not the agent, assistant or advocate of the witness, the party or an accused but are acting as an officer of the Court owing a paramount duty only to the Court to be impartial and accurate to the best of their ability;
- (4) the Court directs that the evidence and interpretation be sound recorded; and
- (5) the person is over the age of 18 years.

#### **Division 5: What is the function of the interpreter**

- 1.9 Unless the Court otherwise orders, an interpreter must:
- (1) interpret questions and all other spoken communications in the hearing of the proceedings for the party or accused from English into the other language and from the other language into English; and
  - (2) subject to rule 1.10, before or during the course of the witness' evidence translate at sight documents shown to the witness.
- 1.10 An interpreter may decline to translate documents at sight if the interpreter considers that they are not competent to do so or if the task is too onerous or difficult by reason of the length or complexity of the document.
- 1.11 Unless the Court otherwise orders, an interpreter may not assist a party or that party's legal representatives in their conduct of proceedings or proposed proceedings other than by interpreting questions and all other spoken communications or translating at sight documents in connection with the proceedings or proposed proceedings (including the hearing) for the witness or accused from English into the other language and from the other language into English.

#### **Division 6: Code of conduct for interpreters**

- 1.12 Subject to rules 1.6 and 1.8, an interpreter must comply with the code of conduct.
- 1.13 Unless the Court otherwise orders, as soon as practicable after an interpreter is engaged in proceedings or proposed proceedings then the engaging party or, in the case of an interpreter appointed by the Court, the Court must provide the interpreter with a copy of the code of conduct.
- 1.14 Unless the Court otherwise orders and subject to rules 1.6 and 1.8, the evidence of a witness may not be received through an interpreter unless the Court is satisfied that the interpreter has read the code of conduct and agreed to be bound by it.

#### **Division 7: Evidence adduced through interpreters**

- 1.15 Where the witness is giving evidence by an affidavit or statement then, unless the Court otherwise orders:
- (1) the party wishing to read that affidavit or statement is not entitled to rely on that affidavit or statement unless it includes certification by the interpreter, or the interpreter separately verifies by affidavit, to the effect that:



- (a) prior to translating the affidavit or statement to the witness at sight, the interpreter:
    - (i) had read the code of conduct and agreed to be bound by it; and
    - (ii) had been given an adequate opportunity to prepare to translate the affidavit or statement at sight;
  - (b) the interpreter translated the entire affidavit or statement to the witness at sight, who then:
    - (i) informed the person responsible for the preparation of the affidavit or statement through the interpreter that they had understood the interpreter and agreed with the entire contents of the affidavit or statement; and
    - (ii) then swore or affirmed the affidavit or signed the statement in the presence of the interpreter;
- (2) the interpreter referred to in rule 1.15(1) may, but is not required to, be the interpreter who interprets for that witness in any hearing in the proceedings.
- 1.16 During the course of the witness's evidence being interpreted by the interpreter, the Court, either of its own motion or on the application of a party, may request the interpreter to correct, clarify, qualify or explain the interpreter's interpretation of that evidence or translation at sight of a document.
- 1.17 Any clarification, qualification or explanation given by the interpreter in response to a request under rule 1.15(1) is not evidence in the proceedings.

**Division 8: Court may give directions concerning interpreters**

- 1.18 Without limiting the generality of the Court's powers to control its own procedures, the Court may at any time make directions concerning all or any of the following having regard to the nature of the proceedings:
- (a) any particular attributes required or not required for an interpreter, including, without limitation, gender, age, ethnic, cultural or social background so as to accommodate any reasonable cultural or other concerns of a party, the witness or accused;
  - (b) the number of interpreters required in any proceedings;
  - (c) establishing the expertise of an interpreter;
  - (d) the steps to be taken to obtain an interpreter who is accredited, registered or recognised by a recognised agency or is otherwise qualified to carry out the office of interpreter;
  - (e) the steps to be taken before an application under rule 1.8 is made;
  - (f) what information concerning the proceedings (including, without limitation, pleadings, affidavits, lists of witnesses and other documents) may be provided to a person in advance of any hearing to assist that person to prepare to carry out the office of interpreter at that hearing;

(g) when, in what circumstances and under what (if any) conditions the information referred to in rule 1.18(f) may be provided;

(h) whether the interpreter is to interpret the witness's evidence consecutively, simultaneously or in some other way;

(i) other resources such as dictionaries or other reference works which the interpreter may require to consult in the course of carrying out the office of interpreter;

(j) the length of time for which an interpreter should interpret during a hearing;

(k) security for the interpreter including, where necessary, arrangements to preserve the anonymity of the interpreter;

(l) practical matters concerning the interpreter such as seating for and the location of the interpreter;

(m) disqualification, removal or withdrawal of an interpreter including on the application of the interpreter, any party to the proceedings or by the Court of its own motion; and

(n) payment of interpreters.

1.19 In making any order or direction in relation to interpreters the Court must have regard to any practice note on the engagement of interpreters approved by the Court for use with these rules.

1.20 These rules apply subject to the provisions of the Evidence Act.

## Schedule 1 – Court Interpreters’ Code of Conduct

### 1. Application of code

This code of conduct applies to any person (the “Interpreter”) who whether or not for fee or any other reward is engaged, appointed, volunteers or otherwise becomes involved in proceedings or proposed proceedings to carry out the office of interpreter by interpreting or sight translating from any spoken or signed language (the “other language”) into English and from English into the other language for any person.

### 2. General duty to the Court

- (1) An Interpreter has an overriding duty as an officer of the Court to assist the Court impartially.
- (2) An Interpreter’s paramount duty is to the Court and not to any party to or witness in the proceedings (including the person retaining or paying the Interpreter).
- (3) An Interpreter is not an advocate, agent or assistant for a party or witness.

### 3. Duty to comply with directions

An Interpreter must comply with any direction of the Court.

### 4. Duty of accuracy

- (1) An Interpreter must at all times use their best professional judgment to be accurate in their interpretation or sight translation. In this code “accurate” means the optimal and complete transfer of the meaning of the other language into English and of English into the other language, preserving the content and intent of the other language or English (as the case may be) without omission or distortion and including matters which the interpreter might consider inappropriate or offensive.
- (2) If an Interpreter considers that their interpretation or sight translation is or could be in any way inaccurate, incomplete or requires qualification or explanation (including, without limitation, where the other language is ambiguous or otherwise unclear for any reason), then:
  - (a) the Interpreter must immediately inform the party who engaged them and provide the necessary correction, qualification or explanation to that party; and,
  - (b) if their evidence is being given or was given in Court, immediately inform the Court and provide the necessary correction, qualification or explanation to the Court.

### 5. Duty of impartiality

- (1) An Interpreter must at all times carry out the office of interpreter impartially so as to be without bias in favour of or against any person including but not limited to the witness whose evidence the interpreter is interpreting, the party who has engaged or is remunerating the Interpreter or any other party to or person involved in the proceedings or proposed proceedings.

- (2) Unless the Court orders otherwise, an Interpreter must not accept an engagement or appointment to carry out the office of interpreter in relation a proceeding or proposed proceeding if the Interpreter:
  - (a) is or may become a party or a witness;
  - (b) is related to or has a close personal relationship with a party or a member of the parties, or with a witness or potential witness;
  - (c) has or may have a financial or other interest of any kind whatsoever in the outcome of the proceeding or proposed proceeding (other than an entitlement to a reasonable fee for the services provided by the Interpreter in the course of their engagement or employment); or
  - (d) is or may be unable to fulfil their duty of accuracy or impartiality for any reason including, without limitation, personal or religious beliefs and cultural or other circumstances.
- (3) Other than carrying out their engagement or appointment in the office of interpreter, an Interpreter must not provide any other assistance, service or advice (including by way of elaboration) to:
  - (a) the party, legal representative or other person who has engaged them; or
  - (b) any witness or potential witness,in relation to the proceeding or proposed proceeding.

## **6. Duty of competence**

An Interpreter must only undertake work they are competent to perform in the languages for which they are qualified by reason of their training, study or experience. An Interpreter must immediately disclose to the party or Court who has engaged or appointed them if the Interpreter considers that they lack the necessary level of competence to fulfil their duty of accuracy in relation to the whole or any part of the task of interpretation or translation that they have undertaken.

## **7. Confidentiality**

Subject to compulsion of law, an Interpreter must keep confidential all information in any form whatsoever which the Interpreter acquires in the course of their engagement or appointment in the office of interpreter (including any communication subject to client legal privilege) unless:

- (1) that information is or comes into the public domain other than by an act of the Interpreter in breach of this duty of confidentiality; or
- (2) the beneficiary of the client legal privilege has waived that privilege.

## Model Practice Note

### Commencement

- (1) This Practice Note commences on [.....].

### Application

- (2) This Practice Note applies to all civil and criminal proceedings commenced after its commencement and to any existing proceedings which the Court directs should be subject to this Practice Note in whole or in part.

### Definitions

- (3) In this Practice Note:

“Code of Conduct” means the Court Interpreters’ Code of Conduct, which is Schedule 1 to the Interpreters’ Rules.

“Interpreters’ Rules” means the rules set out in [e.g. UCPR reference].

“National Standards” means the Australian National Standards for Working with Interpreters in Courts and Tribunals, 2016 (including the Supplementary Materials), a copy of which may be found on the Court’s website.

“Recognised Agency” means the National Accreditation Authority for Translators and Interpreters and such other organisations as are approved by the Chief Justice for the purposes of the Interpreters’ Rules.

### Purpose

- (4) The Court has resolved to implement and apply the National Standards. As part of that implementation the Court has adopted the Interpreters’ Rules, which are the Model Rules prescribed by the National Standards. The Court has also adopted this Practice Note as part of its implementation of the National Standards. This Practice Note and the Interpreters’ Rules are to be read together.

### Construction and application of the Interpreters’ Rules

- (5) The Court must take into account and, unless the Court considers it for any reason impractical or undesirable in the circumstances of the particular case, give effect to, the National Standards when the Court is construing and applying the Interpreters’ Rules.

### Assessing the need for an interpreter

- (6) In considering whether a person requires an interpreter parties must take into account the matters set out in sections [insert references] of the National Standards, in particular the tiered approach set out in section [x] of the National Standards.

### Code of conduct must be provided to an interpreter on engagement

- (7) Subject to paragraph 8, when a party engages an interpreter in anticipation of or in connection with proceedings commenced or to be commenced in the Court, that party

must provide a copy of the Code of Conduct to the interpreter as soon as possible upon engaging the interpreter. The party must not continue with the engagement of the interpreter until that party has obtained from the interpreter a signed acknowledgement that the interpreter understands and will abide by the Code of Conduct.

- (8) Paragraph 7 of this Practice Note does not apply to an interpreter in respect of whom the party intends to make an application under Rule 1.8 of the Interpreters' Rules, or if the interpreter is to be used only by a party and not to communicate with the Court (see rule 1.6).

### **Matters to be considered when an interpreter is engaged**

- (9) When engaging an interpreter a party must give early consideration to the matters set out in Rule 1.18 of the Interpreters' Rules and whether any directions should be sought from the Court having regard to those matters or otherwise in connection with the participation of an interpreter in the proceedings. Such directions must be sought at the earliest possible stage in the proceedings.
- (10) For the purposes of providing any time estimate to the Court where evidence is to be given through an interpreter, a party should generally allow 2.5 hours for every hour that would have been estimated if the evidence was being given in English without an interpreter.
- (11) A party engaging an interpreter to interpret in proceedings in the Court must inform the interpreter that he or she will be required by the Court to produce evidence of the interpreter's current accreditation, registration or recognition as an interpreter for the relevant language by a Recognised Agency or other evidence to satisfy the Court that he or she is qualified to carry out the office of interpreter.

### **Conduct of proceedings**

- (12) In addition to compliance with the Interpreters' Rules and the other provisions of this Practice Note, each party must, to the extent it is reasonably practicable, conduct proceedings in accordance with and so as to give effect to the National Standards.

### **Fees for interpreters**

- (13) The Court accepts that interpreters, in particular those who are accredited by a Recognised Agency, are entitled to charge reasonable fees commensurate with their level of qualifications, skill and experience. While what fees may be reasonable can vary depending on the circumstances, as a general guide the Court adopts as reasonable the rates published from time to time by Professionals Australia for the purpose of any taxation or assessment where an interpreter has been retained by a party.

### **Issues concerning the availability of interpreters and implementation of the National Standards**

- (14) It is expected that the National Standards will be regularly reviewed. The Court encourages parties to provide comments, especially where they have encountered difficulties in obtaining suitably qualified interpreters, about the operation of the Standards to the National Accreditation Authority for Translators and Interpreters at [insert email address].

[Head of Jurisdiction]

[Date]

## Supplementary Materials

### 1. The need for interpreters in Australia's courts

#### 1.1 Languages spoken in Australia

The 2011 Census found that Australians spoke over 300 languages at home. The twenty most frequently spoken languages are:

- English (76.8%);
- Mandarin (1.6%);
- Arabic (1.3%);
- Cantonese (1.2%);
- Vietnamese (1.1%);
- Spanish (0.5%);
- Hindi (0.5%);
- Tagalong (0.4%);
- German (0.4%);
- Korean (0.4%);
- Punjabi (0.3%);
- Macedonian (0.3%);
- Croatian (0.3%);
- Turkish (0.3);
- French (0.3%);
- Indonesian (0.3%);
- Filipino (0.3%); and
- Serbian (0.3).

The 2011 Census found that some 60,000 Aboriginal and Torres Strait Islanders speak an indigenous language at home. There are also approximately 30,000 Deaf Auslan<sup>3</sup> users with total hearing loss.

The 2011 Census estimated that 18.2% of Australian residents (3.9 million people) use a language other than English at home and that 3% of Australian residents (655,379 people) reported that they spoke English poorly or not at all.<sup>4</sup> See Appendix 1 for the 5 most spoken languages at home.

There are considerable variations between States and Territories, and between cities, regional and remote areas. For example, 91.7% of Tasmanians speak only English at home compared to 74.5% of people in New South Wales and 62.8% of people in the Northern Territory. Appendix 1 illustrates some of the variations between States and Territories with regards to English spoken at home, as well as the main five languages spoken by the Australian population.

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<sup>3</sup> There are a range of sign languages used around the world. Auslan is the language of the Australian Deaf community and received linguistic recognition in 1989. It has evolved from sign languages that were brought to Australia during the nineteenth century from Britain and Ireland. Moreover, deaf people isolated from deaf language communities may develop their own 'home' sign languages, which are ways of communicating within the family unit.

<sup>4</sup> Department of Immigration and Border Protection (2014), *The People of Australia* <https://www.border.gov.au/ReportsandPublications/Documents/research/people-australia-2013-statistics.pdf>.



These figures provide some indication of the proportion of people coming before Australia's courts who may require language assistance to understand and be understood. Misunderstandings and knowledge gaps are common between English speakers and people who speak another language as their first language. Further, research shows that some people who have learned English later in life may not have sufficient proficiency to understand complex sentences used to communicate rights or cautions, legal terms, or English spoken at fast conversational pace.<sup>5</sup>

## 1.2 Interpreting in Australia

Since World War II a complex professional interpreting sector has developed domestically and internationally. The Australian Indigenous, migrant and deaf communities are serviced by a mix of government and private Interpreting and Translation service providers. Practitioners can acquire diploma and degree qualifications at TAFE and universities in some language combinations.

Australia is internationally recognised as one of the very few countries that has developed a system to give uniform accreditation to interpreters and translators. Since 1977 the Commonwealth and State and Territory governments joined to create the National Accreditation Authority for Translators and Interpreters Ltd (NAATI). NAATI is the body responsible for setting and monitoring the standards for the translating and interpreting profession in Australia through its accreditation system. NAATI is unique in the broad range of languages covered, as the accreditation system encompasses Aboriginal and Torres Strait Islander, international and signed languages.

See Appendix 2 for an introduction to the Profession of Interpreting and Translating.

## 1.3 Interpreting in Australia's courts

English is the language in which proceedings in Australian courts are generally conducted.

However, domestic and international laws require courts to engage interpreters when communicating with parties of no or limited English proficiency. Similarly, Commonwealth and State and Territory government access and equity policies require government agencies, and bodies funded by government, to provide an interpreter if a person has difficulty expressing themselves fully in English, or understanding English fully – particularly in contexts when miscommunication has implications for a person's rights, health or safety. The convention is that government agencies, and bodies funded by government, cover the costs of engaging interpreters.

Competent interpreters and translators are a key part of the Australian legal system. They assist judicial officers and lawyers to communicate with people with limited English proficiency to ensure that they receive equal treatment before the law.

However, the current operation of the interpreting and translation market, and the state of investment in that market, is creating risks to the implementation of equal justice in Australia. Implementation of these Standards will be a critical component in ensuring that the interpreting profession can operate effectively and is fundamental to any solution to current challenges.

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<sup>5</sup> See, eg, Aboriginal Resource and Development Services (2008), *An Absence of Mutual Respect*; International Communication of Rights Group, *Guidelines for communicating rights to non-native speakers of English in Australia, England and Wales, and the USA* [http://www.une.edu.au/\\_data/assets/pdf\\_file/0006/114873/Communication-of-rights.pdf](http://www.une.edu.au/_data/assets/pdf_file/0006/114873/Communication-of-rights.pdf).

## 2. English and Plain English in Courts

Judicial officers, lawyers and other parties in court all bear the responsibility of communicating clearly and sharing the communication load with the interpreter.

It is unrealistic to expect even the most competent interpreters to provide a full and accurate interpretation of legal discussions between the judicial officer and the lawyers if they have not been fully briefed, or if they are referring to information that is unfamiliar or too complex.

It is ultimately the court's responsibility to ensure that the language used is accessible. It is not the interpreter's responsibility to make sense of and simplify extremely difficult and technical language and content. If the court wants lay parties to understand the proceedings and to facilitate the interpreter's ability to interpret accurately, then the judicial officer needs to do as much as possible to simplify what is being said or provide a summary.

To enhance comprehension within court proceedings, all parties in the legal system should use 'plain English' to the greatest extent possible.

'Plain English' is used to describe a style of English that assists in clear and accurate communication. 'Plain English' does not mean using simple words or 'dumbing down' the message, but rather involves all parties in the courtroom adapting their speech to avoid saying things that will cause confusion for the interpreter or the party with limited English proficiency. This is particularly important when judicial officers and lawyers seek to explain and unpack legal processes and concepts.

Eleven 'plain English' strategies are:

- Use active voice, avoid passive voice;
- Avoid abstract nouns;
- Avoid negative questions;
- Define unfamiliar words;
- Put ideas in chronological order;
- Use one idea in one sentence;
- Avoid using "if" or "or" to discuss hypothetical possibilities;
- Place cause before effect;
- Indicate changing topic;
- Avoid prepositions to talk about time;
- Avoid figurative language.<sup>6</sup>

Judicial officers and lawyers should familiarise themselves with these 'plain English' strategies and use these strategies at all times, but particularly when working with interpreters.

Appendix 3 expands on these strategies.

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<sup>6</sup> Law Society Northern Territory (2015), *Indigenous Protocols For Lawyers*, second edition [http://lawsocietynt.asn.au/images/stories/publications/indigenous\\_protocols\\_for\\_lawyers.pdf](http://lawsocietynt.asn.au/images/stories/publications/indigenous_protocols_for_lawyers.pdf).

### 3. Engagement of interpreters to ensure procedural fairness – legal requirements for interpreting

Australian courts must accommodate the language needs of court users with limited or no English proficiency in accordance with the requirements of procedural fairness, as premised in international and domestic law.

#### 3.1 International legal rights framework

Australia is a party to a range of international law instruments concerning equality before the law, as well as specific rights about access to interpreters in criminal and civil proceedings.

Australia generally only agrees to be bound by a human rights treaty if it is satisfied that its domestic laws comply with the terms of the treaty. While Australia has agreed to be bound by these treaties, they do not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian law through legislation.<sup>7</sup> Failure to comply with the provisions of an international instrument could be the basis of a complaint to the Australian Human Rights Commission, or once national procedures have been exhausted, to the relevant treaty body, such as the ICCPR's Human Rights Committee.<sup>8</sup>

Australia is a party to the *Universal Declaration of Human Rights (1948)*, which provides that everyone has a right to equality before the law<sup>9</sup> and the right to a fair hearing in the determination of rights and obligations or of any criminal charges.<sup>10</sup>

Australia ratified the *International Convention on the Elimination of All Forms of Racial Discrimination (1965)* in 1975. It provides that everyone has the right to equal treatment before tribunals and courts without distinction as to race, national or ethnic origin.<sup>11</sup>

Australia ratified the *International Covenant on Civil and Political Rights (1966) (ICCPR)* in 1980. It provides for a variety of rights associated with interpreters. These include the right of a person upon arrest to be informed, in a language they understand, of the charges and reasons for their arrest, the right to communicate with Counsel, the right to the free assistance of an interpreter if they do not speak the language of the court in criminal proceedings<sup>12</sup> and the right to equality before courts and tribunals.<sup>13</sup>

In 2007, the Human Rights Committee<sup>14</sup> clarified the jurisprudence on the right to equality before courts and tribunals and to a fair trial under Article 14 of the ICCPR<sup>15</sup> stating:

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<sup>7</sup> This principle reflects the fact that agreeing to be bound by a treaty is the responsibility of the Executive, whereas law making is the responsibility of the parliament.

<sup>8</sup> Australian Human Rights Commission Act 1986, s.20 (1) (b) when read with s.3 definition of "human rights" and the definition of "Covenant". However, the provisions of the ICCPR are not part of Australia's domestic law enforceable by a court: *Dietrich v The Queen* (1992) 177 CLR 1 at 8.

<sup>9</sup> UNDHR, Article 7.

<sup>10</sup> UNDHR, Article 10.

<sup>11</sup> ICERD, Article 5.

<sup>12</sup> ICCPR, Article 14(3).

<sup>13</sup> ICCPR, Article 14.

<sup>14</sup> The Human Rights Committee is the treaty body attached to the ICCPR. Australia has acceded to the First Optional Protocol that confers jurisdiction on the Human Rights Committee of the United Nations to receive complaints made by Australian citizens concerning breaches of the covenant once domestic avenues of redress have been exhausted.

<sup>15</sup> UN Human Rights Committee, General Comment No. 32 (2007), *Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 <https://www1.umn.edu/humanrts/gencomm/hrcom32.html>.

- the right to equality before courts and tribunals means that “the same procedural rights are to 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”,<sup>16</sup>
- the principle of equality between parties applies in criminal and civil proceedings;<sup>17</sup>
- “In exceptional cases, [the principle] also might require the free assistance of an interpreter be provided where otherwise an indigent party could not participate on the proceedings on equal terms or witnesses produced by it be examined”,<sup>18</sup> and
- that persons charged with a criminal offence may also need to communicate with counsel via the provision of a free interpreter during the pre-trial and trial phase as part of matters that need to be considered to enable a fair trial.<sup>19</sup>

Australia ratified the *United Nations Convention on the Rights of Persons with Disabilities (2007)* in 2008 and acceded to the Optional Protocol in 2009.<sup>20</sup> The Convention specifically prohibits discrimination against people with a disability and provides that parties are required to provide assistance and intermediaries, including guides and professional sign language interpreters.<sup>21</sup>

Australia supported the *United Nations Declaration on the Rights of Indigenous Peoples (2007)* in 2009. The Declaration provides that States shall take effective measures to ensure that Indigenous peoples’ rights to use their own languages are protected and to ensure that Indigenous people can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.<sup>22</sup>

## 3.2 Statutory provisions

Specific Commonwealth legislation prescribes the use of interpreters in certain matters. For example:

- The Evidence Act 1995, applying in the Commonwealth and most States and Territories, provides in s 30 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 31 provides for the questioning and provision of evidence by deaf and mute witnesses.<sup>23</sup>
- The Migration Act 1958, s 366C, provides a mechanism for a person appearing before the Migration and Refugee Division of the Administrative Appeals Tribunal to request an interpreter for the purposes of communication between the Tribunal and the person, a request the Tribunal must comply with unless it considers that the

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<sup>16</sup> Ibid, para II.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, para V.

<sup>20</sup> The Optional Protocol recognises the competence of the Committee on the Rights of Persons with Disabilities to receive complaints made by Australian citizens concerning breaches of the Convention once all national procedures have been exhausted.

<sup>21</sup> Article 9.

<sup>22</sup> Article 13.

<sup>23</sup> Provisions are identical to the Commonwealth Evidence Act 1995 ss.30 and 31 in the Evidence Act 1995 (NSW); Evidence (National Uniform Evidence) Act (NT); Evidence Act 2008 (Vic); Evidence Act 2001 (Tas); Evidence Act 2011 (ACT). In addition, in the ACT in criminal proceedings, if the witness does not wish to provide an interpreter, or the interpreter the witness has provided is not competent to interpret for the witness, the prosecution must provide the interpreter: Court Procedures Act 2004, s.55 (ACT).

person is sufficiently proficient in English. The provision also provides for the Tribunal to appoint an interpreter if it considers that a person appearing before it to give evidence is not sufficiently proficient in English – even when the person has not requested an interpreter.

- The Native Title Act 1993, s 158 permits witnesses to give evidence or make submissions to the Tribunal through an interpreter.

State and Territory jurisdictions in Australia also have various statutory provisions concerning the use of interpreting services.

In Queensland, s131A of the Evidence Act 1977 (Qld) provides that in a criminal proceeding, a court may order the state to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require.

In South Australia, s14 of the Evidence Act 1929 (SA) provides for an entitlement for a witness to give evidence through an interpreter if the witness' native language is not English and if the witness is not reasonably fluent in English. This provision applies to both civil and criminal proceedings. There are also specific provisions dealing with the provision of interpreters where it is necessary to protect a witness from distress or embarrassment and special arrangements are required;<sup>24</sup> or where the witness is a vulnerable witness and special arrangements are necessary.<sup>25</sup>

In Western Australia, ss102 and 103 of the Evidence Act 1909 (WA) recognise that a witness may give evidence through an interpreter if the interpreter is sworn or affirmed, or the requirement to be sworn or affirmed is dispensed with by the court, and provide for an offence if the interpreter knowingly fails to “translate” [sic] or “translates” falsely. On the other hand, s119 of the Act provides for payment of interpreters by the state in criminal proceedings, except where the interpreter's employer pays the interpreter's full wages (perhaps reflecting a time when interpreters were not usually professionals).

Although there are exceptions, particularly in the case of minor matters, which are able to be dealt with summarily in the absence of the accused, it is common to find legislative provisions which require a sentencer to conduct a sentencing hearing in the presence of the accused.<sup>26</sup> This must mean both the physical presence as well as the ability of the accused to understand the proceedings. In Queensland the legislation permits a sentencing hearing to be conducted by audio-visual link or audio link in certain cases.<sup>27</sup>

The statutory provisions concerning appeals are far from uniform. Northern Territory legislation provides that the appellant is not entitled to be present without the leave of the court.<sup>28</sup> Some jurisdictions provide for a right for the appellant to be present except where the appeal is on a question of law.<sup>29</sup> Others provide that the respondent to an appeal by the Crown is entitled to be present unless he or she is legally represented.<sup>30</sup> In Victoria, a party to a criminal appeal must attend the hearing of an appeal unless excused from attendance.<sup>31</sup> In Western Australia an appellant who is in custody is entitled to be present whether or not

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<sup>24</sup> Evidence Act 1929, s.13(3) (SA).

<sup>25</sup> Evidence Act 1929, s.13A(9) (SA).

<sup>26</sup> Crimes (Sentencing Procedure) Act 1999, s.25 (NSW) (applies to the Local Court only); Sentencing Act, s.117 (NT); Criminal Law (Sentencing) Act 1988, s.9B (SA).

<sup>27</sup> Penalties and Sentences Act 1992, s.15A.

<sup>28</sup> Criminal Code, s. 420 (NT).

<sup>29</sup> Criminal Appeal Act 1912, s.14 (NSW); Criminal Code s 671D (Qld); Criminal Law Consolidation Act 1935, s.361(1) (SA); Criminal Code 1924 s.411(1) (Tas).

<sup>30</sup> Criminal Code, s.421 (NT); Criminal Appeal Act 1912, s.14A (NSW).

<sup>31</sup> Criminal Procedure Act 2009, s.329 (Vic).

he or she is legally represented, but the appellant is not required to be present.<sup>32</sup> In the ACT there are no statutory provisions relating to a party's right to attend the hearing of an appeal.

### 3.3 Common law

#### 3.3.1 Criminal proceedings

Australian common law concerning the right to an interpreter largely conforms with the spirit of the Article 14 of the ICCPR. The key difference is the common law does not establish the obligation to provide an interpreter as a "right" as such, but rather expresses the position in a negative form. It is more accurate to say that an accused's right to a fair trial is a right not to be tried unfairly, or as an immunity against conviction after an unfair trial.<sup>33</sup> Nevertheless it is convenient to refer to the right to an interpreter as a right.

The High Court in *Dietrich v The Queen*<sup>34</sup> discussed the mechanisms by which the courts exercise control over abuses of such rights. These are procedural in nature, for example by ordering an adjournment of the trial or a stay of proceedings until an interpreter was provided.

In *Ebataringa v Deland*<sup>35</sup> the High Court of Australia said that if the defendant does not speak the language of the court in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial. The right to an interpreter applies equally to a person who is deaf or mute or both.<sup>36</sup>

Nevertheless, what must ultimately be shown if the matter goes on appeal, is not that the trial was unfair, but that there was a miscarriage of justice. Except in very unusual circumstances, proof that the trial was unfair would inevitably lead to that conclusion.

The right derives from the principle that, except in special circumstances, a trial for a serious offence must take place in the presence of the accused, so that he or she might understand the nature of the case made against him or her and be able to answer it.<sup>37</sup> Mere corporeal presence is insufficient. The accused must be able to understand what evidence is given against him or her to enable a decision to be made as to whether or not to call witnesses on his or her behalf and whether or not to give evidence.<sup>38</sup>

Whether there is at common law a right for the interpreter to be provided at the cost of the state regardless of whether or not the accused is indigent is not entirely clear. In *Dietrich v The Queen* Deane J thought that the right applied at least in cases where the defendant was indigent, although the passage in his Honour's judgment may be read more widely as requiring the state to pay for the interpreter in every case:

"Inevitably, compliance with the law's overriding requirement that a criminal trial be fair will involve some appropriation and expenditure of public funds: for example, the funds necessary to provide an impartial judge and jury; the funds necessary to provide minimum court facilities; the funds necessary to allow committal proceedings where such proceedings are necessary for a fair trial. On occasion, the appropriation

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<sup>32</sup> Criminal Appeals Act 2004, s.43 (WA).

<sup>33</sup> *Dietrich v The Queen* (1992) 177 CLR 292 per Mason CJ and McHugh J at [7].

<sup>34</sup> (1992) 177 CLR 292.

<sup>35</sup> (1998) 194 CLR 444 at [27] per Gaudron, McHugh, Gummow, Hayne and Callinan, citing *Johnson* (1987) 25 A Crim R 91 at 115; *R v Lee Kun* [1916] 1 KB 337 at 341; *Kunnath v The State* [1993] 4 All ER 30 at 35-36 (PC).

<sup>36</sup> *Ebataringa v Deland* (1998) 194 CLR 444.

<sup>37</sup> An example of "special circumstances" is if the accused has deliberately absented himself or herself from the trial, or has been excluded from the trial due to misbehaviour in court.

<sup>38</sup> *R v Lee Kun* [1916] 1 KB 337; *Kunnath v The State* [1934] 4 All ER 30 (PC).

and expenditure of such public funds will be directed towards the provision of information and assistance to the accused: for example, the funds necessary to enable adequate pre-trial particulars of the charge to be furnished to the accused; the funds necessary to provide an accused held in custody during a trial with adequate sustenance and with minimum facilities for consultation and communication; the funds necessary to provide interpreter services for an accused and an accused's witnesses who cannot speak the language. Putting to one side the special position of this Court under the Constitution, the courts do not, however, assert authority to compel the provision of those funds or facilities. As *Barton v The Queen* (1980) 147 CLR 75, at pp 96, 103, 107, 109 establishes, the effect of the common law's insistence that a criminal trial be fair is that, if the funds and facilities necessary to enable a fair trial to take place are withheld, the courts are entitled and obliged to take steps to ensure that their processes are not abused to produce what our system of law regards as a grave miscarriage of justice, namely, the adjudgment and punishment of alleged criminal guilt otherwise than after a fair trial. If, for example, available interpreter facilities, which were essential to enable the fair trial of an unrepresented person who could neither speak nor understand English, were withheld by the government, a trial judge would be entitled and obliged to postpone or stay the trial and an appellate court would, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial."<sup>39</sup>

As a practical matter, if an accused is unable to afford an interpreter, and if the court or an agency of government does not provide an appropriate interpreter at its expense, the trial cannot proceed either at all, or until an interpreter is provided.

### 3.3.3.1 Criminal Trials

In criminal trials, the judicial officer must ensure the defendant understands the language of the court before the accused enters a plea. If there is any doubt about this the trial should not proceed until the judicial officer is satisfied that the accused has a sufficient understanding to plead to the charge and instruct counsel. The judicial officer should also investigate the processes used by police to caution and interview a respondent with limited English proficiency.

The duty to ensure an interpreter is available applies for represented and self-represented persons. However, if the accused is legally represented and waives his entitlement to an interpreter, the court may proceed without an interpreter if the court is satisfied that the accused is aware of the evidence to be called and is substantially aware of the case being made against him.<sup>40</sup>

The accused's right to an interpreter at his or her trial is intended to cover the whole of the proceedings. Thus the interpreter must be available when the accused is arraigned and asked to plead to the charge, must interpret everything that is said in the courtroom whether by counsel, witnesses or the trial judge, and also interpret the accused's evidence if he or she decides to give evidence.

As the trial progresses, counsel or the instructing solicitor for the accused may need to speak to the accused to take instructions on matters which have arisen during the trial. The trial judge's summing up to the jury and any jury questions must also be interpreted. If there is a *voire dire*, the accused must be present and whatever is said must also be interpreted. If there are legal arguments in court, whatever is said by counsel or the trial judge must also

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<sup>39</sup> *Dietrich v The Queen* (1992) 177 CLR 292 per Deane J at [6].

<sup>40</sup> *R v Lee Kun* [1916] 1 KB 337; *Kunnath v The State* [1993] 1 WLR 1315.

be interpreted. When the verdict is announced, that too must be interpreted, as must all aspects of a sentencing hearing.

These fundamental rights cannot be waived where the accused is not represented by counsel.

In *Chala Sani Abdula v The Queen*<sup>41</sup> the Supreme Court of New Zealand, after holding that the standard of the right to an interpreter enshrined in the provisions of the Bill of Rights of that country was informed by the common law, said:

That standard must reflect the accused person's entitlement to full contemporaneous knowledge of what is happening at the trial. Interpretation will not be compliant if, as a result of its poor quality, an accused is unable sufficiently to understand the trial process or any part of the trial that affects the accused's interests, to the extent that there was a real risk of an impediment to the conduct of the defence. This approach maintains and demonstrates the fairness of the criminal justice process which is necessary if it is to be respected and trusted in our increasingly multicultural community.<sup>42</sup>

The same conclusion was reached by the Supreme Court of Canada in *Quoc Dun Tran v The Queen*.<sup>43</sup> That also was a case involving a right to an interpreter contained in s14 of the Canadian Charter of Rights and Freedoms, which provided that "A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter." In considering the proper interpretation to be given to s14 of the Charter, the Court considered the common law principles which are applicable to a criminal trial.

Fundamentally, the right stemmed from the necessity at common law for the accused to be present during the whole of his trial, unless there were exceptional circumstances. This right was enshrined in s 650 (1) of the Criminal Code (Canada). Presence at the trial meant more than mere corporeal presence; it meant that the party must have the ability to understand the proceedings. The Court referred to an earlier decision of the Court of Appeal of Ontario, *R v Hertich*<sup>44</sup> saying:

The case of *Hertich* is important because it makes it clear that an accused need not demonstrate any actual prejudice flowing from his or her exclusion from the trial – i.e., that he or she was in fact impeded in his or her ability to make full answer and defence. Prejudice is a sufficient but not a necessary condition for a violation of the right to be present under s 650 of the *Code*. For a violation of the right to be present under s 650 to be made out, it is enough that an accused was excluded from a part of the trial which affected his or her vital interests. Importantly, the two rationales provided in *Hertich* for the right of an accused to be present at his or her trial – i.e., full answer and defence, and first-hand knowledge of proceedings which affect his or her vital interests – need not necessarily overlap. For instance, as was the case in *Hertich*, there will be situations where an accused's right to full answer and defence is not prejudiced, but his or her right to first-hand knowledge of proceedings affecting his or her vital interests is negatively affected.<sup>45</sup> [emphasis added in *Quoc Dun Tran v The Queen* judgment]

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<sup>41</sup> [2011] NZSC 130; [2012] 1 NZLR 534.

<sup>42</sup> *Ibid*, at para [43].

<sup>43</sup> [1994] 2 SCR 951.

<sup>44</sup> (1982) 67 CCC (2<sup>nd</sup>) 510 (Ont.C.A.).

<sup>45</sup> *Ibid*, at p 974.



The Court also quoted with approval<sup>46</sup> the following passage from the American decision of the Second Circuit Court of Appeals, *Negron v New York*:

...the right that was denied Negron seems to us even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial [citations omitted], unless by his own conduct he waives that right. [Citations omitted.] And it is equally imperative that every criminal defendant – if the right to be present is to have any meaning – possess “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” [Citations omitted]. Otherwise, “[t]he adjudication loses its character as a reasoned interaction and becomes an invective against an insensible object.”<sup>47</sup> [Citations omitted and emphasis added in *Quoc Dun Tran v The Queen* judgment]

The Court in *Quoc Dun Tran v The Queen* went on to observe:

It is clear that the right to the assistance of an interpreter of an accused who cannot communicate or be understood for language reasons is based on the fundamental notion that no person should be subject to a Kafkaesque trial which may result in loss of liberty. An accused has the right to know in full detail, and contemporaneously, what is taking place in the proceedings which will decide his or her fate. This is basic fairness. Even if the trial is objectively a model of fairness, if an accused operating under a language handicap is not given full and contemporaneous interpretation of the proceedings, he or she will not be able to assess this for him or herself. The very legitimacy of the justice system in the eyes of those who are subject to it is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place.<sup>48</sup>

In *De La Espreilla-Velasco v The Queen*<sup>49</sup> the Court of Appeal of Western Australia considered the question of the extent to which the assistance of an interpreter may be required during a criminal trial in Australia where there is no constitutional right to an interpreter. After reviewing the authorities at some length, Roberts-Smith JA said:

...the task of an interpreter is not restricted merely to passing on the questions when the party is giving evidence, but must be extended to also apprising a party of what is happening in the court and what procedures are being conducted at a particular time. It is quite wrong to imagine that all an interpreter is supposed to do is to interpret questions for a person in the witness box.<sup>50</sup>

After referring to *Tran’s case*, and in particular to the passage where the Court held that the appellant needed to show that the lapse in interpretation in that case “occurred in the course of the proceedings where the vital interest of the accused was concerned, that is to say, while the case was being advanced, other than at some extrinsic or collateral point”<sup>51</sup> Roberts-Smith AJ said:

The first complaint made here is that there was a lack of continuity in that the interpreter failed to interpret, or did not completely and accurately interpret, discussions between the judge and counsel. For the reasons I have explained, it

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<sup>46</sup> Ibid, at p 975.

<sup>47</sup> 434 F.2<sup>nd</sup> 386 (2<sup>nd</sup> Cir.1970) at 389.

<sup>48</sup> *Quoc Dun Tran v The Queen*, at p 975.

<sup>49</sup> (2006) 31 WAR 291.

<sup>50</sup> Ibid, at 305 [36].

<sup>51</sup> Ibid, at 312 [69].

would not be sufficient for the appellant merely to demonstrate a lack of continuity in this sense. It must be shown that as a consequence of that deficiency, either alone or in combination with some other deficiency, the trial was unfair - and that it was so unfair as to constitute a miscarriage of justice. Furthermore, unlike the situation in *Tran* where the breach of a constitutionally guaranteed right itself inevitably amounted to a substantial miscarriage of justice, a conviction may yet not be set aside if the respondent were to satisfy the court that there was no substantial miscarriage of justice.<sup>52</sup>

### 3.3.3.2 Burden of proof

The evidential burden of establishing the need for an interpreter rests upon the party or witness seeking to have the court to exercise its discretion in his or her favour. In most cases this is not an issue, because the legal representatives of the parties will usually be well aware of the English competence of the person concerned.

In criminal proceedings, if the person seeking an interpreter is the defendant, the court is likely to readily grant the application whenever it is asked for. However, if it becomes an issue, the Court will have to decide that question on a *voire dire* hearing.

Although the authorities suggest that the trial judge has a discretion whether or not to allow a witness to utilise an interpreter,<sup>53</sup> the courts have said that prima facie an interpreter should be allowed whenever English is not the accused's first language and the accused has asked for the assistance of an interpreter. As a matter of practice and procedure, a court is likely to approach the question prudentially, so that proof of the need for an interpreter may not necessarily even involve satisfaction on the balance of probabilities. That position is to be distinguished from the situation where the degree of a person's competence in the English language is a fact in issue in the proceedings, where the applicable standard of proof will apply.

In *Chala Sani Abdulla v The Queen* the Supreme Court of New Zealand said:

[45] It is not in dispute that the appellant needed, and was entitled to, interpretive assistance. The threshold for need is not an onerous one. As a general rule, an interpreter should be appointed where an accused requests the services of an interpreter and the judge considers the request justified, or where it becomes apparent to the judge that an accused is having difficulty with the English language. Once an accused has asked for assistance, it ought not to be refused unless the request is not made in good faith or the assistance is otherwise plainly unnecessary.<sup>54</sup>

In *Adamopoulos and Another v Olympic Airways SA and Another* Kirby P in the New South Wales Court of Appeal said:

The mere fact that a person can sufficiently speak the English language to perform mundane or social tasks or even business obligations at the person's own pace does not necessarily mean that he or she is able to cope with the added stresses imposed by appearing as a witness in a court of law. ... Those who, in formal public environments of which courts are but one example, have struggled with their own imperfect command of foreign languages will understand more readily the problem then presented. The words which come adequately in the relaxed environment of the

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<sup>52</sup> Ibid, at 313-314 [76].

<sup>53</sup> Dairy Farmers Co-operative Milk Co Ltd v Acquilina [1963] HCA 59; 109 CLR 458 at [13].

<sup>54</sup> See n 41 at [45].

supermarket disappear from recollection. The technical expressions cannot be recalled, if ever they were known. The difficulties cause panic. A relationship in which the speaker is in command (as when dealing with friends or purchasing or selling goods and services) is quite different from a potentially hostile environment of a courtroom. There, questions are asked by others, sometimes at a speed and in accents not fully understood... Particularly in Australia, which claims a multi-cultural society, courts should strive to ensure that no person is disadvantaged by the want of an interpreter if that person's first language is not English and he or she requests that facility to ensure that justice is done.<sup>55</sup>

This said, a discretion must always be reserved to the trial judge to balance the inconvenience occasioned by a late application for an interpreter; the possibility that the application has been made for extraneous or ulterior purposes; and an assessment in that in the particular case an interpreter is not needed for the issues involved.

In *R v Wurrumara*<sup>56</sup> Blokland J in the Northern Territory Supreme Court, after referring to *Adamopolous*, said:

There are parallels with the principles well established and developed from *R v Anunga*, [(1976) 11 ALR 412] where the Court laid down judicial guidelines for police interviews with Aboriginal suspects. The guidelines apply so as to require an interpreter unless the Aboriginal person "is as fluent in English as the average white man of English descent." Mr. Wurrumarra is obviously within that category and therefore it is unlikely a fair trial will be provided unless he has an interpreter.<sup>57</sup>

### 3.3.3.3 Challenging discretionary refusal

If the court in the exercise of its discretion refuses to permit a party or a witness to give evidence in criminal proceedings through an interpreter the decision may be appealed, but because the decision is interlocutory, leave to appeal would be required.

This presents a practical difficulty because usually the decision would have been made during the course of the proceedings, and in order to challenge the decision, the court might have to be persuaded to grant an adjournment to enable the application for leave to be heard. If it is likely that there is to be a dispute about whether or not a witness or party is to be permitted to give evidence through an interpreter, it may be wise to have the matter ruled upon in advance of the trial if that procedure is available. There is also a second difficulty, in that courts are reluctant to hear leave applications on interlocutory matters in criminal proceedings before the trial is over, although there are rare exceptions. The third difficulty which might arise is that the person refused leave may not be a party.

However, in *Witness v Marsden*<sup>58</sup> it was held that – in civil proceedings at least – a witness has standing to obtain leave to appeal against the discretionary order of a judge to refuse to make a pseudonym order. In that case, although the trial was into its 115<sup>th</sup> day, the Court of Appeal of New South Wales granted leave and allowed the appeal.

If the matter is not able to be resolved before the trial is completed, and the defendant is convicted, the defendant could apply for leave to appeal the order if the witness was either the defendant or a defence witness. If the defendant is acquitted, the prosecution cannot appeal the conviction and it would seem pointless for the prosecution to seek to appeal the

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<sup>55</sup> (1991) 25 NSWLR 75 at 77-78.

<sup>56</sup> [2011] NTSC 89; (2011) 213 A Crim R 440.

<sup>57</sup> *Ibid*, at 446, [31].

<sup>58</sup> [2000] NSWCA 52.

order in those circumstances even though technically the prosecution could seek a reference of the matter to the Court of Criminal Appeal if there were a question of law to be determined.<sup>59</sup>

### 3.3.2 Civil proceedings

At common law, a party or witness whose English skills are lacking may apply to the court to give evidence through an interpreter. The court has a discretion to allow the interpreter if the party or witness is at a disadvantage.<sup>60</sup> The principles to be applied are similar to those in criminal proceedings. A party to civil proceedings has a right to have an interpreter present in Court at his or her own expense to interpret the proceedings to that party as they unfold.

In *Gradidge v Grace Brothers Pty Ltd*<sup>61</sup> the extent of the right to an interpreter was considered by the Supreme Court of New South Wales. In that case, the plaintiff was a deaf mute who had the assistance of an interpreter in an application for compensation before the Compensation Court. During the course of her evidence, objection was taken to a question asked in examination in chief, whereupon argument ensued between counsel and the trial judge. At the request of counsel for the respondent, the trial judge instructed the interpreter not to interpret what was being said between counsel and the bench. A case was stated as to whether the trial judge had erred in giving this direction. The Court of Appeal unanimously held that the trial judge's ruling was in error. The plaintiff as a party was entitled to have whatever was said in open court interpreted to her unless she had been excluded from the courtroom

However, there is no strict principle that the matter cannot proceed in the absence of an interpreter, as there is in criminal proceedings. A party who is represented by counsel cannot be heard to complain if he or she needed an interpreter and through his or her own fault failed to secure one. However, different considerations might arise if the party were unrepresented, or if the party made a diligent attempt to find an interpreter but was unsuccessful.

All courts are required to observe the rules of natural justice and in particular the *audi alteram partem* (hear the other side) rule. Consequently it would be inimical to natural justice for a civil court to proceed in such a way as to prevent a party from giving or calling evidence due to the absence of an interpreter. In the absence of some statutory power for the court to appoint and pay for an interpreter, the only remedy would be for the court to grant an adjournment until the party was able to engage an interpreter at his or her own expense.

However, not all tribunals are bound by the rules of natural justice, although sometimes there is a statutory requirement for an interpreter to be employed in such cases. In such circumstances, a failure to ensure that an interpreter is provided, whilst it may not be able to be remedied as a breach of the rules of natural justice, might still amount to jurisdictional error.

## 3.4 Commonwealth and State and Territory government access and equity legislation policies and guidelines

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<sup>59</sup> See for example, Criminal Code, s.408 (NT).

<sup>60</sup> *Gradidge v Grace Brothers Pty Ltd* (1988) 93 FLR 414 (NSW Court of Appeal); *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 at 81 per Mahoney JA; *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507 per Kenny J at [19]; 92 FCR 6. For a decision where a trial judge refused an interpreter in family court proceedings which was upheld on appeal by a majority of the Full Court of the Family Court see *Djokic v Djokic* [1991] FamCA 47.

<sup>61</sup> See n 63.

Access and equity considerations form part of the multicultural policies of the Commonwealth and State and Territory governments, although policy terminology differs between jurisdictions. In some jurisdictions multicultural and associated access policies are legislatively based, in others they are policy based.

Relevant legislation includes:

- **Commonwealth** – *Racial Discrimination Act 1975, Disability Discrimination Act 1992 and Australian Human Rights Commission Act 1986*;
- **Australian Capital Territory** – *Human Rights Act 2004 and Discrimination Act 1991*;
- **New South Wales** – *Community Relations Commission and Principles of Multiculturalism Act 2000 and Anti-Discrimination Act 1977*;
- **Northern Territory** – *Anti-Discrimination Act 1996*;
- **Queensland** – *Multicultural Recognition Bill 2011 and Anti-Discrimination Act 1991*;
- **South Australia** – *Equal Opportunity Act 1984 and South Australian Multicultural and Ethnic Affairs Commission Act 1980*;
- **Tasmania** – *Anti-Discrimination Act 1998*;
- **Victoria** – *Charter of Human Rights and Responsibilities Act 2006, Equal Opportunity Act 2010 and Multicultural Victoria Act 2011*; and
- **Western Australia** – *Equality Opportunity Act 1984*.

Government policy frameworks about the provision of language assistance to services include:

- Commonwealth Multicultural Language Services Guidelines for Australian Government Agencies;<sup>62</sup>
- New South Wales Government's Multicultural Policies and Services Programme;<sup>63</sup>
- Northern Territory Language Services Policy;<sup>64</sup>
- Queensland Government Language Services Policy;<sup>65</sup>
- Victorian Language Services Policy;<sup>66</sup> and
- Western Australia Language Services Policy.<sup>67</sup>

A convention across policies is that the government agency or third party service provider is responsible for providing a competent interpreter free of charge, and should take steps to ensure competent interpreters are available when required.

Courts need to determine responsibility to pay for interpreting in the context of relevant legislation and access and equity policies and guidelines in their jurisdiction.

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<sup>62</sup> See <https://www.dss.gov.au/settlement-and-multicultural-affairs/programs-policy/multicultural-access-and-equity/multicultural-access-and-equity-resources>.

<sup>63</sup> See <http://www.crc.nsw.gov.au/mpsp>.

<sup>64</sup> See [http://www.dlgcs.nt.gov.au/interpreting/language\\_services\\_policy](http://www.dlgcs.nt.gov.au/interpreting/language_services_policy).

<sup>65</sup> See <https://www.communities.qld.gov.au/multicultural/policy-and-governance/language-services-policy>.

<sup>66</sup> See <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/language-services-policy>.

<sup>67</sup> See [http://www.omi.wa.gov.au/omi\\_language.cfm](http://www.omi.wa.gov.au/omi_language.cfm).

## **4. Engaging an interpreter or translator: Court responsibilities**

### **4.1 Promoting the availability of interpreters**

Many court users may not be aware that they are able to access an interpreter to assist them in court. Basic information about interpreters in the legal system, in languages commonly spoken by court users, should be readily available on court websites and in hard copy from court registries. This information should include the contact details of organisations through which interpreters may be engaged and the role of an interpreter as an officer of the court, as well as information about the circumstances in which a court may provide an interpreter.

Courts should develop and use a form for court users to request an interpreter for themselves or a witness for use in cases in which the court is responsible for the engagement of an interpreter. The form should be available in languages commonly spoken by court users and be readily available on court websites and in hard copy from court registries. The form should include an opportunity to request that particular cultural or other considerations be taken into account in selecting an interpreter.

### **4.2 Training of Judicial Officers and Court Staff**

Judicial officers and court staff should be familiar with the role of the interpreter as an officer of the court. Training should be provided by courts for judicial officers and court staff on assessing the need for interpreters and working with interpreters in accordance with the Standards and the Model Rules as enacted in their jurisdiction.

### **4.3 Responsibility for identifying the need for an interpreter**

While a number of parties can be involved in identifying the need for and the arranging of an interpreter, the obligation finally rests with the court to ensure that all parties who need interpreters in court proceedings are provided with that service.

In criminal matters, for practical purposes, generally the legal representative for the defendant will identify the need for an interpreter for the defendant and their witnesses. However, depending on the complexity of these matters, responsibilities may need to be discussed between the prosecution, the defence and Witness Assistance Services. Consistently with the Standards, the parties are to arrange interpreters for their respective witnesses or the court must cause an interpreter to be engaged for the defendant.

Courts are not responsible for the engagement of interpreters for language assistance prior to court attendance. Those arrangements will continue to be made by the police, lawyers and other parties seeking the services of the interpreter. However, courts should monitor whether persons requiring language assistance in court have also been afforded language assistance by police, counsel and other parties.

In the absence of the parties making appropriate arrangements, the court may directly engage the services of an interpreter whenever it considers it necessary. As a result, judicial officers and court staff, including the registry, need to be alerted to the needs of persons with limited English proficiency. Where necessary, court staff must be able to administer the 4-part English language proficiency test to determine whether a person requires an interpreter: see Appendix 4.

Lawyers must take all steps consistent with the Standards, including liaison with other relevant parties, to ensure all parties who need language assistance have the assistance of an interpreter.

#### **4.4 Court budgets**

Courts should have dedicated budget lines to provide and support interpreting services to court users with limited or no English proficiency, or have appropriate arrangements with an agency of government for the provision of the necessary resources

The Model Rules affirm that all interpreters are officers of the court, whose duties are solely to assist all parties to understand and be understood, regardless of who is paying for their services.

#### **4.5 Coordinating the engagement of interpreters and translators**

Courts should consider having a designated officer, or officers, to be responsible for coordinating interpreting arrangements.

The officer's responsibilities could involve:

- Being the central point of contact for all interpreting matters;
- Coordinating booking requests, including allocating times to ensure interpreters are briefed;
- Administering tests of limited English proficiency if required;
- Responsibility for the welfare and safety of interpreters, including ascertaining whether a debriefing is necessary;
- Following up with the court to monitor whether there were any concerns about the interpreter's ethics, competency or behaviour and, if so, to determine an appropriate response;
- Reporting to NAATI when an interpreter was not available and the court made a decision to adjourn or stay a case, or proceed with a less qualified interpreter.

#### **4.6 Register of preferred competent interpreters**

Courts should maintain a register of preferred competent interpreters, recording all accreditations, qualifications, experience and memberships of professional associations.

A register of interpreters assists courts to efficiently utilise interpreting services and provides a mechanism whereby interpreters can be called on short notice, where court staff have already undertaken a thorough check of their competence.

#### **4.7 Booking system**

The interpreter is a crucial and essential part of bilingual proceedings and they should be considered in every planning process, rather than leaving it as an afterthought. Courts should implement a bookings system for interpreters to ensure that interpreting services are used efficiently and with appropriate consideration to providing interpreters with as much notice as possible in relation to the assignment of work.

Detailed booking and briefing information should be provided to interpreters, preferably through an online interpreters' portal. Ideally, a brief should be prepared for every case

where an interpreter will be booked. The brief should be made available to the interpreter when booking their services, potentially through an interpreters' portal (see 4.14).

The following material should be provided on booking an interpreter:

- Name(s) of parties;
- Type of case;
- Type of charge(s) or claim;
- Type of appearance;
- Major topics to be discussed (if known);
- List of technical or specialised terms likely to be used;
- Address of the court;
- Contact person on arrival;
- Notice of requirement to produce evidence of their qualification(s) and accreditation;
- Interpreter's Code of Conduct relevant to the court, including information on confidentiality;
- Length of time for which the interpreter is booked.

It is preferable that the interpreter be asked about their availability when setting the next date.

If a case needs to be adjourned, it is recommended that the court book the same interpreter (if satisfied with his or her performance), for consistency and experience.

#### **4.8 Using interpreting services efficiently**

In order to increase the efficiency and quality of interpreting, courts should:

- Call interpreter cases promptly so the interpreter can move on to other courtrooms; and
- Schedule interpreter cases in the same courtroom on specific days of the week or at specific times of the day.

In areas where there are high day-to-day requirements for interpreting, courts can:

- "roster on" interpreters who are booked to be available half or a full day in advance of immediate customer demand (for example this happens for Aboriginal language interpreters in the Northern Territory, and for Vietnamese interpreters in a Melbourne Magistrates Court);
- compile rosters of preferred interpreters for key languages who are preferentially assigned work (based on NAATI accreditation, training, professional memberships and track record with the court); or
- delegate the selection of the preferred interpreters to an interpreter service, subject to clear minimum standards, including requiring the service to provide detailed information to the court about the qualifications of every interpreter, for each job, without being asked to do so.

#### **4.9 Ways to anticipate need for interpreters**

Courts who require interpreters frequently should analyse language need among court users so they can be better organised. For example, courts should review census data for their area and analyse demand for interpreters in the court in the preceding year. To develop more specific information, registry staff could undertake snapshot surveys, one day a



fortnight, asking every person approaching the court what language they speak at home and whether they feel they have trouble understanding what lawyers and service providers say to them. This information can be used to identify the main areas of likely need.

Courts should include data elements in case management systems to indicate whether litigants or witnesses need interpreters and clearly mark case files when a person requires an interpreter.

#### **4.10 Timing of engaging an interpreter**

To maximise the ability of interpreting services to provide an appropriate interpreter for a particular case, the party seeking to engage the services of the interpreter should allow as much notice as possible:

- For contested matters provide at least 4 weeks notice;
- For other matters, where possible, provide at least 2 weeks notice.

#### **4.11 Remuneration of interpreters**

Remuneration of interpreters is sometimes controlled by regulations,<sup>68</sup> but is otherwise a matter of the contractual terms of the interpreter's engagement. In some jurisdictions, governments have entered into multi-year agreements with interpreting service companies, including fee rates. Where interpreters can only be engaged through an interpreter service, the individual fees may be subject to control by that service, which may or may not be reviewable by an industrial tribunal.

Courts should agree a scale of fees for interpreter costs and provide appropriate remuneration to the interpreter commensurate with their level of qualifications, skill and experience. The rates should reflect a fair reward for the time and skill of the interpreter concerned. Where the fee is payable to an interpreter service, the rates should reflect the fact that the service will be entitled to charge for its overheads in engaging the interpreter. Professionals Australia has developed a scale of fees to give a benchmark of costs to assist parties in budgeting and negotiating rates of pay for interpreters. It is available at <http://www.professionalsaustralia.org.au/translators-interpreters/recommended-rates/>.

Courts should give consideration to differential rates depending on the qualifications of the interpreter, with a discretion to allow a higher or lesser amount than the standard rates in any circumstances which appear to be just and reasonable.

Interpreters should be remunerated for preparation time, travelling time, travel and accommodation costs where relevant, and for the time contracted – regardless of whether the matter finishes earlier. There should be a minimum payment provision included in contractual terms in case the interpreter is used only for a very short period of time.

For the purposes of assessment or taxation of legal costs the Model Practice Note suggests that a court can indicate that the rate of remuneration set by an organisation such as Professionals Australia will be accepted by the court as reasonable.

#### **4.12 Dedicated interpreters' room**

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<sup>68</sup> Witness and Interpreters Fees Regulations 1974 (NZ); Evidence (Fees, Allowances and Expenses) Regulations 2008 (WA).

As with all other professions, interpreters require adequate working conditions in order to perform their duties to the best of their ability. Poor working conditions can lead to less than satisfactory interpreting results.

Courts should provide interpreters with a dedicated Interpreters' room, where they can wait until called, leave their belongings, prepare materials, be briefed and debriefed. The room should be within close vicinity of the court, and be equipped with a computer with wifi access, for interpreters to use online resources such as dictionaries and terminology banks to prepare for their cases. Having an interpreters' room avoids having the interpreter sitting with the witness in the waiting room, which can potentially compromise the interpreter's ethical obligations.

#### **4.13 Placement of interpreter in court**

In the courtroom, courts should provide interpreters with a dedicated location where they can hear all parties and have a clear view of all persons speaking.

Where a working station or booth is not feasible, interpreters should be provided with a chair, a table to write on, and sufficient room to work, to store dictionaries and glossaries, and access to a jug of water and glass.

Interpreters should have access to the internet to connect to online dictionaries and terminology banks. Smart devices such as tablets and smart phones should be permitted, as they are basic tools and enable access to reference material for interpreters. Similarly, interpreters should be permitted to take notes during consecutive interpreting. All proceedings should be recorded in the event of an appeal.

#### **4.14 Interpreters' portal**

Briefing of interpreters is essential in assisting them prepare for a proceeding (see section 9.5). Courts should consider using technology to assist communication between courts and legal personnel. For example, courts could set up a password protected interpreters' portal to upload booking and briefing materials, and where both interpreters and legal personnel can provide feedback after each assignment.

#### **4.15 Interpreting equipment**

In many Australian courtrooms, the dock is physically situated behind the bar table which means that counsel will not be able to view the interpreter and the interpreter may have difficulty hearing counsel. In such courtrooms, judicial officers need to be particularly active in monitoring the pace and audibility of communication.

Such poor conditions can be rectified by providing appropriate equipment. There is a wide range of technologies available to assist the interpreting process. In international settings, such as conferences and international courts of justice, interpreters sit in a sound-proof booth, hear the speaker through headphones and interpret into a microphone. In international courts of justice the booths are equipped with buttons to signal when an interpreter needs a repetition or clarification.<sup>69</sup>

As part of improving the working conditions of interpreters, it is recommended that simultaneous interpreting equipment be provided. Simultaneous conference interpreting

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<sup>69</sup> Stern, L (2001), *At the Junction of Cultures: Interpreting at the International Criminal tribunal for the Former Yugoslavia in the Light of Other International Interpreting Practices*, *The Judicial review* 5(3): 255-274.

equipment allows interpreter(s) to sit independently from all the parties, in a position where they can see all parties, and interpret through headphones. A useful feature of simultaneous equipment is the existence of a button in their booths, which they can press to activate a light as a signal that they need a break so they can catch up, or to seek clarification or repetition.

Depending on how frequently a court needs interpreters, an approach could be to equip at least one court with simultaneous interpreting equipment and booths, as well as appropriate recording devices to record proceedings, including the interpretation.

An alternative option is the use of inexpensive portable simultaneous interpreting equipment without a booth. A further option is for interpreters to use the headphones already used by courts for people with impaired hearing.

Video Remote Interpreting can be utilised for situations where there are no accredited interpreters residing in a particular location or if the cost of sending an interpreter to a particular location is prohibitive.

For people who use Auslan the best form of communication is via an Auslan interpreter. Hearing loops and real-time captioning can be effective for people who are hard-of-hearing and do not use Auslan. Hearing loops allow people with hearing aids or cochlear implants to hear clearly without other background distracting noise. Real-time captioning is similar to courtroom stenography. A captioner uses a stenotype machine, phonetic keyboard and special software to convert the information being discussed into captions, which are then displayed, on a screen, computer or tablet device. Depending on the communication needs of the person, some may benefit from a combination of communication methods.

#### **4.16 Breaks**

Courts should provide interpreters with regular and timely breaks during proceedings. The frequency of the breaks will depend on the intensity of the pace and content of the matter, on whether there are two or more interpreters alternating, and on the competence of the interpreter. The judicial officer should ask the interpreter at least every 45 minutes (15 minute break for every 45 minutes worked) if they need a break, and encourage them to always notify them if they need a break at any time during the proceedings. The court should adjourn more frequently whenever an interpreter has been called upon to interpret for long periods.

#### **4.17 Debriefing interpreters**

Debriefing is crucial for the health of the interpreter. Research has shown that interpreters are vulnerable to vicarious trauma and secondary stress when interpreting sensitive or distressing material.<sup>70</sup> The requirement to use first person in conveying content may increase the interpreter's risk of experiencing vicarious trauma.<sup>71</sup> Moreover some interpreters will have personal histories of trauma and may have their own traumatic experiences triggered by the interpretation of another person's experience. For example, posttraumatic stress disorder was reported in interpreters associated with the South African Truth and Reconciliation Commission. Others have found that interpreters who share the same country of origin as the refugees for whom they interpret may be more vulnerable to

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<sup>70</sup> Lai M, Heydon G, Mulayim S (2015), *Vicarious trauma among interpreters* International Journal of Interpreter education (7)1.

<sup>71</sup> Bontempo K & Malcom K (2012), *An ounce of prevention is worth a pound of cure*; In Malcom K & Swabey L (Ed) *In our hands*, Washington DC Gallaudet University Press 105-130.

psychiatric disorders. In another study feelings of distress among interpreters increased stepwise to the number of sessions where they had to interpret experiences of violence.<sup>72</sup>

At present in Australia interpreters are provided with little or no support to help them cope with such situations. Some courts already offer counselling to jurors who are in need of it. The Standards recommend that courts provide debriefing and, if necessary, pay for counselling for the interpreter who has performed his or her functions as an officer of the court. This issue merits further investigation to determine how courts can better support interpreters' occupational health and safety.

#### **4.18 Feedback mechanism**

It is important for interpreters to receive feedback on their performance from those who use their services. It is also important for interpreters to provide feedback to the court on whether their professional needs were met and on any other aspect of their assignment, including the need for debriefing and support if they feel they are suffering from secondary stress.

All parties are encouraged to provide feedback about the service provided by interpreters in a court. Where relevant, this should be provided to the interpreter service. The court's contract with the interpreting service should note that comments made in good faith will be protected from civil suit. Alternatively, a feedback mechanism could be incorporated into the interpreter portal, where all parties could provide feedback on a voluntary basis.

#### **4.19 Notification to NAATI**

Interpreter shortages are a matter of concern. At present, there is no coordinating body to which courts can report that they have been unable to secure the services of an interpreter. This impedes the ability of the sector to respond to shortfalls between supply and demand.

NAATI has agreed to serve as a centralised repository of information about the unavailability of interpreters in the legal system. Courts should email [info@naati.com.au](mailto:info@naati.com.au) explaining the language required, the duration of the interpreting job, the efforts made to secure the interpreter and the consequences of not being able to find an interpreter (eg short adjournment, long adjournment, stay of proceedings).

This data will also assist in reviewing the Standards.

#### **4.20 Court procedures**

Court procedures should be adapted as required to ensure that best use is made of the interpreting service. As outlined in Rule 1.18 in the Model Rules, the court may at any time make directions concerning a range of issues potentially affecting how interpreters are employed in proceedings.

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<sup>72</sup> Ibid.

## 5. Assessing the need for an interpreter or translator

### 5.1 Assessing the need for an interpreter

An interpreter should be engaged in any proceedings where a party who has difficulty communicating in, or understanding, English in a courtroom context is required to appear in the court. Courts should also take steps to ascertain whether persons also have hearing or other impairments that affect their ability to understand and to be understood.

#### 5.1.1 Assessing the English competence of a party or witness

Appendix 4 outlines a four-step process for determining if an interpreter is required for a person of limited English proficiency.

The four-part test was developed by the Northern Territory Aboriginal Interpreter Service in consultation with forensic linguists. It is a simplified form of some of the processes used by forensic linguists when preparing to give expert evidence about language proficiency. The approach is endorsed by the Northern Territory Supreme and Magistrates Courts and the Northern Territory Law Society and is already used in Northern Territory courts.

Often the court will be able to establish easily whether a person concerned needs an interpreter. However, if after undertaking the four-part test, there is any remaining doubt, parties should obtain an English proficiency assessment from a suitably qualified linguist as part of a *voire dire* hearing to assess the level of English competence of the witness or party. English language competence is a question of fact. The assessment should be directed towards the question of whether it is reasonable to infer that the person would have a sufficient command of English, even if the English spoken is heavily accented.

The four-part test also helps courts to determine whether people who have limited English language proficiency, including Aboriginal and Torres Strait Islander Australians, need access to an interpreter to understand and be understood in court.

People who speak only one language tend to underestimate the extent of miscommunication that can occur when communicating in English with a person who is not fully proficient in it. The Supreme Court of New Zealand has found that:

“Courts must be alive to the risk that a person, who appears to have a good command of English in ordinary conversation, may have difficulty understanding the more formal language of the courtroom. Language ability varies depending on the particular context and a person with limited command of English is likely to have less fluency and comprehension in English when placed in a stressful situation.”<sup>73</sup>

In the final instance, the judicial officer will determine whether an interpreter is required in order to ensure a fair trial or hearing. If the judicial officer decides that an interpreter is not required the judicial officer should be confident that the non-English speaking party is able to fully understand the language they will encounter in court, including its speed, technical terms, implied accusations and nuances.

The judicial officer’s decision may be influenced by such factors as whether or not the witness will be giving only short evidence about a particular topic, which is unlikely to involve difficult concepts or the use of words, language or expressions which are not common-place.

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<sup>73</sup> See n 41 above at [46].

### 5.1.2 A rule of thumb

A good strategy is to ask the person to paraphrase what you have just said to them, in their own words. This will determine the person's level of comprehension. If the court is not satisfied with the person's level of comprehension, an interpreter should be provided.

### 5.1.3 The dangers of biographical data

Most people who speak English as a second language will have had repeated experience providing biographical data to service providers (e.g. 'where do you live, what's your date of birth, are you employed'). The court should not rely on the party's ability to provide biographical data as the basis for deciding whether to work with an interpreter. Just because a client can adequately answer simple questions about their life, does not mean they have sufficient English proficiency to understand court proceedings, discuss legal concepts or listen to and give evidence in court.

### 5.1.4 The dangers of overly modifying speech

Often when a person gets the impression that another person does not fully understand what is being said, a speaker intuitively compensates by reframing unanswered open questions (e.g. 'Why do you think the police arrested you?') as either/or questions or even closed yes/no questions (e.g. 'Were you arguing with the police when they arrested you?').

When a speaker does this, the party becomes heavily reliant on the prompts, suggestions, tone of voice and other cues to enable the conversation to proceed. In other words, the party's ability to communicate is limited to the questions asked. In these situations, even though the party appears to easily answer questions with a yes/no response, they have not been provided with the option of fully expressing their own story or opinion.

### 5.1.5 Ascertaining hearing ability and other disabilities

Apart from language and hearing impairments, there may be other impairments that affect a person's ability to comprehend. In 2013 the Senate Legal and Constitutional Affairs References Committee reported the findings of its inquiry into justice investment and noted that people who interact with the criminal justice system often have: high levels of hearing impairment, cognitive disabilities, acquired brain injury, mental illness, language impairment.

For example, given the social isolation that is associated with deafness, it is important to determine whether a hearing impaired person experiences other impairments, such as mental health disabilities. This is because the limitations in language development and in educational and social opportunities that so often occur during a deaf person's childhood, as well as vulnerability to abuse, can lead to mental health problems in adult life.<sup>74</sup>

In a criminal case the judicial officer is ultimately responsible for taking all of these factors into account to determine fitness to plead. Counsel also have the responsibility to alert the court to these impairments.

Many courts are fitted with hearing amplification devices. Judicial officers and counsel must ensure that hearing impaired people are provided with adequate support in both the courtroom and during instruction taking. Persons with hearing impairment are unlikely to be able to hear simultaneous whispering interpreting. Therefore, either consecutive interpreting or the use of simultaneous interpreting equipment will be needed.

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<sup>74</sup> Hindley N, Kitson P (2009) *Mental Health and Deafness* John Wiley and Sons.

## 5.2 How to talk with the party about the need for an interpreter

It is important to raise the topic of working with an interpreter in a sensitive manner. There may be a number of reasons the party might not want to work with an interpreter:

- the party might not know what an interpreter does;
- the party might have had a negative experience with an interpreter in the past;
- the party may feel shame or anger because you are indicating their English isn't 'good enough';
- the party might not want other people knowing about their business.

Before directly asking the party what they think about having an interpreter present, the interpreter's role should be explained so that the party can make an informed decision.

'Before we start talking about this, I want to talk to you about what language we should use today.'

'Maybe we can talk in English, or maybe we can talk in your language. I don't speak your language, so if we think it's better to talk in your language I will ask an interpreter to help me.'

Remember that the interpreter is not there 'for' the client. The interpreter is there for the court – to help the parties communicate with each other.

'An interpreter is someone who speaks your language and speaks English and has had training to interpret everything we say, including any legal words that you will hear today.'

'The interpreter will put everything I say into your language, and everything you say into English. The interpreter must follow rules. They can't take sides.'

'They must keep the message the same; they can't add anything or leave anything out.'

## 6. Choosing an interpreter or interpreting team

### 6.1 Minimum standards

The current interpreter qualifications are listed and described in Appendix 2.2. In Australia, interpreters and translators have a wide variety of accreditations, qualifications, in-service training, experience and engagement with professional associations. As a result, some practitioners are trained and accredited, some are accredited but not trained, some are trained but not accredited, and some are bilinguals with no independent verification of interpreting competence or English and target language proficiency.

Research demonstrates the superior performance of trained interpreters over untrained bilinguals.<sup>75</sup> Conversely, incompetent interpreting can lead to appeals, incorrect judgments and increase the cost of the justice process.<sup>76</sup>

Wherever possible, preference should be given to practitioners with NAATI professional interpreter accreditation, as well as those who are engaged with professional associations and who have pursued formal training, especially legal interpreting training.

While there are languages where practitioners meet these benchmarks, there are many languages where there are no practitioners in Australia who meet those standards. In reality there is a very limited range and availability of professional interpreters and, in some languages, even of paraprofessional interpreters.

This complexity and variety reflects Australia's great cultural diversity. The pool of certified, trained and experienced interpreters also varies considerably between languages. Differences can reflect the size of the language-cultural group in Australia, the demand for interpreting in that language and socio-historical factors associated with people from that language group.

Australia's linguistic diversity necessitates a practical approach to establishing minimum standards for interpreting in Australian courts, while providing mechanisms to continue the work of the justice system.

The Standards set out minimum standards language by language, based on the number of available interpreters at professional and other levels. It is based on the principle that where NAATI professional interpreters are reasonably available they should be employed. However, where professional or paraprofessional interpreters are not available, the Standards recommend that courts adopt a team interpreting approach, where several people come together to perform the task at the required level.

The Standards are organised in such a way as to provide increased incentives for practitioners to become accredited at professional levels and to pursue professional development and education.

### 6.2 Tiered approach to minimum standards

The Standards divide<sup>77</sup> all languages in Australia into four tiers, on the basis of NAATI data on the number of accredited practitioners at professional and other levels. The tiers

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<sup>75</sup> Goodman-Delahunty J, Hale, S, Dhami, M, & Martschuk, N. (2015), *Effects of situational and relational variables on interpreting in high stakes police interviews*.

<sup>76</sup> Hayes, A. and S. Hale (2010), *Appeals on incompetent interpreting*, *Journal of Judicial Administration* 20: 119-130.



recognise the current supply of interpreters and are organised in such a way that courts should be able to find appropriately qualified interpreters provided they make sufficient effort to do so.

An initial analysis suggests Tier A comprises 15 languages, Tier B 32 languages, Tier C 43 languages, and Tier D all other languages. Each tier identifies different minimum standards for court interpreters and particular steps courts should take to enable a fair trial. For example, in relation to a language categorised as Tier A, courts and parties can be assured that, with sufficient effort, they can obtain the services of a professional interpreter.

Therefore, there should generally be no reason why an interpreter of lesser standard should ever be used. Tiers B, C and D identify minimum standards for languages where there are few or no professionally accredited interpreters for that language, as well as additional measures courts should take to ensure procedural fairness.

The Standards identify reasonable adjustments courts can make to share the communication load between all parties including the interpreter.

### 6.2.1 Tier A – Professional interpreters

Tier A comprises 15 languages (14 spoken international languages and Auslan) where there have been more than 100 interpreters accredited at NAATI interpreter Professional level (formerly level 3) or above since 1977 (see Table 6.1).

The Tier A languages are: Arabic, Auslan, Cantonese, French, German, Greek, Italian, Japanese, Mandarin, Persian, Russian, Serbian, Spanish, Turkish and Vietnamese.

Courts should never employ an interpreter of lesser standard than NAATI Professional for these Tier A languages. Moreover, within Tier A, preference should be given to interpreters who have also undertaken tertiary qualifications in interpreting and are a current member of AUSIT or ASLIA.

To meet this standard, courts may need to consider deferring a trial, pay for the interpreter to travel from another state/territory or use video conferencing facilities so that the interpreting can be conducted remotely.

For some of these 15 languages, there may well be interpreters who have completed tertiary studies but are not accredited by NAATI at Professional level. In such instances, a judicial officer can deem that an interpreter meets the standards for a Tier A interpreter if the interpreter can demonstrate they have a degree in interpreting and translating or a TAFE Advanced Diploma in Interpreting and Translating *and* as part of that course of study completed units in legal interpreting.

**Table 6.1** Tier A languages – where there are more than 100 interpreters accredited at NAATI level 3 or above

	No. accredited or revalidated at NAATI Professional (3) 2007-	No. ever accredited at NAATI Professional (3) or higher since 1977
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<sup>77</sup> The appropriateness of the allocation of particular languages to particular tiers will be monitored through further consultation with the interpreting sector and regularly updated in consultation with NAATI, AUSIT and ASLIA. AUSIT and ASLIA have directories of current practitioners who are also members of the professional associations. The Standards will be reviewed regularly and can be amended in response to changes in the numbers of credentialed interpreters. The Standards will also be revised once the credentialing system changes noting that NAATI is planning to introduce specialist legal interpreting certification levels which will require specialist training and continuous professional development.

	2015	
Arabic	135	391
Auslan	92	187
Cantonese	27	208
French	21	108
German	3	100
Greek	34	194
Italian	22	243
Japanese	72	243
Mandarin	746	1254
Persian	134	209
Russian	10	101
Serbian	17	176
Spanish	57	291
Turkish	18	147
Vietnamese	25	238

Source: NAATI administrative data 2015

Caveat: This data comprises all accreditations awarded by NAATI since 1977. It is an over-estimate of the number of available interpreters. NAATI is currently re-validating credentials but the first column may provide a closer estimate of the number of interpreters currently working in the profession.

## 6.2.2 Tier B – Professional and paraprofessional interpreters

Tier B comprises 32 spoken international languages where there have been between 1-99 interpreters accredited at NAATI Professional level or above since 1977 and where there are also significant numbers of paraprofessional interpreters (see Table 6.2). Not all of these professional and paraprofessional interpreters are still working as interpreters and, in the majority of languages, few have entered the profession since 2007 or had their accreditations revalidated in the past eight years. Moreover, for some States and Territories, there are no or few interpreters working at Professional or Paraprofessional level in a particular language.

For the 32 Tier B languages, Professional level is preferred but courts should never employ an interpreter of lesser standard than NAATI Paraprofessional level. Within Tier B preference should be given to Professional level interpreters, interpreters who have undertaken tertiary training in interpreting, and who are a current member of AUSIT or ASLIA.

Where larger numbers of interpreters (five or more) of Tier B languages have been accredited at NAATI Professional level since 2007, courts should make every effort to engage the services of a Professional level interpreter, including if necessary by considering deferring the trial, paying for the interpreter to travel from another state or by using video conferencing facilities so that the interpreting can be conducted remotely. However, it is acknowledged that there may be very limited availability of interpreters in these language combinations in a particular State or Territory.

For some Tier B languages, there may well be interpreters who have completed relevant tertiary studies but are not accredited by NAATI at Professional or Paraprofessional level. In such instances, a judicial officer can deem that an interpreter meets the standards for a Tier B interpreter if the interpreter can show they have a degree in Interpreting, in Interpreting and Translating or a TAFE Diploma in Interpreting and Translating *and* undertook units in legal interpreting as part of that course.

**Table 6.2:** Tier B languages – where there are at least one professionally accredited interpreter (Interp 3+) and more than 5 interpreters accredited at NAATI Paraprofessional level (Interp2) or above

Language	No. accredited or revalidated at NAATI Professional (3) or Paraprofessional (2) 2007-2015		No. <u>ever</u> accredited at NAATI Professional (3) or Paraprofessional (2) since 1977	
	Prof (3)	Paraprof(2)	Prof (3)	Paraprof(2)
Albanian	1	6	3	33
Amharic	0	21	3	42
Bangla	15	63	21	77
Bosnian	2	10	33	156
Bulgarian	2	2	6	21
Croatian	4	10	79	229
Czech	0	3	7	17
Dari	3	125	25	237
Dutch	0	1	8	26
Filipino	0	23	8	67
Finnish	0	1	4	9
Hindi	7	23	15	75
Hungarian	2	8	21	57
Indonesian	8	13	47	135
Khmer	0	33	13	169
Korean	12	173	64	489
Lao	0	4	7	45
Macedonian	0	13	60	202
Malay	1	2	3	10
Maltese	0	1	6	19
Nuer	17	0	17	0
Polish	2	8	40	160
Portuguese	9	15	29	93
Punjabi	3	105	5	120
Romanian	0	0	8	18
Samoan	2	8	12	53
Sinhalese	8	39	14	49
Somali	3	36	9	70
Tamil	1	27	1	32
Thai	6	27	25	97
Tongan	0	5	1	20
Ukrainian	0	2	1	15
Urdu	3	52	5	54

Source: NAATI administrative data 2015

*Caveat: This data comprises all accreditations awarded by NAATI since 1977. It is an over-estimate of the number of available interpreters. NAATI is currently re-validating credentials but the first column may provide a closer estimate of the number of interpreters currently working in the profession.*

### 6.2.3 Tier C – Paraprofessional interpreter available in majority of cases

Tier C comprises:

- 15 spoken international languages where there are significant numbers of interpreters accredited at Paraprofessional level, but there are no professional interpreters and few accredited translators (Table 6.3);
- 28 Indigenous languages where there are interpreters accredited at Paraprofessional level (Table 6.4).

#### 6.2.3.1 International languages

For the 15 international languages in Tier C, given that there are no professional interpreters currently available, courts should seek to employ a paraprofessional interpreter. Acknowledging that an intensive search for an interpreter may need to occur, this should be achievable in the majority of cases.

For Tier C languages in Table 6.3 courts should make every effort to engage the service of a Paraprofessional level interpreter, including by giving consideration to deferring the trial, paying for the interpreter to travel from another state or by using video conferencing facilities so that the interpreting can be conducted remotely.

Before commencing with the assistance of a paraprofessional interpreter, the judicial officer should ascertain the interpreter’s academic qualifications and the nature of their experience of interpreting in legal environments, as well as take steps to determine whether they are confident that the interpreter understands the key legal concepts that are likely to be discussed during the proceeding.

If the judicial officer has any concern that the paraprofessional interpreter has insufficient skills, the judicial officer should adjourn the proceeding until a Professional level mentor is appointed to support the paraprofessional interpreter (see discussion following regarding professional mentors).

The judicial officer should manage proceedings to assist all parties to share the communication load. For example, legal argument should be summarised.

For some Tier C International languages, there may well be interpreters who have completed relevant tertiary studies but are not accredited by NAATI at Paraprofessional level. In such instances, a judicial officer can deem that an interpreter meets the standards for a Tier C interpreter if the interpreter has a degree in Interpreting, in Interpreting and Translating, a TAFE Diploma in Interpreting or Translating or demonstrably relevant experience and tertiary qualification (such as linguistics or anthropology and long relationship with the community). Other considerations include whether the practitioner has undertaken specialist units in legal interpreting as part of their course of studies, or is a current member of AUSIT.

Table 6.3 shows the number of interpreters for whom NAATI has awarded “Recognition”. Recognition is an award in a separate category from accreditation. It is granted only in languages for which NAATI does not test, or has recently commenced accreditation testing, and it has no specification of level of proficiency. NAATI recognition acknowledges that a person has reasonable proficiency in English, has completed basic preparation training at the minimum, has had recent and regular experience as an interpreter, but no level of proficiency is specified.

**Table 6.3:** Tier C languages – where there are more than 10 interpreters accredited at NAATI Paraprofessional level (Interp2) (note caveat)

Language	No. accredited or revalidated at NAATI Paraprofessional (2) or Recognition 2007-2015		No. ever accredited at NAATI Paraprofessional (2) or Recognition since 1977	
	Paraprof(2)	Recognition	Paraprof(2)	Recognition
Assyrian	24	0	44	37
Burmese	15	0	35	21
Chin (Haka)	26	3	26	3,14
Chin (Tedim)	10	4	10	4
Dinka	29	0	40	43
Hakka	~	~	20	0
Hazaragi	152	76	152	91

Karen	13	10	13	10
Kurdish/Sorani	0	33	16	31
Nepali	88	62	88	80
Nuer	17	0	17	0
Oromo	25	1	29	10
Pushto	53	0	60	55
Swahili/Kiswahili	71	17	71	43
Tigrinya	27	0	40	20

Source: NAATI administrative data 2015

Caveat: This data comprises all accreditations awarded by NAATI since 1977. It is an over-estimate of the number of available interpreters. NAATI is currently re-validating credentials but the first column may provide a closer estimate of the number of interpreters currently working in the profession.

### 6.2.3.2 Aboriginal and Torres Strait Islander languages

Slightly different arrangements are recommended for indigenous interpreters. Table 6.4 shows these languages and the number of accredited interpreters. Due to the limited supply of the Indigenous interpreters, courts should consult with Aboriginal interpreter services about the appropriate number of interpreters and support people to be allocated in any particular case.

In some cases, the Aboriginal Interpreter Service or Kimberley Interpreter Service may appoint a mentor or support person to assist the accredited interpreter. In such cases, the mentor or support person should also be paid at standard interpreting rates as well as the interpreter, even if they are not an accredited or recognised interpreter.

The judicial officer should manage the court environment to share the communication load, for example by summarising legal argument, allowing frequent breaks and explaining legal concepts.

For some Tier C Indigenous languages, there may well be interpreters who have completed relevant tertiary studies but are not accredited by NAATI at Paraprofessional level. In such instances, a judicial officer can deem that an interpreter meets the standards for a Tier C interpreter if the interpreter has a degree in Interpreting, in Interpreting and Translating, a TAFE Diploma in Interpreting and Translating or demonstrably relevant experience and tertiary qualification (such as linguistics or anthropology and long relationship with the community). Other considerations include whether the practitioner is working under the supervision of the Aboriginal Interpreter Service or the Kimberley Interpreter Service, or whether an Indigenous community attests they are their preferred interpreter because of long association (for example, due to their assistance in native title or linguistic research).

**Table 6.4:** Tier C languages – Aboriginal and Torres Strait Islander languages where there are interpreters accredited at NAATI Paraprofessional level 2

Language	Paraprofessional (2)	
	Accredited 2007-2015	Ever accredited since 1977
Alyawarra	2	4
Anindilyakwa	2	5
Anmatyerre	4	4
Burarra	3	12
Djambarrpuyngu	11	30
Eastern Arrente	1	6
Fitzroy Valley Kriol	9	9
Gurindji Kriol	2	2

Kala Lagaw Ya	0	4
Kimberley Kriol	3	3
Kriol	11	52
Kukatja	1	3
Kunwinjku	0	3
Luritja	4	7
Martu Wangka	1	3
Modern Tiwi	4	12
Murrinh-Patha	2	8
Ngaanyatjarra	1	4
Nyangumarta	3	5
Pintupi-Luritja	1	1
Pitjantjatjara	12	26
Torres Strait Island Creole	2	4
Walmajarri	4	9
Warlpiri	12	19
Warumungu	2	7
Western Arrarnta	2	6
Wik-Mungkan	3	4
Yankunytjatjara	2	7
Gumatj	1	4
Yindjibarndi	New test	5

Source: NAATI administrative data 2015

Caveat: This data comprises all accreditations awarded by NAATI since 1977. It is an over-estimate of the number of available interpreters. NAATI is currently re-validating credentials but the first column may provide a closer estimate of the number of interpreters currently working in the profession.

#### 6.2.4 Tier D – Languages for which there are very few or no accredited interpreters

Tier D comprises all of the other 200 or so languages spoken in Australia, both international and Indigenous languages.

For some of these languages there are a few interpreters and translators accredited at Paraprofessional level, but many of these credentials have not been revalidated recently and some of these individuals may not be currently working in the profession. In addition, as noted in Tier C, NAATI offers recognition – attesting that a person has a basic level of English competency, has some basic familiarity with the principles of interpreting and is working regularly as an interpreter. However, it does not certify a standard of transfer competence.

Table 6.5 shows 10 additional Indigenous languages to those in Table 6.4, where NAATI has certified Paraprofessional level interpreters at some point. Some of these interpreters may still be working, but NAATI advises that the majority of certifications are more than 5 years old, and in a number of cases 10 years old.

**Table 6.5:** Tier D – Indigenous languages where there are Paraprofessional interpreters but no accreditations awarded since 2007 [1997?].

Language	Accreditations awarded 1997-200[6?]
Gunwinkgu	1
Gupapuyngu	3
Iwaidja	1
Jaru	2
Kija	1
Nunggubuyu	1

Tiwi	1
Wangkatha	6

Source: NAATI administrative data 2015.

Caveat: This data comprises all accreditations awarded by NAATI since 1977 and 2007 in these languages. It is an over-estimate of the number of available interpreters and revalidation tests/new tests are not available in these languages

Table 6.6 shows languages where there are a few or no paraprofessional interpreters but where there are significant numbers of recognized interpreters. NAATI has provided recognition in over 100 further other languages but in most cases only one or two people have been recognised.

**Table 6.6:** Tier D – Languages where there are few or no Paraprofessional interpreters but there are some “recognized” interpreters (caveat)

Language	No. accredited or revalidated at NAATI Paraprofessional (2) or Recognition 2007-2015		No. <u>ever</u> accredited at NAATI Paraprofessional (2) or Recognition since 1977	
	Paraprof (2)	Recognition	Paraprof(2)	Recognition
Afrikaans	0	4	0	12
Armenian	1	0	1	32
Chaldean	0	37	0	43
Danish	0	6	1	25
Estonian	0	0	0	16
Fiji Hindi/Hindustani	0	8	0	10
Fijian	0	4	0	11
Gujarati	0	12	0	17
Hebrew	0	21	1	65
Hmong	0	1	0	12
Hokkien	0	1	0	15
Kinyarwanda/Rwanda	0	15	0	21
Kirundi	0	33	0	49
Kurdish/Kurmanji	0	16	2	31
Kurdish/Sorani	0	36	0	36
Kurdish/Feyli	0	34	0	34
Latvian	0	2	0	16
Lithuanian	~	~	0	25
Mongolian	0	6	0	15
Norwegian	0	1	0	21
Rohingya	0	17	0	17
Slovak	0	2	2	3
Slovene	0	6	0	28
Swedish	0	3	0	28
Teo Chiew	0	3	0	22
Tetum	3	0	3	15
Tigre	0	2	0	11

Source: NAATI administrative data 2015

Caveat: This data comprises all accreditations awarded by NAATI since 1977. It is an over-estimate of the number of available interpreters. NAATI is currently re-validating credentials but the first column may provide a closer estimate of the number of interpreters currently working in the profession.

For Tier D languages, one of three main strategies should be considered:

- a tertiary qualified interpreter could be employed from overseas subject to a *voire dire* hearing on competence;
- a team interpreting approach could be adopted; or
- a “relay” approach could be used (least preferred option).

## 6.3 Optimal standards: team interpreting

Interpreting is physically and mentally taxing, and can be exhausting over long periods of time. The quality of the interpreting is also likely to become adversely affected the longer a single interpreter is called.

Two interpreters working as a team is more satisfactory than a single interpreter. This approach is standard practice in international courts of justice, where two interpreters work together as a team at all times, as well as for signed language interpreting. Having two interpreters helping each other and checking on each other's performance is also a very effective quality assurance mechanism.

Shorter assignments – such as initial appearances, arraignments, status conferences and pleas – can usually be covered by a single professional interpreter. Types of proceedings in which the engagement of at least two interpreters is considered particularly important include:

- trials and other proceedings in which evidence is taken, particularly when witness(es) give protracted evidence or if the case involves the calling of a number of witnesses, all of whom require the assistance of an interpreter;
- legal arguments on motions;
- sentencing hearings at which complex issues are argued; and
- any other complex proceeding.

The use of team interpreting is considered an optimal standard for the purposes of the Standards: generally speaking, in instances when less qualified interpreters are used they should always work together as a team, including for short matters.

### 6.3.1 Determining competence of interpreting teams

Prior to proceeding with a trial engaging an interpreting team, the judicial officer should hold a *voire dire* process to determine whether the team members have sufficient language proficiency in both English and the other language and are competent to handle simultaneous and consecutive interpretation.

## 6.4 Tiered approach to team interpreting

### 6.4.1 Tier A – Professional interpreters

Where courts are unable to locate and engage a Professional level interpreter for Tier A languages, after making intensive efforts to do so, the Standards recommend that a team of paraprofessional interpreters be formed as a quality assurance strategy.

Further, for matters of three or more days, two professional interpreters should be employed to allow turn-taking, cross-checking and mutual support.

When at least two interpreters are hired, it is suggested that they change over after approximately 30 minutes of interpreting, preferably during a natural break in the proceedings.<sup>78</sup>

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<sup>78</sup> Interpreter Protocols, Supreme Court of the Northern Territory, para 12.1.



#### **6.4.2 Tier B – Professional and paraprofessional interpreters**

Where courts are unable to locate and engage a professional interpreter after making intensive efforts to do so, courts can engage the services of paraprofessional interpreters in Tier B languages (see Table 6.2), subject to the following conditions:

- for matters of less than half a day, a single NAATI paraprofessional interpreter should be employed;
- for matters of more than half a day, two NAATI paraprofessional interpreters should be employed to allow turn taking, cross checking and mutual support;
- for matters of three or more days, two professional interpreters (or one professional and one paraprofessional interpreter) should be employed to allow turn-taking, cross-checking and mutual support.

When at least two interpreters are hired, it is suggested that they change over after approximately 30 minutes of interpreting, preferably during a natural break in the proceeding.

#### **6.4.3 Tier C – Paraprofessional interpreter available in majority of cases**

For matters of a single day, when a single NAATI Paraprofessional level interpreter is engaged, the court should take more frequent adjournments to allow the interpreter to take a rest (at 5 minutes for every 25 minutes).

For matters of two or more days, two NAATI Paraprofessional level interpreters should be employed to allow turn taking, cross-checking and mutual support.

When at least two interpreters are hired, it is suggested that they change over after approximately 30 minutes of interpreting, preferably during a natural break in the proceedings. Court matters should generally be adjourned until two interpreters can attend.

Where courts are unable to secure sufficient professional or paraprofessional interpreters for a matter, after making intensive efforts to do so, courts can engage the services of a team of non-accredited interpreters.

Two types of three person teams can be considered:

- One type of a team would comprise a professional or paraprofessional interpreter accredited in another language who also speaks the required language PLUS a bilingual person who speaks the language as a first language PLUS a Professional level mentor.
- Another type would comprise a "Recognised" person who speaks that language PLUS a bilingual person who speaks the language as a first language PLUS a professional mentor.

It is essential that a bilingual who speaks the language as a first language is included in the team as a quality assurance process. This is because there are a number of NAATI accredited interpreters or recognised interpreters providing services in third or more distant languages, of which they are only partial speakers and are insufficiently linguistically competent to work alone to provide accurate interpretation.

Professional mentors (who are Professional level interpreters, members of AUSIT and experienced in court interpreting but do not speak the required language) will assist the bilinguals with ethical issues, to manage the interaction of parties in the court and matters of

clarification. This approach recognises the complexity of court interpreting and the multiple skills required.

- In this scenario, the judicial officer should determine how other parties in the court room can assist the interpreter to share the communication load and should take additional measures if untrained bilinguals are engaged. For example, when bilinguals are used in a team, the judicial officer may decide that only consecutive interpreting will occur and instruct the parties to speak slowly, simplify the language used and explain the meanings of legal terms.
- This approach to team interpreting has several advantages over simultaneous whispering. Firstly, counsel and the court can hear whether the interpreter is having trouble keeping up with the dialogue. Secondly, it will enable a second interpreter to advise the court if there has been a significant misunderstanding. Thirdly, it will enable the party to react immediately without being distracted by the voices of counsel and the interpreter speaking at the same time. Fourthly, it will assist the judicial officer to prevent overlapping speech.<sup>79</sup>

#### 6.4.4 Tier D – Languages for which there are very few or no accredited interpreters

Where courts are unable to locate and engage accredited interpreters for a matter, courts can engage the services of a team of non-accredited interpreters.

Two types of three person teams can be considered:

- One type of a team would comprise a professional or paraprofessional interpreter accredited in another language who also speaks the required language PLUS a bilingual person who speaks the language as a first language PLUS a Professional level mentor.
- Another type would comprise a "Recognised" person who speaks that language PLUS a bilingual person who speaks the language as a first language PLUS a Professional level mentor.

As noted above, it is essential that a bilingual who speaks the language as a first language is included in the team as a quality assurance process.

#### 6.5 Relay interpreting permitted only as a last resort (excepting Auslan)

Relay interpreting consists of one interpreter interpreting from language A to language B and the other interpreter interpreting from language B to language C.

Relay interpreting is common practice for deaf interpreting, when an interpreter may interpret from a foreign sign language to Auslan, by a deaf interpreter, then from Auslan to English by a hearing interpreter. Relay interpreting also occurs when interpreting for a deaf person into Auslan and then into English (and vice versa)

Relay interpreting has been judicially approved in the United Kingdom.<sup>80</sup> For example, in one such case, the witness who spoke a dialect of Mandarin which the Mandarin interpreter did not understand, was assisted by her niece who spoke both her dialect as well as Mandarin,

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<sup>79</sup> This approach was recommended by the Supreme Court of Canada in the Tran case: *Quoc Dung Tran v The Queen* [1994] 2 S.C.R. 951 at 989-990.

<sup>80</sup> *R v West London Youth Court; ex parte N* [2000] 1 All ER 823.

and interpreted the witness' evidence into Mandarin which the interpreter then interpreted into English.<sup>81</sup>

With the exception of deaf interpreting, relay interpreting is considered less than ideal. Under the Standards, relay interpreting should only be permitted as a last resort, excepting Auslan. In such cases, the court should take extra steps to satisfy itself that the arrangement is acceptable to the court and to the parties, and to monitor it closely.

## **6.6 Adversarial interpreting should be avoided**

Regardless of the circumstances (for example, when interpreters are hired by different parties rather than by the court), when more than one interpreter is employed, adversarial interpreting should be avoided.

This is a counter-productive practice that is becoming more common in different jurisdictions in various countries in order to ascertain the quality of the other party's interpreter. Instead of working together as a team, interpreters work in opposition and competition with each other. Research shows that when interpreters are being monitored in this way, their performance can decline.<sup>82</sup>

## **6.7 Interpreting using telephones or audio-visual links**

### **6.7.1 Telephone Interpreting**

Telephone interpreting should only be used with appropriate equipment, and for short proceedings or meetings. Best practice is that all parties should have a high quality headset and the interpreter should have separate dual volume control and amplification.

### **6.7.2 Interpreting in matters where a witness or defendant appears via audio-visual link (AVL)**

Research on interpreting via audio-visual link is currently underway in order to assess and recommend best practice. Guidelines reproduced at Appendix 6 have been developed for use in the Northern Territory Magistrates Court. The Standards adopt these guidelines as interim best practice, noting that this guidance will be reviewed as research becomes available.

## **6.8 Which language should be interpreted?**

The preferred option is to find an interpreter who can interpret between the person's first or dominant language and English. However, in some instances the non-English speaking party may speak several languages with considerable proficiency. This may be the situation with speakers of some indigenous languages and people who come from African and West Asian countries characterized by high levels of linguistic diversity. Sometimes it is difficult to secure the services of any interpreter in the person's first or dominant language but possible to find an interpreter for a second or third language in which the person is also proficient. In such cases, a team interpreting approach can be considered, subject to the parties consenting to this arrangement and it being carefully monitored.

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<sup>81</sup> *SZJOW v Minister for Immigration and Citizenship* [2007] FCA 790 at [8].

<sup>82</sup> See work by Dr Krzysztof Kredens from the Centre for Forensic Linguistics at Aston University, [www.aston.ac.uk](http://www.aston.ac.uk).

## 6.9 Taking into account cultural/linguistic preferences of the party

The person booking the interpreter should ascertain whether there are any linguistic and cultural issues that will affect the quality of interpreting, as well as any strong preferences of the non-English speaking party. As much information as possible should be ascertained about the non-English speaking party, well in advance, to enable the best possible interpreter to be selected. In some instances the non-English speaker may speak several languages. In some situations it may be possible to interpret using their second language rather than their first language if the person is proficient enough in their second language.

Gender and age considerations can sometimes be significant. For example, women may not feel comfortable talking about sexual or violence matters via a male interpreter, or even in the presence of other men. Similarly, older people may not be comfortable with a younger interpreter. As a general rule, a woman interpreter should be employed to interpret for women on violence and sexual matters and a male interpreter for the male party.

A wide range of other linguistic and cultural considerations may also need to be taken into account in selecting the best possible interpreter for the matter. For example, there can be substantial differences within a language that is spoken in many different geographical areas, which can lead to potential misunderstandings (for example between Congo Swahili and East African Swahili; between Arabian peninsula Arabic and the varieties of Arabic used in Iraq and Libya; between West Kimberley and Katherine Kriol). Nevertheless, professional trained interpreters are familiar with language varieties and, when confronted with any difficulty, they will seek clarification.

There can also be cultural and ethical complexities when trying to find interpreters for languages with a small pool of speakers in Australia, as is the case for all Aboriginal and Torres Strait Islander languages and languages spoken by some immigrant communities. For example, within Indigenous kinship systems there are avoidance relationships where people are not allowed to talk directly to each other or say each other's names. Further, in some Aboriginal societies, mothers-in-law and sons-in-law may not meet face to face or speak directly with one another. The court may become aware of an avoidance relationship when a person enters a room and another Indigenous person leaves the room, suddenly looks away and ceases talking or rearranges seating arrangements.

The non-English speaking party should be able to meet the interpreter in advance of the proceedings and if they express concerns about that interpreter, a different interpreter should be arranged via phone so they can communicate their concerns.

## 6.10 When a judicial officer decides not to proceed with a professional interpreter or an interpreting team

There is a range of situations where a judicial officer may decide not to proceed with a professional interpreter or an interpreting team. The circumstances which may warrant considering an interpreter at a level below that recommended here include:

- the difficulties encountered in trying to obtain the services of a Professional level interpreter or team;
- whether the interpreter is being engaged to interpret for a single witness or more than one witness;
- whether the interpreter is being engaged to interpret for the accused in a criminal matter, and if so, whether the matter is being heard in a superior court or a court of summary jurisdiction;

- the nature of the matter, whether the matter is a trial or a plea hearing;
- the length of time the interpreter would be required to be available in court;
- whether the issues in the proceedings are complex or straightforward; and
- the experience and knowledge of the interpreter.

In these cases, the judicial officer should document the reasons for their decision.

## **6.11 The Professional level mentor**

The Standards introduce the concept of a Professional level mentor who works with untrained bilinguals to assist them to fulfil their responsibilities. Professional level mentors are professional interpreters who are members of AUSIT and experienced in court interpreting but do not speak the required language. It is envisaged that such mentors will assist the bilinguals with ethical issues, assist to manage the interaction of parties in the court and with matters of clarification.

Guidelines will need to be developed about the accreditations and/or attributes of a Professional level mentor and expectations about their role in court. It would be desirable, but not necessary, if they were a Professional level interpreter. NAATI accreditation alone is insufficient. Some form of professional development would need to be developed and such training could be developed and offered by AUSIT.

Indigenous interpreting has used mentors and team interpreting for many years and this role is performed by a range of experienced people, not just interpreters. Mentors include more experienced interpreters, linguists or people familiar with the cultural context of the courts.

Auslan interpreters also routinely work in pairs, because of the simultaneous nature of their interpreting. This is not a mentoring arrangement.

## 7. Duties of Judicial Officers

### 7.1 Fundamental duties of the Judicial Officer

The fundamental duty of the judicial officer is to ensure that proceedings are conducted fairly and there is no miscarriage of justice, including by ensuring an interpreter is provided to persons of no or limited English proficiency.

If an interpreter is required for a person accused of a criminal offence, it is the judicial officer's duty to ensure that a properly qualified interpreter is engaged. If there is any doubt about this, the case should not proceed until the doubt is removed. The judicial officer should use the Standards as a guide and always check the competence of an interpreter, including holding a *voire dire* hearing where necessary.

The judicial officer must do his or her best to ensure that the interpreter is discharging his or her responsibilities competently. Assuming the judicial officer is not familiar with the language being interpreted the judicial officer can do this by observing whether the interpreting process appears to be functioning appropriately. Where the judicial officer considers that there is a concern, they must take appropriate steps to preserve the integrity of the process.<sup>83</sup> For example, if a non-English speaking person (whether a party, witness or person present in the courtroom) appears concerned about the conduct of the interpreter the judicial officer should ascertain what might be wrong. This could be done by arranging a separate interpreter by telephone or, if one is unavailable, seeking the assistance of other bilinguals to ascertain what might be the issue of concern. If the judicial officer has some familiarity with the language being interpreted the task of monitoring the process may be easier. However, even where the judicial officer can understand the language being interpreted, he or she must decide the case by reference to the evidence as it was interpreted into English and cannot take into account his or her own understanding of the language unless he or she has fully explained to the parties the translation which he or she has assumed and afforded them an opportunity to make submissions on that translation.<sup>84</sup>

### 7.2 Commencing proceedings with an interpreter

#### 7.2.1 Ensuring adequate working conditions

The judicial officer should ensure that the interpreter/s have been provided with appropriate working conditions, as outlined in section 4 above.

#### 7.2.2 Ensuring the interpreter has been appropriately briefed

The judicial officer should also ascertain whether the interpreter has received a briefing on the matters they are required to interpret.

The interpreter is more likely to accept the assignment if they have been properly briefed and know the time, date, place and matters they are required to interpret. Interpreters also need to be fully briefed so they can identify potential ethical conflicts.

If the judicial officer is not satisfied that the interpreter has been appropriately briefed they may delay or adjourn proceedings and require the relevant party to do so.

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<sup>83</sup> See n 41 at [51].

<sup>84</sup> The Hon Justice P W Young and M W Young (1990), *Legal Language* 64 ALJ 761.

### 7.2.3 Assessing the competence of the interpreter

Prior to beginning proceedings, it is essential that the judicial officer consider a number of factors in order to ensure that the interpreter is able to meet the required standard. These include:

- the interpreter's NAATI accreditation;
- the nature of their interpreting qualifications;
- whether they are members of any interpreting associations and are bound by their Codes of Ethics;
- their experience as an interpreter, in particular, their experience in interpreting in legal and court environments;
- whether there are any ethical or cultural complexities and whether the non-English speaker has any particular preferences; and
- the interpreter's acceptance and understanding of the Court Interpreter's Code of Conduct (see Schedule 1 to the Model Rules).

The judicial officer can undertake this task, or delegate the collection of information in a consistent form to court staff or an interpreting service, provided the required information is supplied to the judicial officer and the parties.

The following are general guidelines on how to assess an interpreter's competence:

- **Qualifications:** The higher the interpreter's qualifications the more the judicial officer can be assured of the quality of the interpreting service. A professional, qualified interpreter is an expert who will know the appropriate protocols and will alert the court to potential translation difficulties if and when they occur. The less qualified, the more alert the judicial officer should be and the more likely they will need to help the interpreter, for example, by asking if they understood the utterance or by asking them if they need help, etc.
- **Interpreter's techniques:** The interpreter is less likely to be accurate in their renditions if:
  - they use the third person (e.g. he said that he wanted to go) instead of the first person (e.g. I wanted to go);
  - they engage in private discussions without seeking leave to ask for a clarification or repetition;
  - they offer lay opinions.
- **Interpreter's English proficiency:** the higher the proficiency, the more likely their rendition will be adequate.
- **Interpreter's delivery:** A competent interpreter is usually also confident and will stop proceedings to seek clarifications if needed.

If the judicial officer is concerned about any of these matters, he or she may raise this with the parties to see if a more qualified or experienced interpreter is available, and adjourn matters until one is available.

In the case of interpreting teams comprising bilinguals, the judicial officer should consider conducting *voire dire* hearings to assure themselves of the competence of the bilinguals and that the proceedings will be able to be performed by the two bilinguals cross-checking each other and being mentored by a professional interpreter.

### 7.2.4 The Court Interpreter's Code of Conduct and the Interpreter's Oath/Affirmation

After checking the interpreter's qualifications and competence, the judicial officer should ask the interpreter to depose that they are prepared to comply with the Court Interpreter's Code of Conduct (see 8.5.3, Schedule 1 and Model Rules 1.12-1.14).

At the start of some proceedings, an interpreter will be required to take the interpreter's oath or affirmation. The form(s) of the oath or affirmation may be specified by legislation and differ between jurisdictions.

If an oath is not specified by legislation, the recommended oath is:

“Do you swear by Almighty God (or affirm) that you will faithfully interpret all the evidence and other matters relating to this case to the best of your skill and ability? – Say I do”

Ordinarily, the Court will require the interpreter to take an oath for hearings or in any proceedings when evidence is being interpreted. When no evidence is taken, generally an interpreter is not required to take an oath. Whether an interpreter will be sworn for proceedings that do not involve evidence being given is a matter for the judicial officer.

### 7.2.5 Ethical issues

It is important that interpreters be independent from the parties. Lack of impartiality will lead to unfaithful renditions, as they may filter information to protect the witness, or may improperly use information for personal gain.<sup>85</sup> This may work to the disadvantage of either party, depending on whether or not the court recognises what has occurred. Similarly, interpreters cannot be asked to give evidence as witnesses relating to the interpreting task which has been undertaken: they must remain impartial.<sup>86</sup>

Complete lack of independence can be very difficult where there are a limited number of accredited interpreters in a particular language or dialect. This is particularly the case when the number of language speakers resident in Australia is small, as is the case with all Aboriginal and Torres Strait Islander languages and languages spoken by some immigrant groups. In such cases, the court should take extra steps to satisfy itself that the arrangement is acceptable to the court and to the parties, and should closely monitor the situation. In addition, the Court can put arrangements in place to assure everyone in the court that interpreting will occur impartially. Strategies include:

- the judicial officer and interpreter explaining the interpreters' role and the Court Interpreter's Code of Conduct;
- establishing an interpreting team, so they can cross-check each other's renditions;
- determining whether the non-English speaking party speaks several languages and whether interpreting could occur in a second language; or
- employing an interpreter from interstate or overseas.

## 7.3 Working with interpreters

### 7.3.1 Giving directions to the interpreter

The judicial officer should inform the interpreter to advise the court, and if necessary to interrupt, if the interpreter:

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<sup>85</sup> The Hon. Justice Melissa Perry and Kristen Zornada (2015), *Working with interpreters: Judicial perspectives*, 24 JJA 207 at 208-209.

<sup>86</sup> See *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584.



- cannot interpret the question or answer for any reason. For example, the question to the witness, or the witness's answer to the question, may have included a word or expression which is capable of having more than one meaning and the interpreter is unsure which meaning is intended;
- did not accurately hear what was said;
- needs to correct an error;
- needs to consult a dictionary or other reference material;
- needs a concept or term explained;
- is unable to keep up with the evidence; or
- needs a break.

The judicial officer should also instruct the interpreter not to engage in a conversation with the witness that is not interpreted. This may occur because a concept, expression or word needs to be explained to the witness. In such a circumstance, the interpreter should inform the court that an explanation is required and why this is necessary, so that the court can ensure that the proper explanation is given in a manner which can be interpreted.

### 7.3.2 Introducing the interpreter

At the start of proceedings, the judicial officer should introduce the interpreter and explain their role. While the form of the introduction is a matter for the court, a useful introduction is presented below:

Today we are assisted by [name of interpreter], an interpreter from the [name of the interpreter service – if applicable] who will be interpreting between the English language and the [name of language].

The interpreter is an officer of the Court, whose role is to interpret everything said in court. They play an important role by removing the language barrier in order for the Court to communicate with non-English speaking accused or witnesses.

The interpreter has promised the Court to convey accurately the meaning of what is said from one language to the other. The interpreter does not take sides. The interpreter has undertaken to follow the Court Interpreter's Code of Conduct.

Mr/Madam Interpreter if for any reason there is any problem or difficulty which is concerning you, please interrupt the proceedings by saying "Your Honour, I am now speaking as the interpreter, I have a difficulty which I would like to raise with you."<sup>87</sup>

### 7.3.3 Explaining the role of an interpreter to a witness

It may be appropriate in some cases for the judicial officer to explain the role of the interpreter to the witness. A suggested explanation may be:

This person is an interpreter. His/her job is to interpret everything that the lawyers and I say to you in your language, and to interpret everything you say into English. Please give your answers in short sections to give the interpreter an opportunity to interpret what you say. If you have any questions about what is happening or do not understand something, please do not ask the interpreter. It is not the interpreter's job to explain things to you or to answer your questions. If you have a question, ask me directly and the interpreter will interpret your question to me.<sup>88</sup>

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<sup>87</sup> Based on the NT Protocol, para 5.3.

<sup>88</sup> Based on the NT Protocol, para 8.9.

When team interpreting is being used, a direction should be given to the effect of:

Legal interpreting is a demanding task. From time to time you will see the interpreters change. This is done to ensure that the interpreters do not become mentally fatigued or lose concentration.

### 7.3.4 Ensuring effective courtroom communication

Ensuring all parties understand and can be understood is a shared responsibility of all officers of the court, not just the interpreter.

As a practical measure the judicial officer should be satisfied that the interpreter and the witness or accused understand each other, including whether they speak mutually intelligible dialects.<sup>89</sup>

Judicial officers can assist the interpreter by:

- intervening whenever there is overlapping speech, complex questions, rapid-fire speech, or words or expressions which are likely to be difficult to interpret;
- ensuring questions are short, manageable and understandable to lay audiences;
- intervening if it appears that the interpreter and the witness are having difficulty understanding each other;
- monitoring the interpreter to ensure he or she is keeping up with the pace of speech. For example, the judicial officer and the interpreter can agree on a signal, or how to speak out with a request that speakers slow down;
- listening for irrelevant answers, which might indicate failed communication. This can be due to:
  - misunderstanding of a convoluted question from the lawyer that was accurately interpreted (lawyer's responsibility);
  - misunderstanding a poorly interpreted question (interpreter's responsibility);
  - witness's lack of education;
  - a cross cultural issue that may require more or less explicit information. If it is something that impinges on the interpretation, the interpreter should be allowed to alert the court;
- listening for incoherent answers, which may be a sign of:
  - poor interpreting (miscommunication);
  - the speaker's own incoherence that is accurately portrayed by a competent interpreter (accurate interpreting); or
  - communication impairments associated with trauma. These may manifest as incoherence, impaired chronological logic or apathy. People who have experienced trauma have different discourse patterns to those who have not had these adverse life experiences.

### 7.3.5 Summarising in plain English

The judicial officer can indicate what matters they will summarise in plain English to facilitate understanding. For example, the Northern Territory Magistrate's Interpreters' Protocol advises that the following matters can be summarised with the agreement of the court:

- Judicial officers may advise the interpreter when they need not interpret legal argument in full and can instead interpret the judicial officer's summary of legal arguments between lawyers and the bench for the purposes of interpretation;

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<sup>89</sup> *R v West London Youth Court; ex parte N* [2000] 1 All ER 823 at 828.

- directions from a judicial officer or counsel to a witness;
- objections made by lawyers and answers to objections by counsel and the bench;
- questions and answers to/from expert witness; and
- discussion between parties about logistical or procedural matters (suitable adjournment dates, where and when a brief should be provided, the length of time required for a hearing).

### 7.3.6 Providing directions to the jury concerning the role of the interpreter

During the summing up, it may be necessary to give a direction to the jury about how to evaluate the evidence of a witness given through an interpreter. The judicial officer could consider modifying the direction depending on whether a highly qualified interpreter was engaged, compared to an inexperienced bilingual. A suggested direction is:

There are dangers in attempting to assess the truthfulness of a witness by reference to their body language or demeanour where different cultural backgrounds are involved. This problem may be exacerbated even more when evidence is given through an interpreter.

Judging the demeanour of the witness from the tone of the interpreter's answers is likely to be unreliable [unless the interpreter is highly trained.] Judging the demeanour of the witness from the witness' own answers in a foreign language requires a high degree of familiarity with that language and of the cultural background of its speakers. If a witness' answers appear to be unresponsive, incoherent or inconsistent, and may well appear to lack candour, this may well be due to the difficulty of interpreting concepts from one language to another. [However, when a highly trained interpreter is involved, such features should be attributed to the original speaker, as highly qualified interpreters are trained to maintain accuracy of content and manner.]

Nevertheless, the trial process does involve you in making an assessment of the witness' reliability and truthfulness notwithstanding that the witness has given evidence in a foreign language.

Other situations might demand a direction by the trial judge that although the witness was able to speak some English, because English is not the witness' first language, the law recognises the right of the witness to give evidence through an interpreter in their own language, and why this is so. If a submission is made by the opposing party that the witness was hiding behind the interpreter, any question of whether or not the witness had abused their right to use the services of an interpreter is a matter for the jury even if no objection had been taken to the use of the interpreter.<sup>90</sup>

See Appendix 5 for a summary of ways that judicial officers can assist interpreters.

## 7.4 What if an interpreter is not available?

An interpreter may not be available for a number of reasons. These include:

- the parties did not identify the need for an interpreter in advance;
- an interpreter was arranged, but did not attend for various reasons;
- an interpreter attended as arranged but their services were not used (for example, there was a challenge to their competence; the interpreter disqualified her/himself on

<sup>90</sup> *Tsang v DPP (Cth)* [2011] VSCA 336.

- ethical grounds; the interpreter declined the job on learning more about the matter);  
or
- there are no qualified interpreters for that language and a search failed to secure the services of a competent interpreting team.

There are also some circumstances where an interpreter will feel compelled to withdraw from the engagement due to ethical conflicts. For example:

- the interpreter may be related to the witness or the accused;
- they may have a conflict of interest;
- there may be cultural issues that make it difficult for them to accept the assignment;  
or
- they may not be able to adequately interpret into the relevant language because it is a different dialect from the one they know.

The right to withdraw should be respected by the court.

Interpreters may decline particular jobs, or request additional support, for distressing matters (for example, violence matters). Their reasons for declining a job, or requesting additional support, should be respected in order to keep highly qualified practitioners in the profession.<sup>91</sup> For example, they may advise they have interpreted a number of violence matters recently and need to have a rest from this sort of work for their own mental health, or at a minimum do it as part of a team to manage the isolation and stress associated with such work. Debriefing is also important in alleviating potential secondary stress.

#### **7.4.1 Managing the risk associated with a parties' failure to identify the need for an interpreter**

One reason interpreters may not have been arranged is that a party may not have identified the need for interpreters in advance. It is important for judicial officers to hold other parts of the justice system accountable for their use of interpreting services, as part of their overarching responsibility to ensure a fair trial. All parts of the justice system – for example, police, lawyers and child protection authorities – are required by administrative arrangements to use interpreting services to communicate with persons of limited English proficiency.

If a party did not identify the need for the interpreter, the judicial officer will need to ascertain whether such failure affects a fair trial. For example, the judicial officer will need to determine whether an accused understands the caution, the charges against them and their plea, and was able to give proper instructions to counsel. Part of a trial judge's responsibility in criminal trials is to ensure that the defendant understands the language of the court before the accused enters a plea. If there is any doubt about this the trial should not proceed until the trial judge is satisfied that the accused has a sufficient understanding of English to plead to the charge and to instruct counsel without the assistance of an interpreter.

#### **7.4.2 What if an interpreter cannot be found – adjourning or staying proceedings?**

If there is no qualified interpreter available for a particular date and place, the court should not proceed without language assistance. Instead, there are a number of different options available:

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<sup>91</sup> Research has found that interpreters suffer vicarious trauma and this may be one reason for leaving the profession or wishing to do so: see n 70.

- a short adjournment to see if a suitably qualified interpreter can be arranged at short notice and be at court in reasonable time;
- an adjournment to arrange for an interpreter to attend by video link or to travel from another State or Territory;
- changing the date to accommodate for the best qualified local interpreter to be present.

If these steps are unsuccessful the next step is to seek a longer adjournment. The longer adjournment should allow for a Professional level interpreter to be arranged (if there is one) or for an interpreting team to be organised.

When a party seeks to adjourn a matter on the basis of no interpreter being available the court will take into account any evidence that the relevant party can provide to the court outlining the steps taken to arrange an interpreter for the specified dates. This evidence could include material from an interpreting agency stating that no interpreter was available on the specified date.

Where matters are adjourned, parties should make arrangements to ensure that an interpreter is booked for subsequent court appearances. The party should include the name of the interpreter on the booking request, so that wherever possible the same interpreter will be allocated.

If, after making all enquiries, there is no interpreter available at all, the alternatives available to the court include a stay of criminal, on either a temporary or permanent basis, proceedings. These are measures of last resort used only after every effort to locate an appropriate interpreter, including by establishing an interpreting team, has failed.

## 7.5 Managing complex situations

### 7.5.1 If the non-English speaker refuses an interpreter

It may be the case that the non-English speaker advises that he or she does not need an interpreter. However, it is common for people who speak English as a second language to overestimate their ability to understand and speak English in a Court context. Research has found that non-English language speakers are disadvantaged by their inability to speak in the appropriate style in court.<sup>92</sup>

The judicial officer should check if the person has refused the interpreter because of concerns about the particular interpreter.

The judicial officer should carefully weigh up the complexity of the matters being discussed. For example, the judicial officer may decide to proceed without an interpreter if the limited English speaker is a witness who will be asked simple questions for a short period of time about day-to-day events. For anything that is more complex, if there is any doubt of the limited English speaker's understanding or their ability to make themselves understood, the court should insist on an accredited interpreter being made available, in accordance with the Standards.

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<sup>92</sup> Albrechtsen, D., Henriksen, B. and Faerch, C. (1980), *Native speaker reactions to learners spoken interlanguage*, Language Learning 30 (2): 365–396; Anderson-Hsieh, J., Johnson, R. and Koehler, K. (1992), *The relationship between native speaker judgements of non-native pronunciation and deviance in segmentals, prosody, and syllable structure*, Language Learning 42 (4): 529–555.

### **7.5.2 If the non-English speaker has concerns about a particular interpreter**

If a party has raised concerns about a particular interpreter, the judicial officer should ascertain where there are any linguistic and cultural issues that will affect the quality of interpreting, as well as any strong preferences of the non-English speaking party. For example, the judicial officer should check whether there are concerns such as issues relating to gender, age, dialect or independence of the interpreter.

If the non-English speaking party expresses concerns about working with a particular interpreter, a separate interpreter should be arranged via phone so they can communicate their concerns. The judicial officer should be alert that the person requiring an interpreter is in a very vulnerable position and relies significantly, or wholly, on the interpreter discharging their responsibilities ethically.

### **7.5.3 Physical and verbal threats to interpreters**

Persons present in the court (for example, family members of a party or witnesses) may sometimes be confused by the role of the interpreter. This can arise because the interpreter is required to use the first and second grammatical persons and is required to interpret statements accurately and impartially. This may lead family members to believe the interpreter is taking sides. At times, this has led to reprisals against interpreters by community members. For example, interpreting services are aware of instances where family members have approached the interpreter after proceedings asking “why are you saying his lies for him?” or “why are you taking sides against our mother?”. In some instances this has led to actual threats or acts of physical violence following the case.

During the proceeding, the judicial officer should monitor the demeanour of people in the courtroom and may at times need to repeat the explanation about the duties of the interpreter.

Interpreters should be encouraged to bring any physical threats or verbal accusations to the attention of the court as soon as possible and to seek the assistance of the police if required to assure their safety.

### **7.5.4 Threats to sue an interpreter for defamation**

An interpreter is not responsible for the utterances of those for whom they are interpreting. An interpreter can only be accountable for interpreting accurately to the best of their skill and ability. Anything said in a court attracts absolute privilege.

### **7.5.5 Challenges to competence**

A challenge to the competence of an interpreter could arise before proceedings, during the proceedings, or after the proceedings as a ground of appeal. The challenge could come from one of the parties, a witness, the judicial officer or the jury panel. The optimum time to raise a challenge to competence is before the proceedings begin.

To manage the risk of a challenge to competence, it is essential that:

- the interpreter’s accreditations, formal qualifications experience be known to the court and the parties; and
- the evidence, and the interpreter’s interpretation of it be recorded, so that it can be reviewed by an independent expert, if necessary.

Having two interpreters working as a team, who can help and check on each other's performance, will also help assure the quality of interpreting.

Judicial officers have set as standards of competence the inclusion of continuity, precision, impartiality, competence and contemporaneousness, taking into account that the interpretation must be of such a quality as to ensure that justice has been done.<sup>93</sup> Linguists have specified that accuracy of content and manner are crucial when assessing competence of legal interpreting performance.<sup>94</sup>

#### **7.5.5.1 Managing challenges to competence during the proceedings**

Sometimes a challenge to competence occurs during the hearing itself, when parties present in the courtroom raise concerns with the judicial officer about the interpreter. If the challenge is based on issues such as the failure to provide consecutive or simultaneous interpreting of the evidence, or of the exchanges between counsel and the bench or jury, or the independence of the interpreter, then the challenge can probably be accommodated without having to adjourn proceedings.

If a bilingual party present in the proceedings challenges the interpreter's interpretation, the first step to be taken is to ask the interpreter to defend or justify their interpreting choice. If the interpreter agrees that they have made a mistake, it can be easily rectified. If the interpreter does not agree, the qualifications of the interpreter and the bilingual should be compared first. If the bilingual is not qualified to give an expert opinion, the opinion of the interpreter should prevail. If two interpreters are working together, the other interpreter can be questioned on his or her colleague's interpretation.

If the challenge is raised by an equally or better qualified expert, the response may require a *voire dire* hearing during which the judicial officer would hear evidence from the expert and also from the interpreter concerned. This procedure would interrupt the flow of the trial and may be extremely difficult to accomplish without adjourning the proceedings to a different date. It may be necessary to engage a suitably qualified interpreting expert to provide an independent assessment of the recorded exchanges.

If the challenge is upheld, the judicial officer will have to consider what needs to be done to remedy the situation. It may, for example, be necessary in a criminal case to inform the jury that the evidence of the witness so far given is to be ignored and that the witness will be recalled using the services of a different interpreter. However, other errors may be incapable of a remedy leaving the judicial officer with no choice but to dismiss the jury and order a retrial. It will depend on the particular situation. In some instances the accused's counsel will waive the irregularity if appropriate measures are taken to remedy the situation (for example, if the interpreter has failed to properly interpret the evidence of the witnesses to the accused in the dock).

#### **7.5.5.2 Challenges after the trial are over**

In many cases, the party affected by the interpreter's errors may be unaware of the problem until the proceedings are over. Appeal courts have so far shown considerable reluctance to allow appeals on the ground that the interpreter was incompetent or otherwise failed in his or her duty. However, if the errors are sufficiently important so as to lead to a miscarriage of justice, the appeal court can allow the appeal and order a re-trial. There have been some

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<sup>93</sup> *De La Espriellavesco v The Queen* [2006] WASCA 31.

<sup>94</sup> Berk-Seligson, S. (1990/2002), *The bilingual courtroom*, Court interpreters in the judicial process, Chicago, The University of Chicago Press; Hale, S. (2004/2010), *The discourse of court interpreting*, Amsterdam: John Benjamins.

successful appeals on this ground. The real impact of the interpreter's incompetence is difficult to ascertain.<sup>95</sup>

In order to demonstrate that a miscarriage of justice occurred, the accused on appeal would have to show that the level of interpretation was so bad as to have prevented the accused from being able to give an effective account of the facts vital to his or her defence. For example, the appellant would need to provide evidence that he or she failed to understand in important respects what was said against him or her, failed to understand the questions, or the interpreter did not properly interpret his or her answers.<sup>96</sup> An interpreting expert would also need to demonstrate the nature of the alleged inaccuracies.

Some authorities have suggested that it is relevant for the appeal court to take into account that no objection was taken at the trial.<sup>97</sup> Whilst there may be occasions when it is appropriate to note that no objection was taken, this must depend on the circumstances. If the party concerned speaks no English and the party's counsel does not have a command of the other language to be interpreted or the assistance of someone else to check the quality of the interpretation, the possibility of misinterpretation may not be obvious. Therefore, no weight could be given to the failure to object.

In *De La Espriella Vasco v The Queen*<sup>98</sup> the appeal was dismissed although the expert evidence was that there were over 500 misinterpretations, the interpreter's knowledge of Spanish and English was at an uncultivated level, whereas the appellant's spoken Spanish was that of a highly educated man (the opinion expressed by the expert was that because of this the appellant was wrongly portrayed as a person of low intelligence), and the interpreter had failed to provide simultaneous interpreting of the exchanges between counsel and the bench, but merely summarised them. The court was of the opinion that the misinterpretations were of no real significance, and that the jury would have understood that the witness was highly intelligent, because the Crown suggested this to the jury and because the witness had not displayed any difficulty in understanding the interpreter. The court found that failure to provide simultaneous interpreting of the exchanges had not disadvantaged the appellant.

Forensic linguistic research, however, has shown that jurors make their own evaluations of intelligence, credibility, competence and trustworthiness, based on the way witnesses express themselves, regardless of what counsel may say to them to make them think otherwise.<sup>99</sup> What also told against the appellant in that case was that, although the question of the interpreter's competence had been raised during the trial, the appellant, after having had an opportunity to consult his barrister in circumstances where he had available to him a check interpreter, elected to proceed with the same interpreter.

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<sup>95</sup> Hayes, A. and S. Hale (2010), *Appeals on incompetent interpreting*, *Journal of Judicial Administration* 20: 119-130.

<sup>96</sup> *R v Saraya* (1993) 70 A Crim R 515.

<sup>97</sup> *Ibid*; *Chala Sani Abudla v The Queen* [2011] NZSCA 130 at [56].

<sup>98</sup> [2006] WASCA 3.

<sup>99</sup> Conley, J. M., et al. (1978), *The power of language: Presentational style in the courtroom*, *Duke Law Journal* 6: 1375-1399.



## 8. Duties and Functions of Interpreters

### 8.1 The interpreting process

The fundamental role of the interpreter is to convert what the speaker says to the language of the listener. Interpreters must understand the meaning and style of discourse rapidly, accurately convert it into another language, and articulate it. The potential subject matter of legal proceedings is very broad so the interpreter needs to have a broad general knowledge, as well as a broad active and passive vocabulary and excellent knowledge of regionalisms, idioms and language variations in English and the other language. They should also be able to vary the language they use to accurately match the diversity of language habits of parties.

The interpreting process is complex and involves three main steps: comprehension, conversion and delivery.

#### 8.1.1 Comprehension

The level of the interpreter's comprehension will depend on many factors, including:

- high level proficiency of the languages in all registers;
- knowledge of the subject matter;
- knowledge of the terminology; and
- knowledge of the context.

##### 8.1.1.1 Knowledge of the languages involved

While there are many people who speak more than one language, few understand and speak two or more languages to such a high degree of competence that they can use both languages in all 'registers' – from conversations to high-level international negotiations. Further, interpreters working in specialist areas such as law also require knowledge of specialised terminology and discourse practices in order to accurately interpret.

##### 8.1.1.2 Knowledge of the subject matter

Interpreters working in legal settings also need to understand the subject matter under consideration. Without this, they will not be able to understand the source language message and consequently will not be able to accurately interpret. Research has shown that even in situations where both parties share the same language, the level of comprehension rises significantly the more those involved understand the specific subject matter being discussed.<sup>100</sup> This is why it is of the utmost importance that, where possible, interpreters receive adequate briefings, as well as relevant documents and materials, in order to prepare before the commencement of a hearing.

##### 8.1.1.3 Knowledge of the context

A word or phrase can take on different meanings according to the way in which it is used. As a result, it is crucial for interpreters to know as much as possible about the context in order to perform their interpreting role accurately.

To take an example from a real case, an interpreter who was not briefed about the situational context was asked to interpret: "Did you see the couch in the room?" The

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<sup>100</sup> Hale, S. (2013), *Helping interpreters to truly and faithfully interpret the evidence: The importance of briefing and preparation materials*, Australian Bar Review 37(3): 307-320.

interpreter understood the word “couch” to mean a “lounge chair” and interpreted it as such into the target language. The answer to this question was in the negative. As the questioning progressed, it became apparent to the interpreter that the term “couch” referred to a surgical bed in a doctor’s surgery, and should have been interpreted using a different word in the target language. When the interpreter realised this, he asked permission from the judicial officer to rectify the mistake and was allowed to do so.<sup>101</sup> However, much time was wasted. Had the interpreter been properly briefed, the misunderstanding could have been avoided.

### 8.1.2 Conversion

Conversion is a term used to describe the mental process the interpreter needs to engage in to convert a message from a source language to a target language. Trained, experienced interpreters will make informed choices, and will be able to justify such choices if questioned.

Trained interpreters take all of the following into account in deciding how best to convey what the speaker says into a target language:

- What was the purpose of the statement? (for example: to accuse, compliment or offend?)
- In what tone was the utterance made? (for example, sarcastic, contrite, indifferent?)
- What was the manner of the utterance? (for example, confident, hesitant, assertive, confrontational, polite, impolite?)
- What would be the likely reaction of the listeners had they heard it in the original language? (for example, would they feel offended, intimidated or put at ease?)
- What is the register used? (for example, formal or informal?)
- To whom is the statement addressed and what is the relationship between the speakers? (for example, is it a person of authority addressing a person of a lower status? Or are both those involved of equal status? Is there an age or gender difference?)<sup>102</sup>

The interpreting task is mentally and physically taxing. The interpreter needs an exceptional memory and needs to undertake the complex mental analysis at the same time as committing facts to memory, taking notes, accessing their knowledge of the subject matter and terminology, and then rendering what they have heard in one language into another.

### 8.1.3 Delivery

The interpreter needs to give the fullest possible interpretation of what was being said. This involves not just accurately conveying the content of an utterance, but also the manner and style of delivery. The interpreter needs to speak as much like the person for whom they are interpreting as is possible. They become their “voice”, not unlike an actor, and therefore they need to be faithful to the register and style of the original speaker, as well as to the content of the utterances.

An essential part of accurate interpreting is the use of the first or second grammatical person. For example, when interpreting in the first person, an interpreter will interpret: “He grabbed me and pushed me down and raped me”, rather than in the third person “She said that he grabbed her and pushed her down and then raped her”. When interpreting in the second person, the interpreter will interpret: “You be quiet”, rather than in the third person: “He is telling you to be quiet”. (See Example 1)

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<sup>101</sup> Hale, S. (2004/2010), *The discourse of court interpreting*, Discourse practices of the law, the witness and the interpreter, Amsterdam/Philadelphia, John Benjamins.

<sup>102</sup> Hale, S. (2007), *Community Interpreting*, Basingstoke, Palgrave Macmillan.

Questions should be addressed directly to the person being questioned, not the interpreter. This is known as the 'direct' approach, as opposed to the mediated approach.

Example 1

Defendant: Yo no dije eso (I didn't say that)

Interpreter 1 (correct): I didn't say that (first person)

Interpreter 2 (incorrect): He said he didn't say that (third person)

When the interpreter is interpreting on behalf of the judicial officer, the interpreter needs to sound like the judicial officer. Similarly, when interpreting for an educated witness, the interpreter needs to sound like an educated person. Conversely, when interpreting for an uneducated witness, the interpreter needs to sound like an uneducated person. Only very highly trained interpreters are capable of providing such specific levels of accuracy.

## 8.2 Accuracy in interpreting

### 8.2.1 The meaning of accuracy of interpreting

A common misconception is that accurate interpreting equates to literal, word for word translation. The reality is an interpreter needs to make a wide variety of changes to produce accurate renditions. A practitioner requires an exceptionally complex range of abilities to do so.

The following are examples of common issues:

- **Ideas that are succinctly expressed in one language may need many words for them to be conveyed accurately in another language.** For example, the German word "schadenfreude" is conveyed in English as "pleasure in another person's misfortune". Similarly, the grammar and vocabulary of Auslan is different from English. As in other languages, it has its own lexicon and syntax. There is no direct translation for some words given there are only 4,571 signs in the Auslan vocabulary (compared with over 1 million in English).
- **It is not always easy to interpret complex and abstract ideas between English and other languages.** Interpreters may need to seek clarification if they are unfamiliar with abstract nouns, jargon, acronyms, technical terms or have trouble rendering a term or concept with the expected degree of accuracy (for example, murder or manslaughter; assault or aggravated assault). This can also be due to differences across legal systems which do not have equivalent concepts.
- **Literal word for word translations of idioms will rarely make sense.** Instead, good interpreters will select a similar phrase that maintains the meaning, the tone and the intention of the original phrase. For example, "It's raining cats and dogs" would be translated to "Llueve a cántaros" (Spanish – "rains in clay jars") to maintain the meaning of "It is raining heavily". In this instance, the grammar is different as well ("it's raining" was changed to "rains" due to grammatical differences between the two languages).

- **The way politeness is expressed across language can be very different.** A good interpreter will attempt to achieve the same level of politeness, in order to achieve the same effect as the original on the target language listener. For example, one way to show politeness in English is by being indirect, so a request to do something will normally be expressed in the form of a question, such as: “Would you be able to tell the court what happened?”. In some languages, such a question will be understood as a genuine question of ability. In order to avoid misunderstanding, it may need to be rendered as a direct, specific command in the target language, for example, “Please tell the court what happened”.<sup>103</sup>
- **Different languages use a wide variety of ways to refer to the passage of time, location and space, as well as number, gender, or family relations.** Often when interpreting from a less specific to a more specific language the interpreter may need to seek clarification in order to ensure that meaning is conveyed accurately. For example, an Aboriginal person may distinguish between “properly his father” (his biological father) and his father’s brothers (who are also his fathers in kinship terms).

Content and manner are important in courtroom discourse. Interpreters should aim to achieve accuracy of content and manner, including the tone and register of the source language utterances. Competent and ethical interpreters will not omit information provided in an answer that they consider to be irrelevant to the question.

In court interpreting, trained interpreters will strive to preserve the tone of the original – whether hesitant or confident – and will even interpret obvious mistakes, as they are attempting to maintain full accuracy of the original. For example, if the question is confusing, an accurate rendition will also be confusing. Similarly, a hesitant answer needs to be interpreted hesitantly, an assertive answer assertively, and so on. Competent and ethical interpreters will not attempt to make the questions and answers more coherent or easier to understand. Research has shown the manner in which testimony is delivered is as important as the content.<sup>104</sup>

#### Example 2

Defendant: Ah...dejeme pensar...eh...no sé si dije eso. (*Addressing the interpreter*) No, perdón, mejor no diga eso. Diga que no dije eso.

Gloss: Uh...let me think...uh...I don’t know if I said that. (*Addressing the interpreter*) No, sorry, please don’t say that. Say I didn’t say that.

Interpreter A (incorrect): *I didn’t say that.*

Interpreter B (correct): *Uh...let me think...uh...I don’t know if I said that. No, sorry, please don’t say that. Say I didn’t say that.*

In this example, the interpreter is placed in an ethical dilemma. The defendant answers in a hesitant way and then asks the interpreter to only interpret the last part of his answer.

Interpreter A abides by the defendant’s request. Such an interpretation constitutes an inaccurate rendition and a breach of the Court Interpreter’s Code of Conduct. Interpreter B provides an accurate rendition of the original and abides by the Code.

<sup>103</sup> Hale, S. (2007), *The challenges of court interpreting: intricacies, responsibilities and ramifications*, *Alternative Law Journal* 32(4): 198-202.

<sup>104</sup> Berk-Seligson, see n 94.

Hale, S. (2004), *The discourse of court interpreting*, *Discourse practices of the law, the witness and the interpreter*. Amsterdam/Philadelphia, John Benjamins.

## 8.2.2 Factors that influence accuracy in interpreting

The accuracy of interpreting will depend on many factors, including:

- understanding of the purpose of the interpretation;
- the setting where the interpretation takes place;
- the competence of the interpreter;
- the mode of interpreting (i.e. consecutive or simultaneous);
- the working conditions provided to the interpreter;
- the preparation materials provided prior to the interpreting event;
- the briefing given to the interpreter;
- the manner and speed in which all speakers deliver their speech.

Communication is a shared responsibility between the interpreter and all other parties in court. It is important for all speakers to be aware of interpreters and assist in facilitating their work as much as possible by:

- speaking in complete sentences;
- avoiding overlapping speech;
- pausing after each complete concept to allow for consecutive interpretation;
- asking one question at a time;
- avoiding difficult jargon, or if such jargon is necessary, explaining what it means in lay terms;
- speaking at a reasonable pace and in an audible, clear voice.

## 8.3 Interpreting in the appropriate mode

The different modes of interpreting are further explained in Appendix 2.

### 8.3.1 The consecutive mode

When the non-English speaker gives evidence, the most common mode of interpreting in Australian courts is currently the consecutive mode. The interpreter stands or sits (depending on the length of the testimony), next to the witness and interprets after each short segment. Trained interpreters will know how to coordinate the turns and will commence interpreting at the appropriate intervals. However, there will be interpreters who are not as confident who may be reluctant to interrupt and as a consequence their interpretation may not contain all the elements of the original. For this reason, the judicial officer must be alert to ensure that speakers stop at reasonable intervals to allow the interpreter to interpret.

### 8.3.2 Simultaneous interpreting

Currently, most courts in Australia are not equipped with simultaneous interpreting equipment, which means the interpreter must sit uncomfortably close to the witness to whisper in his or her ear. Similarly, when the accused is in the dock, interpreters are often also seated next to them in the dock. This proximity is not only uncomfortable and unprofessional for interpreters, it can also portray inappropriate messages to the jury or others in the court who may associate the interpreter with the defendant or accused.

## 8.4 Language and culture

Language and culture are inextricably linked. Some cultural aspects are embedded in the way people express themselves. Others are reflected in the way people behave or act. Cross-cultural differences that are embedded in a language can often be addressed through an accurate rendition. Other cross-cultural differences may be very subtle, manifesting via the way a person addresses others: the way a person gives and accepts compliments; the way a person asks and answers questions; the way a person perceives concepts; and what a person regards as appropriate or inappropriate behaviour.

Some cross-cultural differences may lead to misunderstandings if both speakers are unaware of them. However, sometimes misunderstandings occur because of poor communication skills or by poor interpretation that are sometimes unjustifiably attributed to cross-cultural differences.<sup>105</sup> There is also sometimes a tendency to overgeneralise about cross-cultural differences, and incorrectly assume that all people who speak one language act and think in the same way.

Examples of cross-cultural communication differences are eye contact and silence. In some societies people who avoid direct eye contact may be regarded as suspicious or shifty. In Aboriginal, some Asian and other cultural groups it is frequently considered impolite to stare. In some societies lengthy silences may be taken as evidence of non-cooperation, evasion or untruthfulness. However, in other societies people may think very deeply and carefully before talking about serious matters and lengthy silences can be the norm while this occurs.<sup>106</sup>

Another example is the use of nodding in deaf communication. Certain Auslan signs may look as though a deaf person is stating yes. However, it could be that they are just nodding to acknowledge they understand what is being signed to them, not necessarily that they understand or agree with what is being said.

It is impossible to list all the cross-cultural differences that may be encountered in court interpreting. Rather, it is important to be conscious of the fact that cross-cultural misunderstandings can and do occur. One way to address this issue is for all parties to be alert to situations when an answer may not sound logical or relevant. Before assuming that there is something wrong with the answer, or with the interpretation, the person could be asked to explain why they said what they said. Interpreters should also be allowed to alert the court to a potential cross-cultural misunderstanding, which can be followed up with questions from counsel or the bench.

## 8.5 Basic responsibilities of a court interpreter

### 8.5.1 Name and qualifications

Interpreters should be asked to state their name and qualifications before taking the oath or affirmation and confirming their commitment to the Court Interpreters' Code of Conduct.

Qualifications include:

- their level of NAATI accreditation;

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<sup>105</sup> Felberg, T. and H. Skaaden (2012), *The (de)construction of culture in interpreter-mediated medical discourse*, *Linguistica antverpiensia* 11(2012): 95-112.

<sup>106</sup> Mildren D (2008), *Aboriginals in the Criminal Justice System*, *Adelaide Law Review* 2008 (29) 7-27

- any formal interpreting training they may have completed, either at TAFE or university; and
- their experience interpreting in Court.

### **8.5.2 The oath or affirmation**

Interpreters are required to take an oath or affirmation stating that they will interpret everything to the best of their skill and ability.

### **8.5.3 The Court Interpreters' Code of Conduct**

All interpreters should familiarise themselves with their responsibilities under the Court Interpreter's Code of Conduct (see Schedule 1) and be prepared to swear or affirm that they will adhere to that Code.

The Court Interpreter's Code of Conduct is based on the Code of Ethics of the Australian Institute of Interpreters and Translators (AUSIT) that is accepted by practitioners and interpreting and translation service users. The AUSIT Code of Ethics covers the principles of professional conduct, confidentiality, competence, impartiality, accuracy, clarity of role boundaries, maintaining professional relationships, professional development and professional solidarity. The Code adopts these standards as the expectation of all interpreters and translators assisting the Court, regardless of whether or not they are members of AUSIT or the Australian Sign Language Interpreters' Association (ASLIA).

AUSIT and ASLIA expect their members to abide by its Code of Ethics and NAATI accredited practitioners are required to answer questions on ethics, based on the AUSIT Code as part of their accreditation examination.

If uncertified bilinguals are being used as part of interpreting teams, the bilingual must take steps to understand the Code and understand the duties they are being asked to fulfil.

However, it must be stressed that understanding the requirements of the Code of Ethics will not guarantee accurate interpreting if the bilingual does not possess the necessary skills and competence.

When establishing interpreting teams that include untrained bilinguals, the Court should take steps to confirm they understand their responsibilities under the Code. The Court may fund training for such bilinguals in the main languages of demand.

Similarly, one of the responsibilities of the Professional Mentor (see X) is to assist the bilinguals to adhere to the Code.

### **8.5.4 Ethics and the role of the interpreter**

Professional interpreters who abide by the AUSIT Code of Ethics frequently complain that they are asked to act in ways that their Code of Ethics regards as unethical. For example, interpreters advise they are at times asked by judicial officers, court staff and legal representatives to:

- take a person to the court office and explain the legal process;
- convince a lawyer's client to accept an offer;
- offer lay advice on the credibility of a non-English speaking witness;
- serve as experts to the courts, who can be asked to give evidence on a wide variety of linguistic or cultural matters.

Other common misunderstandings of the role of the interpreter are when:

- the non-English speaker may perceive the interpreter as their ally; for example, they might expect the interpreter to help them make decisions, answer questions correctly, or offer advice or explain the legal process;
- lawyers sometimes think that if their firm is paying for the interpreter, then the interpreter should, or must, be on “their side” and therefore help them to win their case, or to become an assistant to their non-English speaking client.

The interpreter’s fundamental obligations are accuracy, impartiality and confidentiality. These are reflected in the Court Interpreter’s Code of Conduct and the AUSIT and ASLIA Code of Ethics.

## 8.6 What must be interpreted

The role of the interpreter is to remove the language barrier so that the party can be made linguistically present at the proceedings and thereby be placed in the same position as an English-speaking person. This means that they are entitled to hear the proceedings in their own language. It does not mean that they will necessarily understand everything, just as English speakers do not necessarily understand everything that transpires in a court.

Ideally, the interpreter should interpret everything said during proceedings. Just as the court needs to hear the interpretation of everything that was said in a language other than English by the party or witness, the defendant is also entitled to hear everything that is said in English, as someone who understands English would.

For this reason, interpreters should interpret objections and should not be instructed to refrain from interpreting them. Once the interpreter has heard an utterance, the interpreter is under an obligation to interpret it into the target language in order to satisfy the party’s entitlement to be linguistically present.

### Example 3

Counsel 1 (during examination-in-chief): Mr Lopez, so you saw the incident then, is that right?

Counsel 2: Objection, leading question.

Judge: Objection sustained.

*An interpreter should interpret this exchange.*

Interpreters *must* interpret:

- Direct speech to the party, including:
  - charges;
  - sentencing remarks;
  - explanations from the bench about adjournments and court processes;
  - any questions put to the party from the judicial officer or counsel;
  - bail or any other conditions imposed by the court;
- Speech expressly about the party including:
  - reading of the agreed facts;



- comments by the prosecution, judicial officer or defence lawyer about the accused’s character (such as criminal history or prospect of rehabilitation);
- reading of character references or similar statements;
- addresses to the jury;
- A prosecutor or judicial officer reading a victim impact statement;
- Examination and cross-examination of non-expert witnesses;
- Direct speech by the party or witness, including any comments addressed to the interpreter;
- Sentences, orders and conditions.

## 8.7 Interpreting the oath to the witness

Interpreters will also have to interpret the witness’ oath or affirmation. In 2015 the International Communication of Rights Group released guidelines noting that particular care needs to be taken communicating rights to non-native speakers of English in the context of police interviews. These considerations are also relevant to interpreting the oath or affirmation in court. The guidelines recommend essential practice should be:

- the clerk provides a written copy of the entire oath or affirmation in advance to the interpreter;
- the clerk reads out the entire oath or affirmation in English, without pauses;
- the interpreter delivers it phrase by phrase in the target language (with phrase breaks that make grammatical and logical sense in the target language);
- the non-English speaker, depending on the requirements for taking the oath or making an affirmation, either repeats it back to the interpreter phrase by phrase or replies with “I do”;
- finally, the interpreter interprets the entire oath or affirmation back to the court or the witness’ reply.

It is very important to give a written copy of the relevant witness oath or affirmation to the interpreter in order to sight translate it to the witness, as many languages have very different syntactic structures to English and sentences cannot be split in the same way as in English.

## 8.8 Addressing the Bench

### 8.8.1 Seeking repetitions, clarifications and explanations

There may be instances when the interpreter will need to ask for repetitions or seek clarifications and explanations. All requests should be addressed to the judicial officer rather than to the questioning counsel. Interpreters should address judicial officers as “Your Honour” and, if in doubt in other contexts, should inquire as to the correct mode of address for the presiding officer, for example “Mr Chairman”.

#### Example 4

Below are two suggested ways an interpreter can address the presiding officer.

1. Interpreter: Your Honour, the interpreter requires repetition.
2. Interpreter: Your Honour, I am now speaking as an interpreter. May I seek leave to have the last question repeated please?

There may be times when the witness utters a term that is unknown to the interpreter. This may be due to a number of reasons, including that it is a regional term, a very colloquial term, a code term or a technical term.

In such circumstances, the interpreter must ask for an explanation rather than guess the meaning or simply omit the term. At these times, the interpreter needs to speak as the interpreter and not on behalf of the witness.

#### Example 5

Defendant: El gallo me dio un combo en la cara.

Interpreter: (*Addressing the Bench*) Excuse me Your Honour, I am now speaking as the interpreter. The defendant has used a regional term I do not understand. May I have leave to seek clarification?

Judge: Yes, thank you.

Interpreter: (*Addressing the defendant*) – Disculpe señor, acabo de pedir permiso para preguntarle qué quiere decir la palabra ‘combo’? (Excuse me sir, I’ve just asked for permission to ask you what the word ‘combo’ means)

Defendant: Ah, bueno, es chileno para un golpe con el puño. (Uh, ok, it’s a Chilean word for hitting someone with the fist)

Interpreter: Bueno, muchas gracias (Thank you very much). (*Addressing the Bench*) – Your Honour I now understand the term is a Chilean colloquial term that means hitting with the fist, or a punch. The answer then is: The bloke punched me in the face.

#### 8.8.2 Alerting the Court to a translation error

There may be occasions when the interpreter needs to correct a mistake. Corrections should be addressed to the judicial officer rather than to the questioning counsel. The following example sees the interpreter rendering the word couch as “easy-chair” due to lack of briefing about context. Later the interpreter realises counsel meant “doctor’s couch”.

#### Example 6

Counsel: And Mrs Martinez, did you see the couch in the room?

Interpreter: Y, Sra Martinez, ¿usted vio el sillón en la sala? (And, Mrs Martinez, did you see the couch in the room?)

Witness: No, no había ningún sillón ahí. (No, there was no couch there)

Interpreter: No, there was no couch there.

Counsel: But you said before that there was a couch there, are you lying to us Mrs Martinez?

(After a number of questions, the interpreter who had not interpreted at the previous hearing and was not given a briefing, now realises that they are referring to a couch in a doctor’s surgery and not a couch in a living room)

Interpreter: Your Honour, the interpreter is now speaking. I now realise that I misinterpreted

the term “couch” because I did not know the context. Now that I know the context is a doctor’s surgery I will use the correct term in Spanish, which is different from the one I used. May I clarify the issue with the witness?

### **8.8.3 Alerting the Court to any potential cross-cultural misunderstandings**

Explaining cross-cultural misunderstandings is a grey area in interpreting practice. Interpreters do not claim to be anthropologists or cultural experts and should not be used as such. However, culture can affect the meaning of words and impinge on accuracy. Moreover, the interpreter may be the only person in the court who can identify miscommunication due to underlying cross-cultural differences.

It is at these times when the interpreter may be allowed to seek leave to alert the court to a potential cross-cultural misunderstanding. It is then the judicial officers decision about how to proceed – whether to seek an adjournment to clarify with the interpreter, whether to ask the party or witness to explain an issue further, or whether to continue without further action.

#### **Example 7**

Interpreter: Your Honour, the interpreter is now speaking. I would like to alert you to what I believe may be a cross-cultural misunderstanding.

### **8.8.4 Requesting breaks**

Interpreters require breaks in order to maintain accuracy. Ideally, the judicial officer and the interpreter will have agreed on frequent rest breaks (for example, 15 minute break every 45 minutes of interpreting). However, the interpreter should feel comfortable to seek a break outside of these times.

### **8.8.5 Alerting the court to any potential conflict of interest and withdrawing from the proceedings**

There may be occasions when, after having accepted an assignment, interpreters need to excuse themselves due to a conflict of interest. For example, the interpreter may become aware of a relationship to a witness, there may be cultural issues that make it difficult for them to accept the assignment or they may feel they can no longer maintain impartiality due to the extent of conflict with personal values or beliefs. Sometimes interpreters may need to excuse themselves because the material is overwhelming and so distressing that they fear for their mental health if they continue.

#### **Example 8**

Interpreter: Your Honour, the interpreter is now speaking. I need to excuse myself. Could I please discuss this with you?

## 9. Duties of Legal Practitioners

Members of the legal profession – along with judicial officers, court staff and interpreters – share responsibility for the provision of quality interpreting services in Australia’s legal system.

### 9.1 Assessing the need for an interpreter

To ensure that proceedings are conducted fairly and there is no miscarriage of justice, an interpreter should be engaged in any proceedings where a party who has difficulty communicating in, or understanding, English in a courtroom context is required to appear in the court. Legal practitioners should also take steps to ascertain whether persons also have hearing or other impairments that affect their ability to understand and to be understood.

In determining whether a person requires an interpreter legal practitioners should apply the four-part test for determining need for an interpreter as outlined in Appendix 4.

Particular care may need to be taken in selecting the interpreter depending on the subject matter of the hearing and characteristics of the non-English speaking person. For example, some subject matters (such as sexual cases) may require special consideration in the choice of the interpreter; an experienced interpreter would be strongly preferred for a child, or a person of low intelligence, or a person who is ill-educated.

### 9.2 Raising the need for an interpreter with clients

Legal practitioners need to be sensitive when raising the topic of engaging an interpreter. There are a number of reasons why a client may not want to use an interpreter, including:

- they may not understand the role of the interpreter;
- they might not want additional people knowing their business;
- they may not trust that an interpreter will act impartially, accurately and confidentially;
- they may have previously had a negative experience with an interpreter;
- legal practitioners should explain to the client the role of the interpreter and reassure them that interpreters are bound by their Codes of Ethics and the Court Interpreters’ Code of Conduct.

### 9.3 Booking interpreters

When booking interpreters for a party, legal practitioners should allow as much notice as possible to the interpreter service or individual interpreter. This will maximise the ability of the interpreting service to provide an appropriate interpreter for a particular case.

Whenever possible, interpreters should be booked to start at least 30 minutes prior to commencing their interpreting task in order to be briefed.

### 9.4 Engaging an interpreter in accordance with the Standards

Parties engaging an interpreter should select interpreters in accordance with Minimum Standards.

## 9.5 Briefing interpreters

Briefings are beneficial to both interpreters and lawyers. The better informed both sides are about the other professionals' role, goals, needs and requirements, the better they will be able to work together.

The party or legal practitioner requiring the assistance of an interpreter should provide the interpreter with sufficient information to prepare for the task of interpreting. What will be required will vary from case to case.

Factors to consider in determining the most appropriate person to brief an interpreter include:

- the nature of the assignment;
- the interpreter's qualifications and experience;
- the complexity of the case; and
- the role played by the non-English speaker (for example if the non-English speaker is only one witness, the briefing will not need to be as thorough as when the non-English speaker is defendant party).

Preferably, interpreters should be appropriately briefed in advance on the nature of the court matter prior to the commencement of proceedings. At a minimum, the legal practitioner requiring the assistance of an interpreter should spend time with the interpreter prior to entering the court to provide an oral briefing to the interpreter.

If it is not possible to provide a briefing ahead of a matter, the legal practitioner should ask the interpreter how much time they will need in order to go over the documents and prepare.

If the court is concerned that the work of the interpreter has been impeded because the interpreter has not been properly briefed, the judicial officer may require the relevant party to do so. The case may need to be adjourned for a short period of time to allow for the interpreter's preparation. The person responsible for the failure to brief the interpreter may be required to explain to the judicial officer why the work of the court is being delayed.

In many instances, the interpreter may also need to have an introductory conversation with the person for whom they are interpreting. Legal practitioners should facilitate this introductory conversation prior to the commencement of proceedings. The purpose of this conversation is to ensure the interpreter speaks the same language as the person, and to ensure that clear communication between the interpreter and person requiring the interpreter is possible.

In briefing the interpreter the legal practitioner should:

- ensure the interpreter understands what is likely to occur during the proceeding;
- what the possible and likely outcomes of the matter are on the day of the interpreting assignment;
- identify the names of parties, victims and witnesses, to confirm there is no conflict of interest, or cultural/kinship issues in the case of Indigenous interpreters;
- identify any technical, unusual or sensitive words or phrases that are likely to be used; and
- ask the interpreter if there are any cross-cultural issues that the court should be aware of – such as social conventions, inappropriate gestures or any taboos.

The interpreter should be provided with all relevant materials, including those that the interpreter will need to either sight translate or simultaneously interpret. Parties should cooperate to agree on material that can be provided to an interpreter as part of any briefing. Consideration should be given to the following material being provided for the following types of hearing.<sup>107</sup>

*For mentions:*

- Copy of charge sheet(s).

*For sentencing hearing after plea of guilty:*

- Copy of charge sheet(s);
- Copy of summary of police facts.

*For defended hearings:*

- List of witnesses (so the interpreter may consider whether they know any of the witnesses and whether this creates a difficulty);
- Charge sheet(s);
- Expert evidence statements or affidavits.

*For jury trials – agreed ‘interpreter’s bundle’ which may include:*

- A copy of the charges and a statement of facts in cases of a guilty plea;
- Names of witnesses;
- Any relevant documents counsel are aware will be shown to witnesses or discussed in submissions, such as photographs or maps;
- Witness statement or other written material when portions of the statement will be read to a witness or judicial officer. These may include: expert evidence statements, affidavits, character references, victim impact statements and other documents that are to be read on the transcript;
- Précis of opening address(es).

*For sentencing:*

- Victim impact statements;
- Antecedents (if target language defendant is asked to accept this as his or her prior convictions).

*For appeals – agreed ‘interpreter’s bundle’ which may include:*

- Copy of notice of appeal;
- Written submissions;
- Précis of the proceeding.

It is also important that the legal practitioner and the interpreter should agree how they will work together. Legal practitioners should ask the interpreter how often they would like to have breaks and whether there is anything they need in facilitating their task.

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<sup>107</sup> A Dixon and T Foley (2013), *Facilitating the right to linguistic presence in criminal proceedings*, unpublished paper presented 5 April 2013, AIJA’s workshop on interpreters, UNSW.

Lawyers for a party should ensure that interpreters they engage are familiar with and understand the Interpreters' Code of Conduct and their role as officers of the court.

### 9.5.1 Commonly expressed concerns about briefing

Some opposition to providing interpreters with materials before a proceeding has been based on concerns about confidentiality and practical difficulties in compiling the material.<sup>108</sup> These are not sufficient reasons to avoid a briefing. Co-operation between parties in relation to briefing an interpreter will benefit everyone in terms of a more efficient hearing and potential savings in court time and therefore costs.

Professional interpreters (especially those who are trained, accredited and AUSIT or ASLIA members), abide by the profession's Code of Ethics, which prescribes strict confidentiality. Under arrangements put in place via the Model Rules, all interpreters will also depose that they adhere to the Court Interpreter's Code of Conduct concerning confidentiality.

In practical terms, all the information will be disclosed to the interpreter during the proceedings in any case. Moreover, interpreters are impartial and officers of the court. They do not have a personal interest in the case (if they do, they should disclose it and withdraw).

Interpreters will be impeded in performing at required levels of competence if they are not adequately briefed.

## 9.6 Plain English

Legal practitioners appearing in cases when an interpreter is assisting should adapt their advocacy accordingly. The principles of plain English should be used, to clearly and articulately communicate during Court proceedings.

Legal practitioners should assist interpreters in their work as much as possible by:

- speaking in complete sentences;
- avoiding overlapping speech;
- pausing after each complete concept to allow for consecutive interpretation;
- asking one question at a time and ensuring that they are short, manageable and contain understandable concepts for lay audiences;
- avoiding difficult jargon, or if such jargon is necessary, explaining what it means in lay terms;
- speaking at a reasonable pace and in an audible, clear voice.

See Appendix 3 for Plain English strategies.

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<sup>108</sup> Hale, S. (2011), *Interpreter policies, practices and protocols in Australian Courts and Tribunals*, A national survey. Melbourne, Australian Institute of Judicial Administration: 1-79.

## Appendix 1 – Top 5 Languages spoken at home, 2011 ABS Census

	Sydney	Melbourne	Brisbane	Perth	Adelaide	Canberra	Hobart	NT
English only	62.2	66.3	82.1	77.8	78.8	77.8	89.5	62.8
Arabic	4.1							
Mandarin	3.0	2.5	1.5	1.5	1.3	1.9	0.7	
Cantonese	3.0		0.9	1.0		1.0		
Vietnamese	1.9	2.1	0.9	0.9	1.3	1.1		
Greek		2.8			1.9		0.5	1.3
Italian		2.8		1.6	2.6	0.9	0.4	
Samoan			0.6					
German							0.4	
Kriol								1.9
Djambarrpuyngu								1.4
Warlpiri								1.1
Other	25.8	23.5	14.0	17.2	14.1	17.3	8.5	31.5

Source: 2011 ABS Census, Census Fact Sheet Languages spoken at home



## Appendix 2 – An Introduction to the Profession of Interpreting and Translating

### A2.1 Key terms

Interpreting and translating involves four different activities. Each activity uses different mental processes and skills and requires different training and qualifications.

- **Interpreting:** the process whereby spoken or signed language is conveyed from one language (the source language) to another (the target language) orally.
- **Translation:** the process whereby written language is conveyed from one language (the source language) to another (the target language) in the written form.
- **Sight translation:** the process during which an interpreter or translator presents a spoken interpretation of a written text.
- **Subtitling:** the process of conveying the meaning of spoken words into written text.

There are also different modes of interpreting:

- **Consecutive interpreting:** the interpreter stands or sits near the witness and interprets after each short segment. Trained interpreters know how to coordinate the turns and will commence interpreting at the appropriate intervals, and may take notes to aid their memory during this process. Confident interpreters will interrupt if needed when the speaker is exceeding a manageable portion to be interpreted. Failure to interrupt may lead to omissions and inaccurate interpreting.
- **Simultaneous interpreting:** a mode of interpreting where the interpreter listens to the speech and interprets at the same time, with only a small lag between the source message and the interpretation in the target language. Interpreters interpret evidence given by other witnesses as well as any discussions or legal arguments to the defendant in the simultaneous mode. In Australia, interpreters usually perform simultaneous interpreting whispering while standing or sitting very close to the person. This is known as ‘chuchotage’ or ‘whispered interpreting’.<sup>109</sup>
- **Signed interpreting:** signed language interpreters conduct simultaneous interpreting that is not heard but seen.
- **Team interpreting:** when two or more interpreters are engaged to work together as a team.
- **Relay interpreting:** consisting of one interpreter interpreting from language A to language B and the other interpreter interpreting from language B to language C.

### A2.2 Interpreter qualifications, accreditations and professional associations

#### A2.2.1 Qualifications

Interpreting and translation qualifications are offered by the Higher Education and Vocational Education and Training (VET) sectors. Formal interpreter and translator qualifications range from TAFE diplomas to university postgraduate degrees. The qualification and accreditation levels will reflect practitioners’ skills at different levels of complexity.

The available training programs in Australia include:

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<sup>109</sup> Whispered interpreting is often very uncomfortable for the interpreter. It can be difficult for interpreters to hear what is being said as they must speak, understand, render and listen all at the same time. Moreover, sometimes whispered interpreting affects the jury’s assessment of the interpreter’s independence, as they see them sitting in the dock with the defendant.

- Vocational Education and Training Diploma in interpreting or translating;
- Vocational Education and Training Advanced Diploma in interpreting or translating
- Bachelor of Arts in Interpreting & Translation;
- Graduate Certificate, Graduate Diploma, Master of Interpreting and/or Translation;
- Doctor of Philosophy in Interpreting or Translation.

Some of these courses have language-specific components in the languages of higher demand. Others offer programs in English only or in multilingual classes to cater for languages of limited diffusion. Some courses include specialist legal interpreting and translation training.

### A2.2.2 National Accreditation Authority for Translators and Interpreters (NAATI)

The National Accreditation Authority for Translators and Interpreters Ltd (NAATI) is the body responsible for setting and monitoring the standards for the translating and interpreting profession in Australia, through its accreditation system. NAATI accreditation is separate from formal qualifications.

Accreditation may be obtained by:

- passing a NAATI accreditation test;
- successfully completing tertiary studies in translation and/or interpreting at an Australian institution as approved by NAATI;
- providing evidence of a specialised tertiary qualification in translation and/or interpreting obtained from an educational institution overseas;
- providing evidence of a membership of a recognised international translating and/or interpreting professional association; or
- providing evidence of advanced standing in translating or interpreting.

NAATI accredits interpreters at a number of levels, according to their proficiency and skill. These include:

- Professional Interpreter;
- Professional Translator;
- Paraprofessional Interpreter;
- Paraprofessional Translator;
- Conference Interpreter;
- Conference Interpreter (Senior);
- Advanced Translator;
- Advanced Translator (Senior).

NAATI credentials are language specific. Each credential assesses distinct skills and different levels of ability. The most common accreditations for interpreters are Professional, Paraprofessional or Recognition.

- **Professional:** This is the minimum level recommended for work in legal interpreting. There are 51 languages in which interpreters are available at Professional level. Since 1977, NAATI has issued over 4,500 Professional level credentials.
- **Paraprofessional:** This represents a level of competence in interpreting for the purpose of general conversations. Paraprofessional interpreters generally undertake the interpretation of non-specialist dialogues. There are 110 languages where

interpreters are available at Paraprofessional level<sup>110</sup> though notably there are 54 languages in Australia where Paraprofessional level accreditation is the highest credential available in that language. Since 1977, NAATI has issued 13,900 Paraprofessional level credentials.

- **Recognition:** This is an award, not a credential. It is only granted in languages for which NAATI does not test, or has only recently commenced accreditation testing. It has no specification of level of proficiency. NAATI recognition recognises that a person has reasonable proficiency in English, has completed basic preparation training at the minimum level and has had recent and regular experience as an interpreter. There are about 200 languages spoken in Australia where Recognition is the only award available.

NAATI accredited professional interpreters can interpret across a wide range of subjects involving dialogues at specialist consultations. NAATI Professional is the minimum level recommended by NAATI and Commonwealth and State and Territory language policies for work in complex settings such as the courts. However, as noted above, there are 54 languages in Australia where Paraprofessional level accreditation is the highest credential available in that language and more than 200 languages where no credentials are available.

NAATI has implemented a process to ensure that practitioners demonstrate at regular intervals that they remain up-to-date and committed to the highest level of competency and currency in the profession. From 1 January 2007, NAATI credentials have been issued with an expiry date and require revalidation. If a practitioner does not apply for revalidation or does not meet the revalidation criteria, the credential will lapse. The process of revalidating credentials is ongoing and there are practitioners whose credentials have not yet been revalidated.

While there is no legal requirement for practitioners to be accredited by NAATI, NAATI has procedures to address ethical concerns. If at any time NAATI considers that a practitioner has breached the applicable AUSIT Code of Ethics, NAATI reserves the right to counsel a practitioner, require further professional development and in certain circumstances to cancel a NAATI credential. No similar oversight exists with respect to practitioners who have only acquired tertiary qualification.

Courts can verify the interpreter's accreditation by checking the practitioner's "NAATI number" at <https://www.naati.com.au/online>.

### A2.2.3 Professional associations

There are several professional associations for interpreting and translating practitioners. Practitioners who are members of professional associations are bound to adhere to relevant codes of ethics.

- The **Australian Institute of Interpreters and Translators (AUSIT)** is the national professional association open to interpreters and translators of all languages. It represents the interests of the profession and promotes the highest professional and ethical standards for its members and provides ongoing professional development. Its Code of Ethics has become the standard for the profession. AUSIT offers a range of Professional Development courses and works in close collaboration with other organisations, including educational institutions. More information can be found on its website: [www.ausit.org](http://www.ausit.org).

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<sup>110</sup> While some countries have specific system to credential court interpreters, these have typically been implemented by courts because there is no other credentialing authority.

- **Australian Sign Language Interpreters' Association (ASLIA)** provides professional development courses and looks after the interests of Auslan interpreters. Members of ASLIA are required to abide by the Code of Ethics and follow the Guidelines for Professional Conduct as a condition of membership of the association. More information can be found on: [www.aslia.com.au](http://www.aslia.com.au).
- **Professionals Australia** is a network of different professional groups. It has a division for Interpreters and Translators, which advocates for better pay and working conditions. More information can be found on [www.professionalsaustralia.org.au](http://www.professionalsaustralia.org.au)

## Appendix 3 – Plain English Strategies

### 1. Use active voice, avoid passives

All parties in the legal system should change a passive statement to an active statement by supplying an actor (the doer). If the actor is unclear, use ‘they’ or ‘somebody’.

Instead of:	Try:
He was arrested.	The police arrested him.
‘You will be paid extra for overtime work.’	‘If you work overtime, they will pay you more money.’
‘He broke the law, so he was jailed.’	‘He broke the law, so they put him in jail.’
‘His money was stolen.’	‘Somebody stole his money.’

### 2. Avoid abstract nouns

An abstract noun is something that is intangible, like an idea or feeling, and cannot be detected with the senses. Judicial officers and lawyers in court frequently use abstract nouns, but many of these are special court words, not common English words which ordinary people might use and understand.

All parties in the legal system should replace abstract nouns with verbs (doing words) or adjectives (describing words).

The secret to replacing English abstract nouns correctly is to discover the actions that are hidden inside of them. An abstract noun may often hide more than one action and each of these actions will have one or more person or things involved in either doing the action or being affected by the action. So in order to properly replace abstract nouns with plain English, judicial officers and lawyers should:

- identify the hidden action within the abstract noun;
- identify who or what is involved with the action;
- restate the abstract noun in a sentence using ordinary nouns and verbs.<sup>111</sup>

Instead of:	Try:
<b>Provision</b> of the Act	The Act tells me what to do
Interpret my <b>direction</b> that	Interpret what I say to the defendant...
<b>Sentence</b> be suspended after 5 months	You stay in prison just five months
Good behavior	(you are) not to break the law
It has no <b>strength</b>	It is not strong (adjective)
His patience has run out	He will not be patient any more (adjective)
He <b>enjoys</b> going for a run	He likes running (verb)

### 3. Avoid negative questions

Instead of:	Try:
Isn't he the boss	Is he the boss?
You never did that before, did you?	Have you ever done this before?

<sup>111</sup> Swartz S (2012), *Unpacking English Abstract Nouns Language and Law Conference 2012*  
[http://www.supremecourt.nt.gov.au/about/documents/s\\_swartz%20unpacking\\_english\\_abstract\\_nouns\\_in\\_court.pdf](http://www.supremecourt.nt.gov.au/about/documents/s_swartz%20unpacking_english_abstract_nouns_in_court.pdf).

So you didn't report trouble?	Have you reported the trouble?
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#### 4. Define unfamiliar words

All parties in the legal system should define unfamiliar words, by using the word and then attaching a short descriptive statement.

Instead of:	Try:
This is Crown land	Crown land is land the government owns.
You have been given bail	The police gave you bail, which means you promise to come back to court next time and not get into trouble before then.

#### 5. Put ideas in chronological order

Instead of:	Try:
Prior to leaving the hotel, you had a drink?	You had a drink at the hotel. Sometime after that you left the hotel. Is that true?
You're scheduled into the house next week, but you haven't signed the tenancy agreement?	First you have to sign the tenancy agreement. Then you can move into the house next week.
Today we need to decide whether you're going to have surgery, based on your test results from last week.	You came in last week and we checked your blood. Today I want to tell you about that blood test and then we can decide what to do next.

#### 6. One idea, one sentence

All parties in the legal system should avoid multiple clauses in a sentence; instead breaking paragraphs into several sentences.

Instead of:	Try:
And I set a period of two years as the operational period for the suspended sentence.	After you come out of prison, you must live for the next two years without breaking the law by doing something really bad. If you do break the law, you will come back to court. Court might decide you will return to prison.
You will be subject to supervision by a Probation Officer and you will obey all reasonable directions including as to reporting, residence, and employment.	The Probation Officer will make certain that you obey the things I am telling you today. The Probation Officer will tell you when to talk to them. You will tell them where you are living and what work you are doing.

#### 7. Be careful about talking about hypothetical events

All parties in the legal system should be careful when using words like 'if' and 'or' to talk about hypothetical events that have not happened yet. Use 'maybe' to indicate multiple possibilities.

Instead of:	Try:
If the corrections officer <b>approves</b> , you can go to the football game.	You must ask the corrections officer about going to the football game. Maybe

	she will say that you can go. Maybe she will say you cannot go. You must do what she says.
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### 8. Place cause before effect

Instead of:	Try:
You're going to be imprisoned for three weeks because you didn't comply with your orders.	The judge gave you rules to follow. You didn't follow those rules. That is why the judge is putting you in jail for three weeks.
You were angry because he insulted your sister?	He insulted your sister and this made you angry. Is this true?

### 9. Indicate when you change topic

For example, try:

'I've finished asking about your job. Now I need to ask you about your family.'

'Thanks for telling me about what happened last week. Now I want to talk to you about what we should do tomorrow.'

### 10. Avoid relying heavily on prepositions to talk about time

All parties in the legal system should avoid using prepositions like 'to', 'from', 'on', 'at', 'under' to talk about time.

Instead of:	Try:
The program will operate from Wednesday to next Tuesday.	The program will start on Wednesday and then finish next Tuesday.
They will make a decision over the next three months.	They will think about this for three months and then they will decide what they will do.

### 11. Avoid figurative language or metaphors

Instead of:	Try:
When I said that, he just exploded.	When I said that, he suddenly got angry and shouted at me.
I want to make sure that we're on the same page.	I want to make sure we understand each other.
Keep your eye on him.	Keep watching him closely.

## Appendix 4 – Four-part test for determining need for an interpreter<sup>112</sup>

### A4.1 – Part 1: Ask the party or witness about an interpreter

Explain the role of an interpreter and ask the party or witness, using an open question (then avoid reframing as a yes or no question if there is no response).

*What do you think about asking an interpreter to help us? Or What do you want to do?*

If the party indicates they would like an interpreter, stop the discussion and arrange for an interpreter to be present.

If the party has difficulty answering this question, stop the discussion and arrange for an interpreter to be present.

If the party indicates they do not want an interpreter, proceed to step 2.

### A4.2 – Part 2: Assessing speaking ability – ask questions that require a narrative response

Get the party to speak to you in narrative (story) form by asking open-ended background questions. Avoid yes or no questions or questions that can be answered with one or two words.

*Tell me about... What do you think will happen if...?*

For example, ‘Tell me about any jobs or training that you have had’) or questions related to the topic at hand, such as ‘Tell me everything that happened after the police arrived’.

Avoid questions that can be answered with one or two words, for examples ‘How long have you been staying in Alice Springs?’.

Include at least one question that seeks the party’s thoughts or opinions, for example ‘What do you think will happen to your children if you go to jail?’

If the party does not respond with anything more than a few words to the first few questions, make several further attempts at eliciting a longer response.

If unsuccessful then it is likely the party cannot express himself or herself adequately or confidently in English. Stop the interview and arrange for an interpreter to be present.

If the party is able to give satisfactory or somewhat satisfactory responses, proceed to step 3.

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<sup>112</sup> Adopted from the Northern Territory Aboriginal Interpreter Service.



### A4.3 – Part 3: Assessing comprehension and speaking relevant to the context

Write down two sets of two medium length sentences, using the style and some of the terms that the party or witness will encounter in the court. Read each set to the party or witness and ask them to explain back to you what you just said.

Present the task in this way “I need to tell you something important now, and then I will ask you to tell that story back to me. This way I can check that we understand each other. Are you ready?”

Example 1: Any suspect, defendant, victim or witness can ask for an interpreter, so that s/he can tell his story using his own language, and to make sure s/he understands everything people say. Okay, now tell me back what I just said to you?

Example 2: When a person is guilty, it means that a judge or jury decided that s/he broke the law. In court, 'guilty' has a different meaning from when people use the word outside of court. In court, 'guilty' does not mean that a person feels guilty. Guilty means that the person broke the law. A judge can say that a defendant is guilty, even when the defendant does not feel guilty. Can you tell me back what I said to you?

Example 3: Bail is the law that decides if a defendant will wait in jail or if he will wait out of jail while waiting to come back to court. When a defendant gets bail, s/he will wait outside of jail for his court case. Bail is like this: The police or judge decide to let the defendant out of jail to wait for his court case. The defendant promises to come back to court at the right time for the court case, and to obey any other rules that are in the bail conditions. When a defendant does not get bail, he will wait in jail for his court case. Can you tell me back what I said to you?

Example 4: An oath is a promise. When a witness tells her story (gives evidence) in Court she must promise to tell the true story. To show that she will keep that promise, the witness might promise God that she will tell the true story in court. The witness will put her hand on a Bible when she promises to tell the true story. When she does that, her promise is called an oath. When a witness lies after she speaks an oath, she is breaking the law and maybe the judge will punish her. Okay, now tell me back what I just said to you?

Example 5: An order is a law-paper that a judge writes for a person. There are rules (conditions) on the order that the person must obey. More information: The person will sign his name on that paper and that means he agrees that he will obey the rules on the order. When a person does not obey an order from a judge, the person will go back to court and the judge might punish that person or give him a different order. In a sentencing order, the judge writes down all the rules the offender must obey as part of his punishment (sentence). There are other orders, like Bail Orders and Domestic Violence Orders. Can you tell me back what I said to you?

### A4.4 – Part 4: Assessing communication

Assess the party’s response, and any other communication you have already had with them.

	Likely to need an interpreter	Less likely to need an interpreter
<b>Articulating back</b>	The person has difficulty articulating back what you said to them.	The person is able to articulate meaningfully most of what you said to them,

		using their own words.
<b>Short or long answers</b>	The person only speaks in short sentences (4-5 words or less) or mainly gives one-word answers.	The person speaks in full sentences of 6-7 words or more, and elaborates answers to questions.
<b>Agrees or disagrees</b>	The person consistently agrees with your questions or propositions you put to them.	The person is easily able to disagree and articulate a different point of view.
<b>Inappropriate responses</b>	The person frequently responds inappropriately to your comments or question (e.g. responding with “yes” to “what” or “where” questions).	The person consistently responds meaningfully and appropriately to questions and comments.
<b>Unsure of meaning</b>	You are sometimes mystified as to what exactly the person is telling you even when the words and grammar they are using are clear to you.	You can process the person’s speech clearly and understand what it is they are telling you.
<b>Contradictions</b>	The person appears to contradict themselves, and is unaware of the apparent contradictions.	The person does not contradict themselves, or if they do, they are aware of and can address the contradiction.
<b>Uses new vocabulary</b>	The person does not add significant amounts of new vocabulary to the conversation. They rely on using the words or phrases that you have previously said to them.	The person frequently adds new vocabulary to the conversation.
<b>Good grammar</b>	The person does not use English grammatically. E.g. mixes up pronouns (“he” instead of “she”); uses the past tense incorrectly (“He look at me”).	The person uses English grammatically.
<b>Repeating and simplifying</b>	You find yourself frequently needing to restate and simplify your utterances.	You can talk easily in a normal manner.

If two or more of the points in the ‘likely to need an interpreter’ column apply to the party or witness, it is advisable to work with an interpreter.

## Appendix 5 – Summary: what judicial officers can do to assist the interpreter

- Ensure that interpreting services are organised well in advance of the proceeding and ensure the interpreter has received a full briefing.
- Ensure that the interpreter's working conditions are appropriate (see XXX), that they can hear all parties and have a clear view of all persons speaking.
- Ask interpreters to introduce themselves and state their accreditations, qualifications and experience, how often they have worked in a court and their understanding of their ethical obligations.
- Explain the interpreter's role as an officer of the court to the witness, party and jury (as relevant) and explain that their role is to interpret everything accurately and impartially as if they were the voice of the person speaking.
- Instruct the interpreter to feel free to seek clarification when needed and to seek leave to consult a dictionary or to ask for repetitions. (Remember, it is a sign of a good interpreter to take such actions when needed, to ensure accuracy of interpretation). Ask interpreters what resources they will be accessing in court and what pauses or breaks are necessary to allow them to check this material (for example, on-line glossaries).
- Acknowledging that interpreting is mentally and physically taxing, ask the interpreter when she or he would like to take their breaks – ideally breaks should be provided at least every 45 minutes.
- Remember that interpreting accurately does not mean interpreting word-for-word. Interpreters are required to interpret what is said – including swear words and evasive and confusing statements.
- Instruct lawyers and witnesses to speak clearly and at a reasonable pace, to use plain English, and to pause after each complete concept to allow the interpreter to interpret. Stop any overlapping speech or any attempts from lawyers or other parties to interrupt the interpreter. (As a guide, if you cannot remember the question in full or understand its full meaning, it is very unlikely the interpreter will).
- Explain legal concepts, jargon, acronyms and technical terms. It is the court's role to explain terms, not the interpreter's. If there are no direct equivalents, the interpreter may ask for an explanation, which they will then interpret.
- If there is anything to be read out, provide the interpreter with a copy too. If it is a difficult text, give the interpreter time to read through it first to the end. Longer written material will need to be formally translated.
- If anyone questions the interpreter's rendition, do not take their criticism at face value. Bilinguals who are not trained interpreters often overestimate their competence. Compare qualifications and give the interpreter the opportunity to respond to the criticism.

## **Appendix 6 – Interpreting in matters where a witness or defendant appears via audio-visual link (AVL)<sup>113</sup>**

### **A6.1 – Interpreting for a defendant who is in custody and appears via audio-visual link (AVL):**

- Where the matter is listed for a short mention, such as an adjournment, the interpreter will ordinarily be present and interpret from the court room, rather than being present with the defendant in the correctional facility.
- In cases where the matter is longer or more complex, the interpreter may prefer to be physically present with the defendant in the correctional facility. The relevant legal practitioner should discuss the likely length and complexity of the matter with the interpreter prior to the day of the interpreting assignment to determine whether the interpreter will interpret from the courtroom or from the correctional facility.

### **A6.2 – Interpreting for a witness who gives evidence via AVL:**

- Ordinarily, the interpreter should be located with the witness when the witness gives evidence.

### **A6.3 – Interpreting when the interpreter is present with the defendant or witness off-site**

- Prior to the matter commencing, court staff should ensure that the interpreter is able to see all people in the courtroom who will speak. Ordinarily, the camera should be set up so that the interpreter can see the judicial officer and both legal practitioners on screen at the same time.
- Prior to the matter commencing, court staff should ensure that the interpreter is able to hear people speaking from each location in the courtroom where speech will occur.
- The screen in the courtroom showing the interpreter and witness or party should be visible to the judicial officer and legal practitioners, in order for the interpreter to interrupt and seek clarification as needed.
- When working with an Auslan or Sign Language interpreter, the interpreter will provide additional guidance on how to position the camera.
- The volume of the AVL in the courtroom should be sufficiently loud so that all parties can hear the interpreter when the interpreter interrupts to seek clarification.
- If a briefing has not previously occurred, the legal practitioner should ensure that the interpreter receives a briefing prior to the matter commencing.
- If any documents will be read onto the record or shown to a witness, the legal practitioner should ensure that copies of these documents have been provided to the interpreter prior to the matter commencing.

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<sup>113</sup> Northern Territory Magistrates Court, Interpreter Protocols, 2015, p.20.

## **A6.4 – Interpreting when the interpreter is present in the court room and the defendant or witness appears via AVL**

- Prior to the matter commencing, court staff should ensure that the interpreter is given time to speak with the party or witness via AVL to ensure that the interpreter and defendant/witness speak the same language and are able to communicate, and for the interpreter explain their role.
- The interpreter should be provided with a seat in front of a microphone in the court room. When interpreting for a witness, the interpreter will ordinarily sit in the witness box in the court room. When interpreting for a defendant, the interpreter will ordinarily sit next to the defence lawyer, provided that the interpreter has clear access to a microphone.
- Ensure that the interpreter has an unobstructed view of a screen that clearly shows the defendant/witness' face.
- When working with an Auslan or SignLanguage interpreter, the interpreter will provide guidance on how to position the camera. When the defendant/witness is deaf the interpreter must have a clear unobstructed view of the upper body, face and hands.
- Unless a defendant or witness requests otherwise, the camera should be set up so that the defendant/witness sees the entire court room, rather than just seeing the interpreter.
- At the start of a matter, the judicial officer may confirm, through the interpreter, that the party or witness is able to hear and understand the interpreter via the AVL.
- In cases where the interpreter is present in the court room, simultaneous interpreting may be difficult or impossible as the party or witness will hear two languages simultaneously through the AVL. Where simultaneous interpreting is necessary, consider reducing the volume of the English speaking participants so that the witness/defendant can clearly hear the interpreter's voice.