JUDICIAL COUNCIL ON DIVERSITY & INCLUSION

MARCH 2022

Recommended National Standards for

Working with Interpreters in Courts and Tribunals

SECOND EDITION

Published 2022

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Preamble

The interpreter's role 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 a party is entitled to participate in the proceedings in their own language. As such, the work of interpreters is essential to ensuring access to justice and procedural fairness for people with limited English proficiency in Australia's courts. Further, in the case of criminal proceedings, if an accused needs an interpreter, the trial cannot proceed unless and until an interpreter is provided.

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

These Standards, their Annotations and the Legal Appendix which accompany the Standards are intended to provide guidance to courts, tribunals, judicial officers, interpreters, and members of the legal profession.

The JCDI recognises the important role that tribunals play in the civil justice system and in relation to administrative review, and that interpreters are equally relevant in the tribunal context. Unless otherwise indicated, or where context suggests otherwise, such as in relation to criminal proceedings, references to 'courts' is intended to include tribunals. These Standards are intended to apply to tribunals in the same or similar manner as they apply to courts.

The Standards are recommended rather than prescriptive and can be implemented progressively in line with resource capacity. It is proposed that all courts and tribunals in Australia implement these Standards, where necessary adapting them to meet the needs and legislative context of each jurisdiction. The JCDI is also working with interested parties to develop training programs to assist with the implementation of these Standards.

Acknowledgments

The first edition was prepared by a specialist committee appointed by the JCDD. The JCDD 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, Senior member and Member for Diversity, 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, Edith Cowan University
- Ms Carla Wilshire, Chief Executive Officer, Migration Council Australia

A draft of this document was released for national public consultation. 32 written submissions were received. Public meetings were also held in Sydney and Melbourne and a telephone consultation took place with interested parties in Perth.

The committee expresses its gratitude to:

- Professor Sandra Hale and The Hon Dean Mildren AM RFD QC for their primary authorship of the Annotations and Legal Appendix.
- The Migration Council of Australia for its instrumental support for and involvement in the preparation of this document, especially Ms Carla Wilshire (CEO), Ms Veronica Finn (Senior Policy Officer), Mr Elliott King (Junior Policy Officer) and Ms Frances Byers (on secondment from the Commonwealth Department of Prime Minister and Cabinet).
- The Northern Territory Local Court for its permission to reproduce part of its Interpreter Protocols, which forms the material at Annexure 6 to 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 at Annexure 4 to this document.
- Ms Allison Henry of Millwood Consulting and Ms Kristen Zornada for editorial and drafting assistance.
- All those who participated in the public consultations for their interest and thoughtful comments.

Acknowledgements for the Second Edition

The second edition was prepared by a specialist committee appointed by the JCDD.

The committee comprised:

- The Hon Justice Melissa Perry, Federal Court of Australia (Chair)
- The Hon Judge Jane Culver, District Court of New South Wales
- Professor Sandra Hale, Professor of Interpreting and Translation, UNSW Australia
- The Hon Justice Judith Kelly, Supreme Court of the Northern Territory
- The Hon Justice François Kunc, Supreme Court of New South Wales
- Mr Mark Painting, Chief Executive Officer, National Accreditation Authority for Translators and Interpreters Ltd (NAATI)
- Ms Magdalena Rowan, Senior Lecturer, Foundation Skills, Interpreting and Translating, TAFE SA
- The Hon Judge Rauf Soulio, District Court of South Australia
- Mr Reynah Tang, Member and Deputy Head of Practice List, Victorian Civil and Administrative Tribunal (VCAT)
- Professor Anne Wallace, La Trobe University
- Ms Carla Wilshire, Chief Executive Officer, Migration Council Australia

To inform the second edition, the Recommended National Standards were reviewed by Courts, Tribunals and Interpreter bodies across Australia.

The committee expresses its gratitude to:

- The Migration Council of Australia for its instrumental support for and involvement in the preparation of this document, especially Ms Carla Wilshire (CEO), Ms Veronica Finn (Senior Manager), Ms Daisy Kolt (Manager), Ms Luisa Martinez (Senior Policy Officer) and Ms Annie Willox (Junior Policy and Project Officer).
- Ms Sonya Campbell (Associate to the Hon Justice Perry, Federal Court of Australia) and Ms Kassandra Girolamo (Associate to for the Hon Chief Judge Evans, District Court of South Australia) for their work on the Legal Appendix.
- All those who participated in the review of the Standards for their considered and thoughtful feedback.

Foreword

As Chair of the Judicial Council on Cultural Diversity I am pleased to commend to all those involved in the administration of justice the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*. These standards represent a major milestone towards reducing the impediments which language may place in the path to justice. I hope that these Standards will soon come to be regarded as an essential and practical resource for every Australian Court and Tribunal.

The Recommended Standards and accompanying rules and annotations provide the first comprehensive guide with respect to practices and procedures which might be adopted by courts, judicial officers, interpreters and legal practitioners when providing interpretation in the setting of a court or tribunal. Taken together, the material in this document is intended to provide a guide to best practice in the application and utilisation of interpreters in courts and tribunals.

In a multicultural country such as Australia, robust and consistent standards that provide for the proper and effective use of an interpreter are essential to the fair and equal administration of justice. They are not a luxury or an advantage, but an essential requirement. A fundamental principle of a fair trial is that the proceedings must be understood by those involved and all key parties must be able to fully participate and be understood.

Access to justice, and the capacity to effectively utilise the legal system, requires that active steps be taken to ensure that linguistic barriers and impediments are addressed. As Australia becomes increasingly diverse, two groups within our community are particularly vulnerable to the obstacles which language can place in the path of access to justice, namely Aboriginal and Torres Strait Islander people and Australians from non-English speaking backgrounds. The existing pressing need for Australian courts to accommodate linguistically diverse users is likely to increase in the decades to come. The implementation of effective systems and practices, both administrative and judicial, to ensure the proper use of interpreters is essential if those needs are to be met. Implementation of these standards will have cost implications. However, those costs must be viewed in the context of the importance of ensuring that justice is equally available to all Australians, whatever language they speak.

The Recommended Standards have been specifically designed to recognise and respond to the practical limitations which may preclude achievement of optimal practices in all cases and circumstances, including limitations imposed by existing court building layouts, and the limitations imposed by the very limited availability of appropriately qualified interpreters in some languages. The Recommended Standards embody a degree of flexibility in order to accommodate these practical limitations.

The document includes Model Rules and a Model Practice Note that will encourage courts and tribunals to give effect to the proposed standards. The Recommended National Standards are also accompanied by Annotations which offer practical explanations that are intended to assist in improving the effective utilisation of interpreters in court and tribunal settings. While there are currently significant jurisdictional differences in relation to practices with respect to the use of interpreters in courts and tribunals, this document provides guidance with respect to practices and procedures which, if adopted and implemented where feasible, should improve the justice system's response to Australia's increasing cultural and linguistic diversity. I encourage all courts and tribunals to assess their current practices and procedures against the recommended standards set out in this comprehensive body of work.

Wayne Martin AC
Chief Justice's Chambers
PERTH

Foreword to the Second Edition

Since the *Recommended National Standards for Working with Interpreters in Courts and Tribunals* were first published in 2017, many of the recommendations and their guiding principles have been implemented in courts and tribunals across Australia. The *Standards* have served as a leading and integral document in the effort to maximise all people's access to justice in Australia, no matter their cultural and linguistic background.

The *Standards* were designed as a comprehensive tool outlining best practice and procedure for courts and tribunals, judicial officers, the legal profession, and interpreters when an interpreter is required during a proceeding. They have been implemented either in whole or partially as practice and procedure rules, interpreter protocols, and professional development courses and events, among others, in nearly every jurisdiction in Australia. The *Standards* have also been referred to in several important judgments, including of the High Court of Australia, and have assisted courts in coming to their decisions on disputes regarding interpretation and translation.

To ensure that the *Standards* remained relevant and up to date, the Judicial Council on Diversity & Inclusion and the Recommended National Standards Subcommittee agreed that the document should be periodically reviewed. This review process includes consultation with the heads of jurisdiction and peak interpreter bodies on how the *Standards* were being implemented, and how they could be improved. One such review led to a consensus that the *Standards* should be updated, and a second edition published.

While the bulk of the recommendations included in the *Standards* remain unchanged from the first edition, this second edition includes some key revisions. The language of the document has been adjusted to be more inclusive of tribunals and the different needs of the tribunal process compared to that of courts. Specific recommendations regarding the suggested process for engaging an interpreter were amended to emphasise that in all circumstances and for all languages, the most highly certified or qualified interpreter should always be first preference. References to NAATI's system of certification for interpreters and translators were updated to reflect the changes made to that system by NAATI in 2018, which incorporates into one document the 2019 *Addendum to the Recommended National Standards for Working with Interpreter in Courts and Tribunals*. References to interpreters as 'officers of the court' were, where possible, qualified to emphasise that interpreters owe paramount duties to the court or tribunal and are independent of the party who may have hired them or the party they are interpreting for. Additionally, in response to significant increases in the use of audio/visual technology in court and tribunal proceedings, several changes were made to both Optimal Standard 1 – Equipment and Annexure 6 – AVL Guidelines to provide greater detail and specificity in the recommendations therein. This provides a brief outline of the many amendments made to improve the relevance and applicability of the *Recommended National Standards* as a best practice resource across jurisdictions.

This Second Edition, published digitally in an interactive format, has been designed to be more accessible for readers on devices of all kinds. We hope that this Second Edition of the *Standards* encourages greater implementation of its principles in courts and tribunals, within what is practically possible for each court or tribunal. I encourage all courts and tribunals to continue to consider their practices and procedures with respect to interpreters in the context of the *Standards*, to ensure that justice is administered properly to all people who come before them, notwithstanding their cultural and linguistic background.

Chris Kourakis
Chair, Judicial Council on Cultural Diversity
Chief Justice's Chambers

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Definitions

IN THESE STANDARDS:

"AUSIT" means Australian Institute of Interpreters and Translators, the national association for the translating and interpreting profession;

"ASLIA" means Australian Sign Language Interpreters' Association, the national peak organisation representing the needs and interests of Auslan/English interpreters and Deaf Interpreters in Australia;

"Certified Interpreter" means a person certified by NAATI as a Certified Interpreter;

"Certified Mentor" means a Certified Interpreter in another language who is a member of AUSIT, ASLIA or other recognised State or Territory based association requiring adherence to a code of ethics and/or standards, and is experienced in court interpreting;

"Certified Provisional Interpreter" means a person certified by NAATI as a Certified Provisional Interpreter;

"Certified Specialist Interpreter" means a person certified by NAATI as a Certified Specialist Interpreter in the legal or health domain;

"Certified Specialist Legal Interpreter" means a person certified by NAATI as a Certified Specialist Legal Interpreter;

"Certified Translator" means a person certified by NAATI as a Certified Translator;

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

"Court Interpreters' Code of Conduct" means Schedule 1 to the Model Rules;

"interpret" means the process whereby spoken or signed language is conveyed from one language (the source language) to another (the target language) orally;

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

"language" includes Auslan and other signed languages;

"NAATI" means National Accreditation Authority for Translators and Interpreters, the body responsible for setting and monitoring the standards for the translating and interpreting profession in Australia through its certification system;

"party" includes an accused in criminal proceedings and may include a person with a significant interest in the proceedings;

"Qualified Interpreter" means a person qualified for court interpreting because they have all of the following attributes:

- a tertiary (VET or university) qualification in interpreting; and
- certification from NAATI; and
- membership with a professional body (e.g. AUSIT, ASLIA or other recognised State or Territory based interpreter association); and
- experience interpreting in court.

"Recognised Practising Interpreter" means a person holding the NAATI award of Recognised Practising Interpreter, which requires the person to demonstrate English proficiency, ethical competency, intercultural competency and complete a minimum amount of introductory interpreter training, but there is no testing of the person;

"sight translate" means the process whereby an interpreter or translator presents a spoken interpretation of a written text;

"Suitable Person" means an interpreter who has some of the attributes of a Qualified Interpreter, or where no interpreter can be found, a bilingual;

"translate" means the process whereby written language is conveyed from one language (the source language) to another (the target language) in the written form.

Introduction

Australia is one of the world's most culturally diverse nations.[1] Aboriginal and Torres Strait Islander peoples have the longest continuing culture in the world, and in Australia currently number 700,000, or 3 per cent of the total population.[2] One in four Australians was born overseas.[3] These 5.3 million people include Australian citizens, permanent residents and long-term temporary residents. Another linguistic and cultural group in Australia are the estimated 10,000 Deaf people who use Australian Sign Language (Auslan) as their first language.[4]

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 and tribunals are conducted in English. However, over 300 languages are spoken in Australian households,[5] meaning that it is not uncommon for people coming before the courts to require the assistance of an interpreter 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 them 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: they must be linguistically present.[6] As such, interpreters play an essential role in the administration of justice in our linguistically diverse society.

The Judicial Council on Diversity & Inclusion (JCDI) has developed these *Recommended National Standards for Working with Interpreters in Courts and Tribunals* to establish recommended and optimal practices for Australia's courts and tribunals. The Standards are accompanied by Model Rules and a Model Practice Note that give effect to the Standards. The Model Rules recognise and affirm the important role of interpreters by confirming their status as officers of the court, owing their paramount duty as such to the court.

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

1. Courts and tribunals as institutions (including those responsible for court administration)
2. Judicial officers
3. Interpreters
4. Members of the legal profession

The Standards are intended to provide courts with guidance on engaging and working with interpreters to ensure procedural fairness for people with limited English proficiency. It is recommended that all Australian courts and tribunals 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. Since their original publication in 2016, the Standards have been implemented wholly or in part by several jurisdictions around Australia. The High Court of Australia has also made reference to them in relevant judgments.[7]

The Standards are intended to be flexible and are designed to apply across a range of settings, recognising that varying levels of resources may be available in different jurisdictions. Reflecting this approach, the Standards include minimum (or baseline) recommended standards – that should be complied with by courts in all circumstances – and optimal standards, to be met when funding and other circumstances permit. The purpose of the Standards is to embody the benchmark to which all courts in Australia should give effect. They do not justify a reduction in standards or practices already in place in courts that exceed the Standards.

This document also addresses four areas:

1. the use of simultaneous interpreting equipment;
2. tandem or team interpreting;
3. the provision of professional mentors;
4. the establishment of an interpreter portal;

in which resources would be required which are not presently available to all or even many courts and tribunals. In those areas the document describes procedures regarded as best practice — described as "Optimal Standards" — which are intended to provide aspirational targets or longer-term strategies or objectives to be implemented as and when resources become available.

The Standards are to be read and applied with their annotations, comprising the Annotated Standards. The Annotated Standards and Legal Appendix provide an invaluable compendium of the current best learning and practice on the role of interpreters in the courts.

The Standards introduce a graded approach to choosing an interpreter or interpreting team. Languages in Australia are divided into four tiers based on National Accreditation Authority for Translators and Interpreters (NAATI) data on the number of certified practitioners at certain levels for each language. The tiers recognise the current supply of interpreters, and are organised in such a way that courts, tribunals, and members of the legal profession should be able to meet the standards of each tier provided they make sufficient effort to do so. The four tiers are based on the available data as to the number and expertise of interpreters Australia wide for each language:

1. Tier A – Languages where there are ample NAATI Certified Interpreters with formal education/training in interpreting and the possibility of NAATI Certified Specialist Interpreters.
2. Tier B – Languages with fewer NAATI Certified Interpreters with or without formal education/ training and which have a sufficient supply of Certified Provisional Interpreters.
3. Tier C – Languages where NAATI Certified Provisional Interpreters are generally available.
4. Tier D – Languages where there are very few or no certified or trained interpreters and Recognised Practising Interpreters are the only option.

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 and tribunals, 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. Further, it is intended that there will also be a process of educating judicial officers, court and tribunal staff and the legal profession on the implementation of the Standards for which the JCDI is currently developing training.

Implementing these Standards will have cost implications. It is intended that these Standards will encourage other courts and tribunals which do not provide interpreters to follow the example of those that do, particularly where dealing with particularly vulnerable or disadvantaged litigants. It is essential that governments, in order to ensure equality and access to justice for all, provide courts and tribunals with adequate funding to give effect to these Standards.

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

It is intended that the Standards will be kept under review and updated from time to time, including importantly the categorisation of languages for each tier set out in Standard 11.

1 Lisa Thomson, *Migrant Employment Patterns in Australia: Post Second World War to the Present* (Research Report, October 2014) 14.

2 Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Population Nearing 700,000*, June 2011 (Catalogue No 3238.0.55.001, 30 August 2013).

3 Australian Bureau of Statistics, '2011 Census Reveals One in Four Australians is Born Overseas' (Media Release CO/59, 21 June 2012).

4 Australian Bureau of Statistics, 2011 Australian Census: 9,723 users of Auslan. Deaf Australia considers this an under–estimation of the total number.

5 Australian Bureau of Statistics, 'Census Shows Asian Languages on the Rise in Australian Households' (Media Release CO/60, 21 June 2012).

6 See Legal Appendix regarding the requirements of procedural fairness that must be afforded to an accused in relation to language assistance to understand the case against them.

7 *DVO16 v Minister for Immigration and Border Protection* [2021] HCA 12.

Recommended Standards for Courts and Tribunals

Standard 1 – Model Rules

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

Standard 2 – Proceedings generally to be conducted in English

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

Standard 3 – Engagement of interpreters to ensure procedural fairness

3.1 Courts and tribunals must accommodate the language needs of parties and witnesses with limited English proficiency in accordance with the requirements of procedural fairness.

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 used by court and tribunal users, should be readily available on court and tribunal websites and in hard copy from the relevant 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 or tribunal.

4.2 Information about the circumstances in which a court or tribunal may provide an interpreter should be published on court and websites and be available in hard copy from the relevant registries.

4.3 If a court or tribunal is responsible for the engagement of an interpreter in some or all kinds of matters, an application form for the provision of an interpreter in languages commonly spoken by court and tribunal users should be readily available online and in hard copy from the relevant registries. The form should make provision for a person to request that particular cultural or other considerations are taken into account in selecting an interpreter.

Standard 5 – Training of judicial officers and court and tribunal staff

5.1 Judicial officers and court and tribunal staff should be familiar with the role of the interpreter as an officer of the court or tribunal, in that they owe paramount duties to the court or tribunal.

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 and tribunal staff on assessing the need for interpreters and working with interpreters in accordance with these Standards.

Standard 6 – Engaging an interpreter in accordance with these Standards

6.1 Where an interpreter is engaged by the court or tribunal, the court or tribunal should endeavour to ensure that the interpreter is selected in accordance with Standard 11 of these Standards.

6.2 In the selection of an interpreter, courts and tribunals should ensure the interpreter is appropriate, taking into account any cultural and other reasonable concerns relevant to the proceedings.

Standard 7 – Budget for interpreters

7.1 If the court or tribunal is responsible for the engagement of interpreters either directly or through an interpreting service, court or tribunal budget allocations should provide and support interpreting services to court and tribunal users with limited English proficiency in accordance with these Standards and the Model Rules and the Practice Note.

Standard 8 – Coordinating the engagement of interpreters

8.1 This standard applies where the court or tribunal is responsible for the engagement of the interpreter either directly or through an interpreting service.

8.2 A specific member(s) of registry staff should be designated as having responsibility for coordinating interpreting arrangements.

8.3 Courts and tribunals 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.

8.4 To maximise the ability of interpreting services to provide an appropriate interpreter for a particular case, courts and tribunals seeking to engage the services of the interpreter should give as much notice as possible.

8.5 Where Auslan interpreters are engaged to work with a deaf party or witness, they should work in tandem with two (or more) interpreters, given the simultaneous mode of their work and risk of occupational injury.

Standard 9 – Support for interpreters

9.1 Courts and tribunals should provide adequate and appropriate working conditions and remuneration to support interpreters in the performance of their duties to the best of their ability.

9.2 Interpreters should be remunerated by reference to a scale of fees which reflect their level of qualifications and NAATI certification, skill and experience. Interpreters should also 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.

9.3 In order to provide practical support for interpreters and protect their independence, courts and tribunals should provide interpreters with a dedicated space where they can wait until called, leave their belongings, prepare materials, and be briefed and debriefed. The space should be close to hearing rooms and be equipped with wireless internet and/or a computer with internet access, for interpreters to use online resources such as dictionaries and terminology banks to prepare for their cases.

9.4 In the hearing room, courts and tribunals should provide interpreters with a dedicated location where they can see all the parties. 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.

9.5 Interpreters should be provided with regular breaks during proceedings.

9.6 Where the court or tribunal is responsible for the engagement of interpreters directly or through an interpreting service, the court or tribunal shall provide counselling and debriefing for any distress or trauma suffered by the interpreters arising from their performance as officers of the court or tribunal, in that they owe paramount duties to the court or tribunal, unless such counselling and debriefing is already provided by the interpreting service provider.

9.7 Where the court or tribunal is responsible for the engagement of interpreters directly or through an interpreting service, the court or tribunal should implement procedures for the provision of feedback to and from interpreters on interpreting performance and associated matters, either coordinated through the interpreter service or through the court or tribunal.

9.8 Courts and tribunals should advise NAATI when they have been unable to secure the services of an interpreter.

9.9 Court and tribunal procedures should be adapted to ensure that the most efficient use is made of the interpreter's time and skills. As outlined in rule 8.1 in the Model Rules, the court may at any time make directions regarding a range of issues concerning the retainer and role of the interpreter in proceedings.

Standard 10 – Assessing the need for an interpreter

10.1 In determining whether a person requires an interpreter, courts and tribunals should apply the four-part test for determining need for an interpreter, as outlined in Annexure 4.

Standard 11 – Engaging an interpreter

11.1 This Standard applies where the court or tribunal is responsible for the engagement of the interpreter either directly or through an interpreting service, or required to determine whether or not a particular individual should be permitted to carry out the office of interpreter.

11.2 Courts and tribunals should prefer to engage a Qualified Interpreter. Where a Qualified Interpreter cannot reasonably be obtained, a Suitable Person may be engaged instead. Where possible, the following order of preference for an interpreter's level of certification and qualification should be followed:

1. Certified Specialist Legal Interpreter
2. Certified Interpreter
3. Certified Provisional Interpreter
4. Recognised Practising Interpreter
5. Suitable Person

11.3 When engaging an interpreter, whether a Qualified Interpreter or otherwise, the court or tribunal should also take into account:

- the extent and level to which the person has pursued formal education and interpreter training, especially legal interpreting training;
- the level of their NAATI certification;
- whether or not the person is a current member of AUSIT, ASLIA or other recognised State or Territory based association requiring adherence to a code of ethics and/or standards; and
- any experience interpreting in court or tribunal, including the nature of that work.

11.4 For languages in Tier A, a Certified Interpreter, or a Certified Specialist Interpreter if available, should be engaged, subject to cultural and other reasonable concerns.

11.5 For all other tiers, if a Certified Specialist Legal Interpreter or Certified Interpreter is not reasonably available, then, subject to cultural and other reasonable concerns:

a. For languages in Tier B:

   i. A Certified Provisional Interpreter should be engaged if one is available; or

   ii. if a Certified Provisional Interpreter is not reasonably available, the judicial officer may grant leave for a Suitable Person to carry out the office of interpreter in accordance with Model Rule 4.2

b. For languages in Tier C:

   i. a Certified Provisional Interpreter should be engaged if one is available; or

   ii. if a Certified Provisional Interpreter is not reasonably available, the judicial officer may grant leave for a Suitable Person to carry out the office of interpreter in accordance with Model Rule 4.2

c. For languages in Tier D:

   i. a Certified Provisional Interpreter should be engaged if one is available; or

   ii. if a Certified Provisional Interpreter is not reasonably available, a Recognised Practising Interpreter should be engaged if there is one available; or

   iii. if neither a Certified Provisional Interpreter nor a Recognised Practising Interpreter is reasonably available, the judicial officer may grant leave for a Suitable Person to carry out the office of interpreter in accordance with Model Rule 4.2

Standard 12 – Provision of professional development to interpreters on the Standards

12.1 Where the court or tribunal is responsible for the engagement of interpreters, either directly or through an interpreting service, interpreters should be provided with induction and continuing training, either by the court or tribunal or by the interpreting service, to ensure that interpreters understand their role as officers of the court or tribunal, in that they owe paramount duties to the court or tribunal, and responsibilities under the Court Interpreters' Code of Conduct.

Optimal Standard 1 – Simultaneous interpreting equipment

1.1 To improve the efficiency and quality of interpreting, satisfy the requirements of procedural fairness and improve the working conditions of interpreters, courts and tribunals 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 or witness.

Optimal Standard 2 – Provision of tandem or team interpreting

2.1 Whenever possible, courts and tribunals should utilise tandem interpreting. Particularly in the case of Tier C and Tier D languages when a Suitable Person may be difficult to locate and engage, courts and tribunals should utilise team interpreting.

Optimal Standard 3 – Provision of professional mentors

3.1 In cases where it has been necessary to engage a Suitable Person for a Tier C or Tier D language, courts and tribunals (where they are responsible for providing the interpreter) or the party engaging the interpreter should endeavour to provide a Professional Mentor for the person undertaking the office of interpreter. The role of the Professional Mentor is to assist the person undertaking the office of interpreter with ethical issues, to assist with the interaction of that person with others in the hearing, including where clarification or explanations may be required.

Optimal Standard 4 – Establishment of an interpreters' portal

4.1 Courts and tribunals 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.

Recommended Standards for Judicial Officers

Standard 13 – Judicial officers' duties

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

Standard 14 – Plain English

14.1 Judicial officers should use their best endeavours to use plain English to communicate clearly and articulately during the proceedings.

Standard 15 – Training of judicial officers for working with interpreters

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

Standard 16 – Assessing the need for an interpreter

16.1 The fundamental duty of the judicial officer is to ensure that proceedings are conducted fairly and in accordance with the applicable principles of procedural fairness, including by ensuring an interpreter is available to persons of limited English proficiency.

16.2 To ensure that criminal proceedings are conducted fairly and that there is no miscarriage of justice, courts should ensure that an interpreter is provided to an accused of limited English proficiency.

16.3 Judicial officers should satisfy themselves as to whether a party or witness requires an interpreter in accordance with the four-part test for determining the need for an interpreter as outlined in Annexure 4.

Standard 17 – Proceedings with an interpreter

17.1 Judicial officers should ensure that the interpreter has been provided with appropriate working conditions, as outlined in Standard 9.

17.2 In making directions as to the conduct of proceedings, judicial officers should consider whether and to what extent interpreters should be briefed on the nature of a matter prior to the commencement of proceedings and, if so, give consideration as to the time which an interpreter may reasonably require to become familiar with the briefing material. Briefing may include the provision of materials which may otherwise have required sight translation, subject to Standard 26.

17.3 Interpreters should be a afforded reasonable time to familiarise themselves with materials that are relevant for the process of interpretation in the particular case.

17.4 Except where a Qualified Interpreter has been engaged, judicial officers should ascertain the competence of an interpreter by reference to their certification status, qualifications and court experience, as well as whether they are members of AUSIT, ASLIA or other recognised State or Territory based association requiring adherence to a code of ethics and/or standards. If the judicial officer is concerned about any of these matters, they may raise this with the parties to ascertain whether another interpreter is available, and should consider adjourning the proceedings until one is available.

17.5 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 or tribunal.

17.6 Judicial officers should confirm that the interpreter has acknowledged the Court Interpreters Code of Conduct and understands their duties as an officer of the court or tribunal.

17.7 Judicial officers should inform the interpreter to alert the court or tribunal, and if necessary to interrupt, if the interpreter:

a. becomes aware that they may have a conflict of interest in the proceedings;
b. cannot interpret the question or answer for any reason;
c. did not accurately hear what was said;
d. needs to correct an error;
e. needs to consult a dictionary or other reference material;
f. needs a concept or term explained;
g. is unable to keep up with the evidence; or needs a break.

17.8 Judicial officers may become aware that an interpreter has a conflict of interest in the proceedings. In such cases, judicial officers should permit the interpreter to withdraw from the proceedings if necessary and adjourn the proceedings until another interpreter can be found, or consider another appropriate strategy to address the conflict.

17.9 Judicial officers should speak at a speed and with appropriate pauses so as to facilitate the discharge by the interpreter of their duty to interpret.

Recommended Standards for Interpreters

Standard 18 – Interpreters as officers of the court

18.1 Interpreters are officers of the court or tribunal in the sense that they owe to the court or tribunal paramount duties of accuracy and impartiality in the office of interpreter which override any duty that person may have to any party to the proceedings, even if that person is engaged directly by that party.

Standard 19 – Code of Conduct for Interpreters in Legal Proceedings

19.1 Interpreters must ensure that they are familiar with, and comply with, the Court Interpreters Code of Conduct.

Standard 20 – Duties of interpreters

20.1 Interpreters must diligently and impartially interpret communications in connection with a proceeding as accurately and completely as possible.

20.2 Interpreters must comply with any direction of the court or tribunal.

20.3 Where the interpreter becomes aware that they may have a conflict of interest, the interpreter must alert the court or tribunal to the possible conflict of interest immediately, and, if necessary, withdraw from the assignment or proceed as directed by the court or tribunal.

20.4 Requests by the interpreter for repetition, clarification and explanation should be addressed to the judicial officer rather than to the quewstioning counsel, witness or party.

20.5 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, witness or party.

20.6 If the interpreter recognises a potential cross-cultural misunderstanding, or comprehension or cognitive difficulties on the part of the person for whom the interpreter is interpreting, the interpreter should seek leave from the judicial officer to raise the issue.

20.7 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.

Recommended Standards for Legal Practitioners

Standard 21 – Assessing the need for an interpreter

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

21.2 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 Annexure 4.

Standard 22 – Booking interpreters

22.1 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.

22.2 When applying for a hearing date, parties or their legal advisors should draw the availability of the interpreter to the attention of the court or tribunal for the judicial officer to take into account where possible.

Standard 23 – Engaging an interpreter in accordance with these Standards

23.1 Parties engaging an interpreter should select interpreters in accordance with Standard 11 of these Standards.

Standard 24 – Briefing Interpreters

24.1 The legal representatives for a party are to use their best endeavours to ensure that interpreters who are engaged are familiar with, understand and are willing to adopt the Code of Conduct for Interpreters in Legal Proceedings and understand their role as officers of the court or tribunal.

24.2 The legal representatives for a party should ensure that interpreters (whether or not engaged by those legal representatives) 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, subject to Standard 26.

24.3 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.

Standard 25 – Plain English

25.1 Legal practitioners should use their best endeavours to use plain English to communicate clearly and coherently during a proceeding. Legal practitioners should speak at a speed and with appropriate pauses so as to facilitate the discharge by the interpreter of their duty to interpret.

Standard 26 – Documents

26.1 Legal practitioners should ensure that any document in a language other than English which is to be referred to or tendered into evidence in proceedings has been translated into English or the other language by a NAATI Certified Translator, where available.

26.2 Legal practitioners should not require interpreters to sight translate during the course of a hearing without prior notice ("sight unseen") long, complex or technical documents. Sight unseen translation by interpreters of even simple or short documents should be avoided as far as possible.

Model Rules

Division 1: Definitions

1.1 In these Rules:

"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.

"code of conduct" means the Code of Conduct for Interpreters in Legal Proceedings set out in Schedule 1.

"interpret" means the process whereby spoken or signed language is conveyed from one language (the source language) to another (the target language) orally.

"other language" means a spoken or signed language other than English.

"recognised agency" means the National Accreditation Authority for Translators and Interpreters (NAATI) and such other organisations as are approved by the Head of Jurisdiction.

"sight translate" means the process whereby an interpreter or translator presents a spoken interpretation of a written text.

"translate" means the process whereby written language is conveyed from one language (the source language) to another (the target language) in the written form.

Division 2: Proceedings to be conducted in English

2.1 Subject to these Rules, proceedings in the Court/Tribunal are conducted in English.

Division 3: When interpreters may be required

3.1 If the Court/Tribunal is satisfied that a party cannot understand and speak the English language sufficiently to enable the party to understand, and to make adequate reply to, questions that may be put to the party, then the party may give:

1. 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.

3.2 The party calling a witness who requires the services of an interpreter is responsible for engaging an interpreter in accordance with these rules, unless that party is an accused person in criminal proceedings in which case the Court will cause an interpreter to be engaged in accordance with these Rules, or if the court or tribunal has an obligation or policy to arrange interpreters for parties on request.

3.3 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.

3.4 In any civil proceedings, if the Court/Tribunal 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/Tribunal must permit that party to engage the services of an interpreter who meets the standards and requirements imposed by these rules, if the interpreter is to be engaged by that party to communicate with the Court/Tribunal (but not otherwise).

Division 4: Who may carry out the office of interpreter

4.1 Subject to rule 3.4 and 4.2, to carry out the office of interpreter a person must:

1. be currently certified, registered or recognised as an interpreter for the other language by a recognised agency or otherwise satisfy the Court/Tribunal 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 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/Tribunal.

4.2 In exceptional circumstances or where all reasonable efforts have failed to identify a person who satisfies the requirements of rule 4.1, the Court/Tribunal 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 4.1, provided that:

1. the Court/Tribunal is satisfied that because of their specialised knowledge based on their training, study or experience that person is able to interpret and, if necessary, sight translate accurately to the level the Court/Tribunal 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 accurately to the best of their ability;
3. the Court/Tribunal 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 or Tribunal owing a paramount duty only to the Court/Tribunal to be impartial and accurate to the best of their ability;
4. the Court/Tribunal directs that the evidence and interpretation be sound recorded for spoken languages, and video recorded for sign languages; and
5. the person is over the age of 18 years.

Division 5: What is the function of the interpreter

5.1 An interpreter is an officer of the court or tribunal in the sense that they owe to the court or tribunal paramount duties of accuracy and impartiality in the office of interpreter which override any duty that person may have to any party to the proceedings, even if that person is engaged directly by that party.

5.2 Unless the Court/Tribunal otherwise orders, an interpreter must:

1. interpret questions and all other spoken or signed 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 5.3, before or during the course of the witness' evidence translate at sight written words shown to the witness.

5.3 An interpreter may decline to sight translate 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 text.

5.4 Unless the Court/Tribunal 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 or signed communications or translating at sight documents in connection with the proceedings or proposed proceedings (including the hearing) for the party from English into the other language and from the other language into English.

Division 6: Code of conduct for interpreters

6.1 Subject to rules 3.4 and 4.2, an interpreter must comply with the Code of Conduct.

6.2 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.

6.3 Unless the Court/Tribunal otherwise orders and subject to rules 3.4 and 4.2, the evidence of a witness may not be received through an interpreter unless the Court/Tribunal is satisfied that the interpreter has read the Code of Conduct and agreed to be bound by it.

Division 7: Evidence adduced through interpreters

7.1 Where the witness is giving evidence by an affidavit or statement then, unless otherwise ordered:

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 sight translating the affidavit or statement to the witness, 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 sight translate the affidavit or statement;
   b. the interpreter sight translated the entire affidavit or statement to the witness, 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 7.1(1) may, but is not required to, be the interpreter who interprets for that witness in any hearing in the proceedings.

7.2 The Court/Tribunal may at any time, either of its own motion or on the application of a party, request the interpreter to correct, clarify, qualify or explain the interpreter's interpretation of the evidence or translation at sight of a document.

7.3 Any clarification, qualification or explanation given by the interpreter in response to a request under rule 7.2 is not evidence of the interpreter in the proceedings.

Division 8: Court may give directions concerning interpreters

8.1 Without limiting the generality of the Court or Tribunal's powers to control its own procedures, the Court/Tribunal may at any time make directions concerning all or any of the following having regard to the nature of the proceedings (including the type of allegations made and the characteristics of the parties and witnesses):

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 cultural and other reasonable concerns of a party, the witness or accused;

b. the number of interpreters required in any proceedings and whether relay interpreting should be used;

c. establishing the expertise of an interpreter;

d. the steps to be taken to obtain an interpreter who is certified, 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 4.2 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 8.1(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 without a break;

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/Tribunal of its own motion; and

n. payment of interpreters.

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

8.3 These rules apply subject to the provisions of the Evidence Act, or any other evidentiary provisions or customs applicable to the Court/Tribunal.

Schedule 1 – Code of Conduct for Interpreters in Legal Proceedings

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 or Tribunal

1. An Interpreter has an overriding duty as an officer of the Court/Tribunal to assist the Court/Tribunal impartially.
2. An Interpreter's paramount duty is to the Court/Tribunal 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/Tribunal.

4. Duty of accuracy

1. An Interpreter must at all times use their best 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 person 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/Tribunal orders otherwise, an Interpreter must not accept an engagement or appointment to carry out the office of interpreter in relation to 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 and other reasonable concerns.
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,
    c. 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, qualifications or experience. If it becomes apparent in the course of a matter that expertise beyond their competence is required, the Interpreter must inform the Court/Tribunal immediately and work to resolve the situation, either withdrawing from the matter or following another strategy acceptable to the Court/Tribunal.

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/Tribunal 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.

   "interpret" means the process whereby spoken or signed language is conveyed from one language (the source language) to another (the target language) orally.

   "Interpreters' Rules" means the Model Rules set out in the Recommended Standards.

   "Recognised Agency" means the National Accreditation Authority for Translators and Interpreters (NAATI) and such other organisations as are approved by the Head of Jurisdiction for the purposes of the Interpreters' Rules.

   "Recommended Standards" means the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*, 2021, a copy of which may be found on the Court's website.

Purpose

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

Construction and application of the Interpreters' Rules

5. The Court/Tribunal must take into account and, unless the Court/Tribunal considers it for any reason impractical or undesirable in the circumstances of the particular case, give effect to, the Recommended Standards when the Court/Tribunal 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 at Standards 8, 9 and 10 of the Recommended Standards, and in particular the tiered approach set out at Standard 11 of the Recommended 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/Tribunal, 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 has read, 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 4.2 of the Interpreters' Rules, or if the interpreter is to be used only by a party and not to communicate with the Court/Tribunal (see rule 3.4).

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 7.3 of the Interpreters' Rules and whether any directions should be sought from the Court/Tribunal 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/Tribunal where evidence is to be given through an interpreter using the consecutive mode, 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. The use of the simultaneous mode can significantly expedite the proceedings.

11. A party engaging an interpreter to interpret in proceedings in the Court/Tribunal must inform the interpreter that they will be required by the Court/Tribunal to produce evidence of the interpreter's current certification as an interpreter for the relevant language by a Recognised Agency, status as a Suitable Person for the relevant language, or other evidence to satisfy the Court/Tribunal that they are 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 Recommended Standards.

13. Interpreting "accurately" for the purposes of the Interpreters' Rules and the Code of Conduct involves skilled and sophisticated judgments on the part of the interpreter. An accurate interpretation does not equate to a literal or "word for word" translation. The Court/Tribunal recognises that, in general, the obligation to interpret accurately is not intended to compel, and will not necessarily be satisfied by, literal or "word for word" interpretation.

Fees for interpreters

14. The Court/Tribunal accepts that interpreters, in particular those who are certified by a Recognised Agency, are entitled to charge reasonable fees commensurate with their level of qualifications, and NAATI certification, skill and experience. While what fees may be reasonable can vary depending on the circumstances, as a general guide the Court/Tribunal adopts as reasonable minima 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 Recommended Standards

15. It is expected that the Recommended Standards will be regularly reviewed. The Court/Tribunal encourages parties to provide comments, especially where they have encountered difficulties in obtaining qualified interpreters, about the operation of the Standards to the National Accreditation Authority for Translators and Interpreters at info@naati.com.au.

[Head of Jurisdiction]

[Date]

Recommended Standards for Courts and Tribunals

Standard 1 – Model Rules

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

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

However, where a person before the courts has limited proficiency in English, the provision of interpreting services is necessary in order to meet the requirements of procedural fairness and ensure a fair trial in accordance with fundamental human rights. As such, the participation of competent interpreters and translators across the range of languages spoken in Australia is key to ensuring equal access to justice for all members of Australian society and for the administration of justice.

Australia's increasingly linguistically diverse society means that proactive steps are essential in particular to ensure the availability and competency of interpreters in languages other than English within the specialised environment of courts and tribunals and to promote an understanding of the proper role of interpreters in the administration of justice. Implementation of these Standards will be a critical component in achieving these goals in the short and long term.

In providing that Australian courts and tribunals "should so far as possible adopt the Model Rules and Practice Note", the Standards recognise that practices may vary between and within jurisdictions as to such matters as who is responsible for engaging an interpreter. For example, Model Rule 3.2 is drafted on the assumption that the court in civil cases relies on the parties to engage an interpreter. However, in some jurisdictions the court assumes that responsibility and the Model Rules should be adapted accordingly.

Standard 2 – Proceedings generally to be conducted in English

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

While English is the most commonly spoken language in Australia, it is estimated that 21 per cent of Australian residents (4.9 million people) use a language other than English at home.[8] Further, 3.5 per cent (819,922 people) of those who speak another language at home have reported that they speak English poorly or not at all.[9]

In addition, the 2016 Census found that some 60,000 people reported speaking an Aboriginal or Torres Strait Islander language at home, and 15 per cent reported not speaking English well or at all.[10] Approximately 10,000 Deaf people use Auslan as a first language. [11]

These figures provide some indication of the proportion of people coming before Australian courts and tribunals who may require language assistance to understand and be understood. Misunderstandings and knowledge gaps may also occur where English is not a person's first language, depending upon their proficiency. Further, people who have learnt English later in life may lack sufficient proficiency to understand complex sentences used to communicate rights or cautions, legal terms, or English spoken at fast conversational pace.[12]

8 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia – Stories from the Census*, 2016 (Catalogue No 2071.0, 28 June 2017).

9 ABS.Stat, *Census 2016, Proficiency in Spoken English/ Language by Age by Sex (SA2+)* (Australian Bureau of Statistics) <https://explore.data.abs.gov.au>.

10 Australian Bureau of Statistics, *Census of a Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians* (Catalogue No 2076.0, 19 February 2018).

11 Australian Bureau of Statistics, *Census of Population and Housing 2011* (June 2012). As with spoken language languages there are many different signed languages used around the world. Auslan is the language of the Australian Deaf community and received recognition as a community language under the Federal Government's National Policy on Languages in 1987.

Standard 3 – Engagement of interpreters to ensure procedural fairness

3.1 Courts and tribunals must accommodate the language needs of parties and witnesses with limited English proficiency in accordance with the requirements of procedural fairness.

While a number of parties can be involved in identifying the need for and arranging for the provision of interpreting services, the obligation ultimately rests with the court/tribunal to ensure a fair hearing.

In criminal matters, the accused has a right to an interpreter. From a practical perspective, in general the legal representative for the defendant will identify the need for an interpreter for the defendant and their witnesses. Nonetheless the judicial officer must ensure that the accused understands English before the accused enters a plea. In cases of any doubt, 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 their legal representatives. Responsibility for the provision of an interpreter may need to be discussed between the prosecution, the defence and any relevant agency, such as Witness Assistance Services.

In cases where the court/tribunal is exercising its protective jurisdiction and a party has limited English proficiency, the court/tribunal should be responsible for providing an interpreter. Further, while the position varies between the different jurisdictions, some courts/tribunals have assumed responsibility for engaging an interpreter where required in all or certain kinds of cases. As a result, mechanisms need to exist for the timely identification of parties and witnesses with limited English proficiency so as to facilitate the engagement of an interpreter and to take account of any cultural or other relevant considerations in the choice of interpreter. Where necessary, court/tribunal staff must be able to administer the four-part English language proficiency test to determine whether a person requires an interpreter: see Annexure 4.

12 See, eg, Aboriginal Resource and Development Services Inc, *An Absence of Mutual Respect* (Report, 2008); Communication of Rights Group, *Guidelines for Communicating Rights to Non-native Speakers of English in Australia, England and Wales, and the USA* (Report, November 2015).

Courts/tribunals are not responsible for the engagement of interpreters for language assistance outside court/tribunal attendances. Those arrangements are made by others, such as the police and legal representatives. However, courts/tribunals should be alert to inquire whether persons requiring language assistance in court have also been afforded language assistance by police, counsel and other parties.[13]

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 used by court and tribunal users, should be readily available on court and tribunal websites and in hard copy from the relevant 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 or tribunal.

Courts and tribunals should explain in the basic information provided to court or tribunal users that the phrase "officer of the court or tribunal" in relation to an interpreter means a person who owes to the court paramount duties of accuracy and impartiality in the office of interpreter which override any duty that person may have to any party to the proceedings, even if that person is engaged directly by that party or their legal representatives.

It is intended that the status of the interpreter as an officer of the court or tribunal will enhance and promote the independence of the interpreter, as well as acknowledging their vital role in the courtroom.

13 See Legal Appendix.

4.2 Information about the circumstances in which a court or tribunal may provide an interpreter should be published on court and tribunal websites and be available in hard copy from the relevant registries.

4.3 If a court or tribunal is responsible for the engagement of an interpreter in some or all kinds of matters, an application form for the provision of an interpreter in languages commonly spoken by court and tribunal users should be readily available online and in hard copy from the relevant registries. The form should make provision for a person to request that particular cultural or other considerations are taken into account in selecting an interpreter.

Many court and tribunal users may not be aware that they are able to access an interpreter to assist them. A form allowing court and tribunal users to request an interpreter for themselves or a witness should be presented in plain English and in commonly spoken languages. The form should be located in a prominent location on the court or tribunal's website and in hard copy at the Registry so that court users with limited English literacy do not have difficulty finding this information. The form should also include a space for court users to note any interpreter(s) that they do not want, for example for cultural, confidentiality or other reasons.

Standard 5 – Training of judicial officers and court and tribunal staff

5.1 Judicial officers and court and tribunal staff should be familiar with the role of the interpreter as an officer of the court or tribunal, in that they owe paramount duties to the court or tribunal.

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 and tribunal staff on assessing the need for interpreters and working with interpreters in accordance with these Standards.

Standard 6 – Engaging an interpreter in accordance with these Standards

6.1 Where an interpreter is engaged by the court or tribunal, the court or tribunal should endeavour to ensure that the interpreter is selected in accordance with Standard 11 of these Standards.

6.2 In the selection of an interpreter, courts and tribunals should ensure the interpreter is appropriate, taking into account any cultural and other reasonable concerns relevant to the proceedings.

Standard 7 – Budget for interpreters

7.1 If the court or tribunal is responsible for the engagement of interpreters either directly or through an interpreting service, court or tribunal budget allocations should provide and support interpreting services to court and tribunal users with limited English proficiency in accordance with these Standards and the Model Rules and the Practice Note.

Courts should have dedicated adequate budget lines to provide and support interpreting services to court users with limited 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 or tribunal, whose duties are to interpret accurately for all parties so they can communicate with each other, irrespective of whether the interpreter is engaged by the court/ tribunal or by the parties.

Standard 8 – Coordinating the engagement of interpreters

The circumstances in which a court or tribunal, rather than the parties and their legal representatives, will engage an interpreter on behalf of a limited English proficiency speaking person will vary depending on the practice of that court or tribunal.

Nothing in the Standards is intended to alter those arrangements or to shift responsibility for organising interpreter services from the parties and their legal representatives to the court or tribunal. However, Standard 8 is relevant in circumstances where the court or tribunal engages an interpreter on behalf of a limited English proficiency speaking person.

8.1 This Standard applies where the court or tribunal is responsible for the engagement of the interpreter either directly or through an interpreting service.

8.2 A specific member(s) of registry staff should be designated as having responsibility for coordinating interpreting arrangements.

It is envisaged that the responsibility of the designated officer or officers would embrace:

- 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;
- Assuming responsibility for the welfare and safety of interpreters, including ascertaining whether a debriefing is necessary;
- Following up with the court or tribunal 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 or tribunal made a decision to adjourn or stay a case, or to proceed with a less qualified interpreter.

8.3 Courts and tribunals 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.

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

- Call interpreter cases promptly so the interpreter can move on to other hearing rooms; and
- Schedule interpreter cases in the same hearing room 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 and tribunals may "roster on" interpreters who are booked to be available half or a full day in advance of immediate customer demand (as, for example, is currently the case Aboriginal and Torres Strait Islander language interpreters in the Northern Territory, and for Vietnamese interpreters in a Melbourne Magistrates Court).

Ways to anticipate need for interpreters

Courts and tribunals requiring interpreters frequently should analyse language needs among users in order to improve efficiencies in the use of interpreter services. For example, census data relevant to a court or tribunal's jurisdiction may be indicative of the likely demand for interpreters in particular languages. To develop more specific information, registry staff could undertake snapshot surveys, one day a fortnight, inquiring of persons using registry services on that day what language they speak at home and whether they feel that they have trouble understanding what lawyers and service providers say to them. This information could assist in identifying the main areas of likely need.

Courts and tribunals 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.

Booking information to be provided to interpreters

Detailed booking and briefing information should be provided to interpreters, preferably through an online interpreters' portal (see Optimal Standard 4). 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.

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 or tribunal;
- Contact person on arrival;
- Notice of requirement to produce evidence of their qualification(s) and certification;
- Interpreter's Code of Conduct relevant to the court or tribunal, including information on confidentiality;
- Length of time for which the interpreter is booked.

Any confidential documents that are provided to the interpreter as part of the brief must be returned to the court or tribunal.

Interpreter availability

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 or tribunal book the same interpreter (if satisfied with their performance), for consistency and experience.

> 8.4 To maximise the ability of interpreting services to provide an appropriate interpreter for a particular case, courts or tribunals seeking to engage the services of the interpreter should give as much notice as possible.

Early consideration to engaging an interpreter will facilitate the process of engaging an interpreter in line with the tiered approach in Standard 11 and compliance with any requests for cultural and other relevant considerations as to the choice of interpreter. It also better allows for the interpreter's needs to be considered in preparing for the hearing and for appropriate arrangements to be made with respect to the process by which interpreting is to occur.

The following timeframes are suggested:

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

> 8.5 Where Auslan interpreters are required to interpret for a deaf party or witness, they should be engaged in tandem with two (or more) interpreters, given the simultaneous mode of their work and risk of occupational injury.

Many Auslan interpreters use a form of 'relay interpreting'. Relay interpreting consists of one interpreter interpreting from language A to language B and the other interpreter interpreting from language B to language C.[14] For example, in a case where a witness speaks a dialect of Mandarin which the Mandarin interpreter does not understand, the Mandarin interpreter could be assisted by a Suitable Person who speaks both the witness' dialect as well as Mandarin. The Suitable Person could interpret the witness' evidence into Mandarin, which the interpreter then interprets into English.[15]

Given Auslan is the standard interpreting method used within Australia only, participants in a hearing room situation may be more familiar with alternate deaf interpreting methodologies. A version of relay interpreting is commonly used with deaf persons whose Auslan usage is limited or idiosyncratic, or who may use a foreign-signed language. Where a deaf person does not use Auslan, having both deaf and Auslan interpreters may be necessary.

14 Relay interpreting has been judicially approved in the United Kingdom: *R v West London Youth Court; Ex parte N* [2000] 1 All ER 823.

15 See, eg, *SZJOW v Minister for Immigration and Citizenship* [2007] FCA 790, [8].

Deaf Interpreters are native or native-like users of Auslan and understand the complex cultural experience of growing up deaf.[16] They are able to adapt their sign language to accommodate a broad range of behavioural and linguistic traits specific to the deaf community. Deaf Interpreters with specialised communication skills work alongside hearing Auslan-English interpreters, bridging gaps in the transfer of information between English, Auslan and the deaf party's foreign signed language or non-standard Auslan.

Standard 9 – Support for interpreters

> 9.1 Courts and tribunals should provide adequate and appropriate working conditions and remuneration to support interpreters in the performance of their duties to the best of their ability.

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.

Regardless of the circumstances (for example, when interpreters are hired by different parties rather than by the court or tribunal), when more than one interpreter is employed, adversarial interpreting should be avoided. This practice is becoming more common in different jurisdictions in various countries in order to ascertain the quality of the other party's interpreter. In such circumstances, instead of working together as a team, interpreters work in opposition and competition with each other. This practice is counterproductive with research showing that when interpreters are being monitored in this way, their performance can decline.[17]

> 9.2 Interpreters should be remunerated by reference to a scale of fees which reflect their level of qualifications and NAATI certification, skill and experience. Interpreters should also 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.

Remuneration of interpreters is sometimes controlled by regulations,[18] but is otherwise determined by 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 and tribunals should agree to a scale of fees for interpreter costs and provide appropriate remuneration to the interpreter commensurate with their level of qualifications and NAATI certification, 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 minimum fees to give a benchmark of costs to assist parties in budgeting and negotiating rates of pay for interpreters. This is available at http://www.professionalsaustralia.org.au/translators-interpreters/recommended-rates/.

Courts and tribunals should give consideration to differential rates depending on the qualifications and level of NAATI certification of the interpreter, with a discretion to allow a higher or lesser amount than the minimum rates in any circumstances which appear to be just and reasonable. There is a real concern that many qualified interpreters leave the profession due to poor remuneration and inadequate working conditions.

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 services

16 Deaf Interpreters are capable of being certified by NAATI.

17 See generally work by Dr Krzysztof Kredens from the Institute for Forensic Linguistics at Aston University, including Krzystof J Kredens, 'Making sense of adversarial interpreting' (2017) 4(1) *Language and Law* 17.

18 See, eg, *Witness and Interpreters Fees Regulations 1974* (NZ), s6; *Evidence (Fees, Allowances and Expenses) Regulations 2008* (WA), s6.

of the interpreter are only required 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 the minimum rate.

9.3 In order to provide practical support for interpreters and protect their independence, courts and tribunals should provide interpreters with a dedicated space where they can wait until called, leave their belongings, prepare materials, and be briefed and debriefed. The room should be close to the hearing rooms and be equipped with wireless internet and/or a computer with internet 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 a party or witness in the waiting room, which can potentially compromise the interpreter's ethical obligations and independent role as an officer of the court or tribunal.

9.4 In the hearing room, courts and tribunals should provide interpreters with a dedicated location where they can see all parties in the room. 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.

In the hearing room, courts and tribunals should provide interpreters with a dedicated location where they can hear all parties and have a clear view of all persons speaking. In addition, the safety and professional distance of interpreters should be a primary consideration when deciding on the placement of interpreters. Auslan interpreters can give advice as to the optimal standing positions to enable optimal visual access to and from signing deaf parties and/or witnesses.

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.

The taking of evidence which is interpreted should be audio recorded or, in cases where an Auslan interpreter is engaged, video recorded, so as to protect the parties' rights if an issue should arise at trial or on appeal as to the accuracy of any part of the interpreted evidence.

Telephone interpreting and interpreting using audio-visual links

Where an interpreter is unable to be present in the hearing room, audio-visual links should be preferred over telephone interpreting whenever possible. Interpreting court and tribunal proceedings by telephone can lower the accuracy of the interpreting compared to face-to-face or video hearings.[19] 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. Where telephone interpreting is necessary, these Standards should still be complied with, including briefing the interpreter where appropriate and the scale of remuneration for their work in the proceedings.

The use of audio-visual links to provide interpreting services should only be considered when the available equipment is of sufficient quality, and is appropriately configured, so as to provide adequate sound and vision for all parties.

The use of teleconferences and audio-visual links for hearings has increased, and it may be expected that the use of such technology may continue, at least for some kinds of hearings. Annexure 6 provides guidelines for working with interpreters where audio-visual links are used in various hearing contexts.

19 Sandra Hale, unpublished research study, 2021

9.5 Interpreters should be provided with regular 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, on the mode of interpreting (either consecutive or simultaneous), whether the interpreting is conducted remotely or on site, and on the competence of the interpreter. The judicial officer should ask interpreters if they need a break every 45 minutes for spoken language interpreters, and every 20 minutes for signed language interpreters. More regular breaks are needed for simultaneous interpreting and for remote interpreting. The judicial officer should encourage interpreters to always notify the court or tribunal if they need a break at any time during the proceedings. The court or tribunal should adjourn more frequently whenever an interpreter has been called upon to interpret for long periods.

It is important that the need for interpreters to take breaks is taken into account in considering the length of time for which the interpreter's services will be required and in estimating the likely time required for the hearing overall. Paragraph (10) of the Practice Note recommends that the time estimate for the taking of evidence with an interpreter using the consecutive mode be two and a half times the estimated time that would be required for that witness to give their evidence in English. That recommendation has taken into account the time required for breaks, which should be at least 15 minutes for every 45 minutes worked.

9.6 Where the court or tribunal is responsible for the engagement of interpreters directly or through an interpreting service, the court or tribunal shall provide counselling and debriefing for any distress or trauma suffered by the interpreters arising from their performance as officers of the court or tribunal, in that they owe paramount duties to the court or tribunal, unless such counselling and debriefing is already provided by the interpreting service provider.

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.[20] The requirement to use first person in conveying content may increase the interpreter's risk of experiencing vicarious trauma.[21] 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, post-traumatic 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 refugees for whom they interpret may be more vulnerable to psychiatric disorders. In another study, feelings of distress among interpreters correlated with the number of sessions where they had to interpret experiences of violence.[22]

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. The Standards recommend that courts and tribunals provide debriefing and, if necessary, pay for counselling for the interpreter who has performed their functions as an officer of the court or tribunal. This issue merits further investigation to determine how courts and tribunals can better support interpreters' occupational health and safety and thereby also better ensure that a pool of available and competent interpreters is available to assist in matters where such risks are heightened.

20 Miranda Lai and Susie Costello, 'Professional Interpreters and Vicarious Trauma: An Australian Perspective' (2020) 31(1) *Qualitative Health Research* 70; Miranda Lai, Georgina Heydon and Sedat Mulayim,'Vicarious Trauma Among Interpreters' (2015) 7(1) I*nternational Journal of Interpreter Education* 3, 6.

21 Karen Bontempo and Karen Malcolm, 'An Ounce of Prevention Is Worth a Pound of Cure: Educating Interpreters About the Risk of Vicarious Trauma in Healthcare Settings' in Laurie Swabey and Karen Malcolm (eds), *In Our Hands: Educating Healthcare Interpreters* (Gallaudet University Press, 2012) 105, 111.

22 Ibid.

9.7 Where the court or tribunal is responsible for the engagement of interpreters directly or through an interpreting service, the court or tribunal should implement procedures for the provision of feedback to and from interpreters on interpreting performance and associated matters, either coordinated through the interpreter service or through the court or tribunal.

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 or tribunal 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 or tribunal. Where relevant, this should be provided to the interpreter service. The court or tribunal'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.

9.8 Courts and tribunals should advise NAATI when they have been unable to secure the services of an interpreter.

Interpreter shortages are a matter of serious concern. At present, there is no coordinating body to which courts and tribunals can report where 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 and tribunals should email 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 (e.g. short adjournment, long adjournment, or stay of proceedings).

This data will also assist in reviewing the Standards.

9.9 Court and tribunal procedures should be adapted to ensure that the most efficient use is made of the interpreter's time and skills. As outlined in rule 8.1 in the Model Rules, the court or tribunal may at any time make directions regarding a range of issues concerning the retainer and role of the interpreter in proceedings.

Model Rule 8.1 lists various matters on which directions concerning the provision of interpreting services may be made. The list of issues in Rule 9.1 is intended to assist parties, their legal representatives and the court or tribunal to ensure that all relevant matters are considered and considered at an early stage of the proceedings. This does not mean that the court or tribunal will in fact make directions on all of the matters identified in Rule 9.1; nor that it would do so without first hearing from the legal representatives or the parties (if unrepresented): see also Standard 20.2 (interpreters must comply with any direction of the court). Rule 9.1 is not intended to be exhaustive of the matters on which directions affecting interpreters may be made. It is envisaged that the parties and their legal representatives would in appropriate cases speak with the proposed interpreter or interpreting service provider in advance of a directions hearing to ascertain their needs and discuss how they may be accommodated.

Standard 10 – Assessing the need for an interpreter

10.1 In determining whether a person requires an interpreter, courts and tribunals should apply the four-part test for determining need for an interpreter as outlined in Annexure 4.

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

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 limited English proficiency speaking party may speak several languages with considerable proficiency. This may be the situation with speakers of some Aboriginal or Torres Strait Islander languages in Australia and with speakers from African and West Asian countries characterised 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 using relay can be considered, subject to the parties consenting to this arrangement and careful monitoring.

Standard 11 – Engaging an interpreter

11.1 This Standard applies where the court or tribunal is responsible for the engagement of the interpreter either directly or through an interpreting service, or required to determine whether or not a particular individual should be permitted to carry out the office of interpreter.

11.2 Courts and tribunals should prefer to engage a Qualified Interpreter. Where a Qualified Interpreter cannot be found, a Suitable Person may be engaged instead. Where possible, the following order of preference for an interpreter's level of certification and qualification should be followed:

1. Certified Specialist Legal Interpreter
2. Certified Interpreter
3. Certified Provisional Interpreter
4. Recognised Practicing Interpreter
5. Suitable Person

11.3 When engaging an interpreter, whether a Qualified Interpreter or otherwise, the following should also be taken into account:

- the extent and level to which the person has pursued formal education and interpreter training, especially legal interpreting training;
- the level of their NAATI certification;
- whether or not the person is a current member of AUSIT, ASLIA or other recognised State or Territory based association; and
- any experience interpreting in court or tribunal, including the nature of that work.

The current interpreter qualifications are listed and described in Annexure 2. In Australia, interpreters have a wide variety of certifications, qualifications, in-service training, experience and engagement with professional associations. As a result, some practitioners are trained and certified, some are certified but not trained, and some are trained but not certified. In any case, only those with appropriate training and/or certification should be considered interpreters, and not, for example, bilinguals with no independent verification of interpreting competence or English and other language proficiency.

Research demonstrates the superior performance of trained interpreters over untrained bilinguals.[23] Conversely, incompetent interpreting can lead to appeals, increase the cost of the justice process and be productive of delay.[24]

While there are languages where practitioners meet the benchmarks contained in Standard 11, 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 Certified Interpreters and, in some languages, even of Certified Provisional 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 standards for interpreting in Australian courts and tribunals, while providing mechanisms to continue the work of the justice system.

23 Jane Goodman-Delahunty et al, *Effects on Situational and Relational Variables on Interpreting in High Stakes Police Interviews* (Research report not released to public, United States Federal Bureau of Investigation, 2015).

24 Alejandra Hayes and Sandra Hale, 'Appeals on Incompetent Interpreting' (2010) 20 *Journal of Judicial Administration* 119.

These Standards set out standards by language, based on the number of available interpreters at Certified and other levels. It is based on the principle that where NAATI Certified interpreters are reasonably available, they should be employed. However, where Certified or Certified Provisional interpreters are not available, the Standards recommend that courts and tribunals 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 NAATI Certified and to pursue formal education and training and continuous professional development and education.

The Standards divide[25] all languages in Australia into four tiers, on the basis of NAATI data on the number and level of Certified practitioners. The tiers recognise the current supply of interpreters and are organised in such a way that courts should be able to find qualified interpreters provided they make sufficient effort to do so.

Standards 11.4 and 11.5 detail the preferential order of interpreting certifications that courts and tribunals should seek to pursue when engaging an interpreter for each Tier. Generally speaking, however, courts and tribunals should prefer interpreters in the following order of certification level:

1. Certified Specialist Legal Interpreter
2. Certified Interpreter
3. Certified Provisional Interpreter
4. Recognised Practising Interpreter

> 11.4 For languages in Tier A, only a Certified Interpreter, or a Certified Specialist Interpreter if available, should be engaged, having regard to any cultural and other reasonable concerns.

Tier A comprises 11 languages, Tier B 17 languages, Tier C 50 languages, and Tier D all other languages. Each tier identifies different 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 Certified interpreter. Therefore, there should generally be no reason why an interpreter of lesser standard should ever be used.

Tiers B, C and D identify Standards for languages where there are few or no Certified interpreters for that language, as well as additional measures courts and tribunals should take to ensure procedural fairness. Courts and tribunals should make every reasonable effort to engage the most qualified interpreters, including consulting interpreters about their available dates when setting the date for the hearing or trial, adjourning if no interpreter is available, flying an interpreter in from another state or using video link before considering the engagement of an unqualified and/or non-certified interpreter. Non-certified and unqualified bilinguals should only be engaged when there are no qualified or Certified interpreters in existence in that language combination.

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

Tier A comprises 11 languages (10 spoken international languages and Auslan) where there are at least 40 Certified Interpreters and possibly some Certified Legal Interpreters.

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

Courts and tribunals should never employ an interpreter of lesser standard than NAATI Certified Interpreter for these Tier A languages. Moreover, preference should be given to interpreters who have also undertaken tertiary qualifications in interpreting and are a current member of AUSIT or ASLIA or other recognised State or Territory based professional association requiring adherence to a code of ethics and/or standards, where they are available.

To meet the standard required by Standard 11, courts and tribunals may need to consider deferring a trial or hearing, paying for the interpreter to travel from another state/territory or using video conferencing facilities so that the interpreting can be conducted remotely.

For some of these languages, there may well be interpreters who have completed tertiary studies but are not certified by NAATI at Certified Interpreter 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 as part of that course of study completed units in legal interpreting.

Table 1.1 Tier A

Language	No. Interpreters with some certification (as of February 2022)
Arabic	614
Auslan	62
Cantonese	263
Greek	135
Italian	117
Japanese	144
Mandarin	2186
Persian	362
Spanish	161
Turkish	102
Vietnamese	330

> 11.5 For all other tiers, if a Certified Interpreter is not reasonably available, then, subject to cultural and other reasonable concerns:
>
> a. For languages in Tier B:
>
> i. a Certified Provisional Interpreter should be engaged if there is one available; or
>
> ii. if a Certified Provisional Interpreter is not reasonably available, the judicial officer may grant leave for a person to carry out the office of interpreter in accordance with Model Rule 4.2

Tier B comprises 17 spoken international languages where there are between 10 and 40 Certified Interpreters and a significant number (>30) of Certified Provisional Interpreters.

The Tier B languages are Bangla, Bosnian, Croatian, Dari, French, German, Hindi, Hungarian, Indonesian, Macedonian, Polish, Portuguese, Russian, Serbian, Sinhalese, Tamil, and Thai.

For these 17 Tier B languages, Certified level is preferred but courts should never employ an interpreter of lesser standard than a NAATI Certified Provisional Interpreter. Within Tier B, preference should be given to Certified level interpreters, interpreters who have undertaken tertiary education/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 certified at NAATI Certified Interpreter level, courts and tribunals should make every effort to engage the services of a Certified Interpreter, including if necessary by considering deferring the trial or hearing, 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 certified by NAATI at Certified or Certified Provisional level. In such instances, a judicial officer can deem that an interpreter meets the standards for a Tier B interpreter if the interpreter

25 The appropriateness of the allocation of particular languages to particular tiers will be monitored through further consultation with the interpreting sector and updated yearly in consultation with NAATI, AUSIT and ASLIA. AUSIT and ASLIA have directories of current practitioners who are also members of the professional associations. These Standards will be reviewed regularly and can be amended in response to changes in the numbers of credentialed interpreters.

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 1.2 Tier B

Language	No. Interpreters with some certification (as of June 2021)
Bangla	48
Bosnian	37
Croatian	54
Dari	184
French	51
German	20
Hindi	47
Hungarian	14
Indonesian	41
Macedonian	47
Polish	32
Portuguese	32
Russian	57
Serbian	84
Sinhalese	31
Tamil	58
Thai	53

b. For languages in Tier C:
   i. a Certified Interpreter should be engaged if one is available; or
   ii. if a Certified Provisional Interpreter is not reasonably available, the judicial officer may grant leave for a person to carry out the office of interpreter in accordance with Model Rule 4.2

Tier C comprises 50 languages where there are very few (<10), if any, Certified Interpreters, but sufficient numbers (10-200) of Certified Provisional Interpreters available relative to the population of speakers of those languages. This includes several Australian Indigenous languages.

For the languages in Tier C, given that there are very few, if any, Certified Interpreters currently available, courts and tribunals should seek to employ a Certified Provisional Interpreter. Acknowledging that an intensive search for an interpreter may need to occur, this should be achievable in the majority of cases.

Before commencing with the assistance of a Certified Provisional 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 Certified Provisional Interpreter has insufficient skills, the judicial officer should adjourn the proceeding until a Certified level mentor is appointed to support the Certified Provisional Interpreter (see discussion following regarding professional mentors).

c. For languages in Tier D:
   i. a Certified Provisional Interpreter should be engaged if there is one available; or
   ii. if a Certified Provisional Interpreter is not reasonably available, a Recognised Practising Interpreter should be engaged if there is one available; or
   iii. if neither a Certified Provisional Interpreter nor Recognised Practising Interpreter is reasonably available, the judicial officer may grant leave for a person to carry out the office of interpreter in accordance with Model Rule 4.2

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

Recognised Practising Interpreters do exist for many of these languages. Whilst they are not certified, this credential does require individuals to demonstrate English proficiency, ethical competence, intercultural competence, and completion of introductory interpreter training. Individuals holding this credential are also required to engage in continuing professional development.

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

- a qualified interpreter could be employed from overseas subject to a voir dire hearing on competence;
- a team interpreting approach could be adopted using bilinguals and a qualified interpreter in another language as a mentor; or
- a "relay" approach could be used – however, this is the least preferred option for spoken languages, and in such cases the court or tribunal should take extra steps to satisfy itself that the arrangement is acceptable to the court or tribunal and to the parties, and to monitor it closely.

Standard 12 – Provision of professional development to interpreters on the Standards

12.1 Where the court or tribunal is responsible for the engagement of interpreters, either directly or through an interpreting service, interpreters should be provided with induction and continuing training, either by the court or tribunal or interpreting service, to ensure that interpreters understand their role as officers of the court or tribunal, in that they owe paramount duties to the court or tribunal, and responsibilities under the Court Interpreters' Code of Conduct

Optimal Standard 1 – Simultaneous interpreting equipment

1.1 To improve the efficiency and quality of interpreting, satisfy the requirements of procedural fairness and improve the working conditions of interpreters, courts and tribunals 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 or witness.

In many Australian hearing rooms, 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 hearing rooms, 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.[26]

26 Ludmila Stern, 'At the Junction of Cultures: Interpreting at the International Criminal Tribunal for the Former Yugoslavia in the Light of Other International Interpreting Practices' (2001) 5(3) *Judicial Review 255*.

As part of improving the working conditions of interpreters, it is recommended that simultaneous interpreting equipment be provided. This will allow interpreter(s) to sit independently from all the parties, in a position where they can see all parties, and interpret through headphones. This will also facilitate safer working conditions, where the interpreter does not need to sit in close proximity to potentially dangerous criminal offenders, or where health and safety or social distancing guidelines suggest it is unsafe to sit so closely to another person.

Depending on how frequently a court or tribunal 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. This equipment needs to be used in conjunction with the headphones already used by courts for people who are deaf and hard of hearing. These hearing loop headphones can allow interpreters to effectively hear what is being said while sitting anywhere in the hearing room. The interpreter interprets into a transmitter connected to a radio receiver with earphones worn by the party who requires the interpreting service. Where available, hearing loop headphones should always be offered to the interpreter.

It must be noted that not all interpreters are capable of interpreting simultaneously, as such a mode requires specialised training.

Video Remote Interpreting can be utilised for situations where there are no interpreters with an appropriate level of certification residing in a particular location or if the cost of sending an interpreter to a particular location is prohibitive, or where it is not possible for all parties or the interpreter to be in the hearing room together due to mandatory or adopted health and safety requirements. See Annexure 6 for more information on working with interpreters via audio-visual link.

For people who use Auslan as their first language, 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.

Interpreters should be permitted access to other tools, such as online glossaries and dictionaries, which may assist them in effectively interpreting what may be unfamiliar legal terminology. If an interpreter accessing the internet on a personal device is of concern to the court or tribunal, a dedicated device should be provided to them.

Optimal Standard 2 – Provision of tandem or team interpreting

2.1 Whenever possible, courts and tribunals should utilise tandem interpreting. Particularly in the case of Tier C and Tier D languages when a Suitable Person may be difficult to locate and engage, courts and tribunals should utilise team interpreting.

Interpreting is physically and mentally taxing and can be exhausting if conducted for lengthy periods of time. The quality of the interpreting is also likely to become adversely affected the longer a single interpreter is required to interpret without adequate breaks.

Two interpreters working in tandem is more satisfactory than a single interpreter for all languages. Courts and tribunals can expect to at least double the speed of proceedings if they employ a team working in tandem. This approach is standard practice in international courts, where two interpreters work together in tandem at all times. It has also been standard practice for Auslan interpreters working in Australia for many years.[27] Having two interpreters helping each other and checking on each other's performance is also a very effective quality assurance mechanism.

27 As they predominantly work in simultaneous mode, Auslan interpreters work in pairs alternating turns to limit cognitive overload and reduce overuse injury. See also Annotated Standard 8.5 in relation to Deaf Interpreter teams.

Shorter assignments – such as initial appearances, arraignments, status conferences and pleas – can usually be covered by a single Certified 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 tandem interpreting is considered an optimal standard for the purposes of the Standards with the exception of Auslan and signed languages where the use of tandem interpreting is mandatory.

Generally speaking, in instances when less qualified interpreters are used, they should always work together as a team, including for short matters. Prior to proceeding with a trial engaging an interpreting team, the judicial officer should hold a *voir 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.

Tier A – Certified Interpreters

For matters that are scheduled for longer than two days, two Certified Interpreters, or Certified Specialist Interpreters if available, should be employed to work in tandem, for 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 for spoken languages, and approximately 20 minutes for signed languages, preferably during a natural break in the proceedings.[28]

Where courts and tribunals are unable to locate and engage a Certified Interpreter or a Certified Specialist Interpreter for Tier A languages, after making intensive efforts to do so, the Standards recommend that a team of Certified Provisional Interpreters be formed as a quality assurance strategy.

28 Supreme Court of the Northern Territory, *Protocols for Working with Interpreters in the Northern Territory Supreme Court*, 3 June 2013, 19 [12.1].

Tier B – Certified and Certified Provisional Interpreters

Where courts are unable to locate and engage a Certified Interpreter or a Certified Specialist Interpreter after making intensive efforts to do so, courts can engage the services of Certified Provisional Interpreters in Tier B languages subject to the following conditions:

- for matters of less than half a day, a single NAATI Certified Provisional Interpreter should be employed;
- for matters of more than half a day, two NAATI Certified Provisional Interpreters should be employed to allow turn taking, cross checking and mutual support;
- for matters of three or more days, two Certified Provisional Interpreters (or one Certified and one Certified Provisional 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.

Tier C – Certified Provisional Interpreter available in majority of cases

For matters of a single day, when a single NAATI Certified Provisional Interpreter is engaged, the court or tribunal 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 Certified Provisional 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. Matters should generally be adjourned until two interpreters can attend.

Where it is not possible to secure sufficient Certified or Certified Provisional Interpreter for a matter, after making intensive efforts to do so, courts and tribunals can engage the services of a team of Recognised Practising Interpreters. It should be noted that team interpreting is a complex task. Putting two or three less competent interpreters

untrained in teamwork, or untrained bilinguals, together in a team will not automatically result in competence.

Two types of three person teams can be considered:

- One type of team would comprise a Certified or Certified Provisional Interpreter certified in another language who also speaks the required language PLUS a bilingual person who speaks the language as a first language PLUS a Certified level mentor.
- Another type would comprise a Recognised Practising Interpreter 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 Certified Interpreters or Recognised Practising 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. Therefore, it may be that a bilingual and NAATI Certified Interpreter providing services in a third or more distant language have differences of opinion regarding the interpretation process. Any disagreement between team members should be brought to the attention of the court or tribunal and a process determined by the court or tribunal for responding to the concern.

Professional mentors (who are Qualified Interpreters and therefore have court or tribunal experience but do not speak the required language) will assist the bilinguals with ethical issues, to manage the interaction of parties in the hearing and matters of clarification. This approach recognises the complexity of interpreting in courts and tribunals and the multiple skills required.

- In this scenario, the judicial officer should determine how other parties in the hearings 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 for untrained bilinguals has several advantages over simultaneous whispering. Firstly, counsel and the judicial officer can hear whether the interpreter is having trouble keeping up with the speech. Secondly, it will enable a second interpreter to advise 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.[29]

Tier D – Languages for which there are very few or no certified interpreters

Where courts and tribunals are unable to locate and engage NAATI certified interpreters for a matter, the services of a team of non-certified interpreters can be engaged.

Two types of three person teams can be considered:

- One type of a team would comprise a Certified or Certified Provisional Interpreter certified in another language who also speaks the required language PLUS a bilingual person who speaks the language as a first language PLUS a professional mentor.
- Another type would comprise a Recognised Practising Interpreter who speaks that language PLUS a bilingual person who speaks the language as a first language PLUS a professional 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.

29 This approach was recommended by the Supreme Court of Canada in *Quoc Dung Tran v The Queen* [1994] 2 SCR 951, 989-990.

Optimal Standard 3 – Provision of professional mentors

3.1 In cases where it has been necessary to engage a Suitable Person for a Tier C or Tier D language, courts and tribunals (where they are responsible for providing the interpreter) or the party engaging the interpreter should endeavour to provide a Professional Mentor for the person undertaking the office of interpreter. The role of the Professional Mentor is to assist the person undertaking the office of interpreter with ethical issues, to assist with the interaction of that person with others in the hearing, including where clarification or explanations may be required.

The Standards introduce the concept of a Certified level mentor who works with untrained bilinguals to assist them to fulfil their responsibilities. Professional Mentors are Qualified Interpreters who are 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 certifications and/or attributes of a Professional Mentor and expectations about their role in court. It would be desirable, but not necessary, if they were a Certified level interpreter. NAATI certification alone is insufficient. Some form of professional development would need to be developed and such training could be developed and offered by AUSIT or other approved provider.

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.

Optimal Standard 4 – Establishment of an interpreters' portal

4.1 Courts and tribunals 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.

Recommended Standards for Judicial Officers

Standard 13 – Judicial officers' duties

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

Standard 14 – Plain English

14.1 Judicial officers should use their best endeavours to use plain English to communicate clearly and articulately during the proceedings.

Judicial officers, lawyers and other parties in a matter 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 lawyers if they have not been fully briefed and given material in advance in order to prepare, or if they are referring to information that is unfamiliar or too complex.

It is ultimately the responsibility of the court or tribunal and any legal representatives to ensure that the language used is accessible. It is not the interpreter's responsibility to make sense of and simplify difficult and technical language and content. To enhance comprehension within the 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 hearing room 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.[30]

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. Annexure 3 expands on these strategies.

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 Local Court'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;
- 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).

30 Law Society Northern Territory, *Indigenous Protocols for Lawyers* (2nd ed, 2015), 20-24.

Language needs of Aboriginal and Torres Strait Islander peoples

If an Aboriginal and/or Torres Strait Islander language interpreter does not read English, somebody should read the words to be interpreted to the interpreter, who can then interpret from English into the relevant Aboriginal and/or Torres Strait Islander language.

Further, while the Standards focus on issues concerning the engagement of interpreters, the court or tribunal, judicial officers and legal practitioners should be aware that Aboriginal and/or Torres Strait Islander people may have additional language needs that may affect the interpretation process. This includes that Aboriginal and/or Torres Strait Islander people may have a:

- lesser ability to speak and/or understand (standard) English, noting that many speak a form of Aboriginal English;
- different communication styles, for example not making eye contact or the use of silence preceding answers to questions, that make it hard for others to adequately understand them, or means that they are wrongly assessed as, for example, evasive or dishonest;
- lower literacy or educational level than average;
- disability that requires using a communication aid or different technique; or
- better knowledge or higher appreciation of Aboriginal and/or Torres Strait Islander customary law than Australian law and legal processes.[31]

Standard 15 – Training of judicial officers for working with interpreters

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

31 Judicial Commission of New South Wales, *Equality before the Law Bench Book* (Release 11, December 2017), 2123-2135.

Standard 16 – Assessing the need for an interpreter

16.1 The fundamental duty of the judicial officer is to ensure that proceedings are conducted fairly and in accordance with the applicable principles of procedural fairness, including by ensuring an interpreter is available to persons of 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 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 *voir dire* hearing where necessary.

The judicial officer must do their best to ensure that the interpreter is discharging their responsibilities competently. Assuming that 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.[32] For example, if a limited English proficiency speaking person (whether a party, witness or person present in the hearing room) 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 bilinguals to ascertain what might be the issue of concern. In any event, the interpreter should be given the opportunity to explain or reply to any concerns or complaints. The interpreting qualifications of those making a complaint should be compared with those of the interpreter. 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, they must decide the case by reference to the evidence as it was interpreted into English and cannot take into account their own understanding of the language unless they has fully

32 See *Chala Sani Abudla v The Queen* [2011] NZSCA 130 at [51].

explained to the parties the interpretation which they have assumed and have afforded them an opportunity to make submissions on that interpretation.[33]

16.2 To ensure that criminal proceedings are conducted fairly and that there is no miscarriage of justice, courts should ensure that an interpreter is provided to an accused of limited English proficiency.

16.3 Judicial officers should satisfy themselves as to whether a party or witness requires an interpreter in accordance with the four-part test for determining the need for an interpreter as outlined in Annexure 4.

Annexure 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 Local 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 *voir 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/or Torres Strait Islander Australians, need access to an interpreter to understand and be understood in the hearing. 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.[34]

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 limited English proficiency speaking party is able to fully understand the language they will encounter in the hearing, 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 commonplace.

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 or tribunal is not satisfied with the person's level of comprehension, an interpreter should be provided.

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 or tribunal should not rely on the party's ability to provide biographical data as the basis for deciding whether to work with an interpreter. It does not necessarily follow from the fact that a person can adequately answer simple questions about their life that they have sufficient English proficiency to understand the proceedings, discuss legal concepts, or listen to and give evidence in a court or tribunal.

33 Justice P W Young and M W Young, 'Legal Language' (1990) 64 *Australian Law Journal* 761.

34 *Chala Sani Abudla v The Queen* [2011] NZSCA 130 at [46].

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.

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 with cognitive disabilities, acquired brain injury, mental illness, language impairments and deaf and hard of hearing people are over-represented in the justice system.[35]

For example, given the social isolation that is associated with deafness, it is important to determine whether a person who is deaf or hard of hearing 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.[36]

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

Many courts and tribunals are fitted with hearing amplification devices. Judicial officers and counsel must ensure that deaf and hard of hearing people are provided with adequate support in both the hearing room and during instruction taking. Persons who speak a language other than English and are also deaf or hard of hearing are unlikely to be able to hear simultaneous whispering interpreting. Therefore, either consecutive interpreting or the use of simultaneous interpreting equipment will be needed.

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 or tribunal – to help the parties communicate with each other.

'An interpreter is someone who speaks your language and speaks English and will interpret everything said 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.'

35 Senate Legal and Constitutional Affairs Reference *Committee, Parliament of Australia, Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Inquiry Report, 20 June 2013) 34-41.

36 Peter Hindley and Nick Kitson (eds), *Mental Health and Deafness* (John Wiley and Sons, 2009).

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

'Interpreters are trained to interpret accurately and impartially. They are also required to keep strict confidentiality'

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 themself on 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 some 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.[37] 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.

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 legal representatives. 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 legal representatives without the assistance of an interpreter.

What if an interpreter cannot be found?

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

- a short adjournment to see if an 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 a local interpreter to be present.

37 Research has found that interpreters suffer vicarious trauma, which may be one reason for leaving the profession or wishing to do so: see Miranda Lai, Georgina Heydon and Sedat Mulayim,'Vicarious Trauma Among Interpreters' (2015) (n 19).

If these steps are unsuccessful the next step is to seek a longer adjournment. The longer adjournment should allow for a Qualified Interpreter to be arranged (if one exists) 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 or tribunal will take into account any evidence that the relevant party can provide 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 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 or tribunal include a stay of proceedings, on either a temporary or permanent basis. These are measures of last resort used only after every effort to locate an appropriate interpreter, including by establishing an interpreting team, has failed.

If the limited English proficiency speaker refuses an interpreter

It may be the case that the limited English proficiency speaker advises that they do 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 the specialised environment of a court or tribunal. Research has found that limited English proficiency speakers are disadvantaged by their inability to speak in the appropriate style in court.[38]

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

38 Dorte Albrechtsen, Birgit Henriksen and Claus Faerch, 'Native Speaker Reactions to Learners' Spoken Interlanguage' (1980) 30(2) Language Learning 365; Janet Anderson-Hsieh, Ruth Johnson and Kenneth Koehler, 'The Relationship between Native Speaker Judgements of Non-Native Pronunciation and Deviance in Segmentals, Prosody, and Syllable Structure' (1992) 42(4) *Language Learning* 529.

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 or tribunal should insist on a certified interpreter being made available, in accordance with the Standards.

If the limited English proficiency 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 limited English proficiency 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 limited English proficiency 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. Nevertheless, the interpreter against whom the complaint is made, must be given the opportunity to explain or clarify their interpretation.

When a judicial officer decides not to proceed with a Certified Interpreter or an interpreting team

There is a range of situations where a judicial officer may decide not to proceed with a Certified Interpreter or an interpreting team when they are otherwise available. 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 Certified 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 or tribunal;
- 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.

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 limited English proficiency speaking party. As much information as possible should be ascertained about the limited English proficiency speaking party, well in advance, to enable the best possible interpreter to be selected. In some instances, the limited English proficiency 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, certified, 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. Care must be taken to ensure respect for any kinship obligations of the parties to the litigation, both in selecting an interpreter and during the interpretation process. In addition, within some Aboriginal or Torres Strait Islander kinship systems there are avoidance relationships where people are not allowed to talk directly to each other or say each other's names. For example, in some Aboriginal and Torres Strait Islander 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 Aboriginal and/or Torres Strait Islander person leaves the room, suddenly looks away and ceases talking or rearranges seating arrangements.

In all cases, the limited English proficiency 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.

Standard 17 – Proceedings with an interpreter

17.1 Judicial officers should ensure that the interpreter has been provided with appropriate working conditions, as outlined in Standard 9.

17.2 In making directions as to the conduct of proceedings, judicial officers should consider whether and to what extent interpreters should be briefed on the nature of a matter prior to the commencement of proceedings and, if so, give consideration as to the time which an interpreter may reasonably require to become familiar with the briefing material. Briefing may include the provision of materials which may otherwise have required sight translation, subject to Standard 26.

17.3 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.

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: see also Standard 8.3 (booking information to be provided to interpreters). Interpreters also need to be fully briefed so that they can identify potential conflicts of interest.

If the judicial officer is not satisfied that the interpreter has been appropriately briefed they may delay or adjourn proceedings with potentially adverse costs orders and require the relevant party to undertake the necessary briefing.

Interpreters or other persons performing the office of interpreter should not be expected to sight translate documents, especially lengthy or complex documents: see also Standard 26. A high level of technical competence is required to translate a document at sight, and in any case, it may not be an appropriate method of interpretation in the hearing room setting. Interpreting and translating are different skills that require specialist training and certification.

Nonetheless at times it may become necessary during the proceedings for written words to be interpreted to the witness or party. Where that occurs, sight translation should be limited to short portions of text only, as opposed to lengthy and complex documents which should be provided in advance to the interpreter.

17.4 Except where a Qualified Interpreter has been engaged, judicial officers should ascertain the competence of an interpreter by reference to their certification status, qualifications and court experience, as well as whether they are members of AUSIT, ASLIA or other recognised State or Territory based association requiring adherence to a code of ethics and/or standards. If the judicial officer is concerned about any of these matters, they may raise this with the parties to ascertain whether another interpreter is available, and should consider adjourning the proceedings until one is available.

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 for court and tribunal interpreting. Courts should always prefer a Qualified Interpreter and a judicial officer can be satisfied that a Qualified Interpreter is able to meet the required standard. For Tier A and some Tier B languages, a Qualified Interpreter should be available, and therefore should always be engaged.

For some Tier B languages and Tier C languages, it may not always be possible to engage a Qualified Interpreter, and less qualified interpreters may need to be engaged, for example, interpreters with certification but lacking tertiary qualifications, or with certification and tertiary education but lacking court experience. For Tier D languages, there may be even fewer Qualified Interpreters, and Recognised Practising Interpreters or even untrained bilinguals may have to be engaged.

In the case of persons who are not Qualified Interpreters, the judicial officer should determine whether the interpreter is otherwise suitable. When determining whether the interpreter is suitable, a judicial officer may wish to establish whether and to what extent the person's training and/or experience meets the relevant national competency standards for interpreters and translators. The national competency standards are available in the Public Sector Training Package and form a nationally consistent frame of reference for determining competence objectively.

In the case of untrained bilinguals, the judicial officer should consider conducting *voir dire* hearings to assure themselves of the competence of the bilinguals, and where possible, that the proceedings will be able to be performed by the two bilinguals cross-checking each other and being mentored by a Certified Interpreter.

During proceedings or a *voir dire*, the following are general guidelines on how to assess the competence of a person other than a qualified interpreter:

- **Technique:** A person 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);

- engage in private discussions without seeking leave to ask for a clarification or repetition;
- offer lay opinions; and
- do not take notes during long segments in consecutive interpreting.

- **English proficiency:** the higher the proficiency, the more likely the person performing the interpretation will render an adequate interpretation.
- **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, they may raise this with the parties to see if a more suitable interpreter is available, and adjourn matters until one is available.

The judicial officer can undertake the task of determining whether the interpreter is suitable to engage in the proceedings, or delegate the collection of information in a consistent form to court or tribunal staff or an interpreting service, provided the required information is supplied to the judicial officer and the parties.

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 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 certifications, formal qualifications experience be known to the court or tribunal 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 in tandem, 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.[39] Linguists have specified that accuracy of content and manner are crucial when assessing competence of legal interpreting performance.[40] This should not be misunderstood as meaning a literal, word-for-word translation.[41]

Managing challenges to competence during the proceedings

Sometimes a challenge to competence occurs during the hearing itself, when parties present in the hearing room 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 their colleague's interpretation.

If the challenge is raised by an equally or better qualified expert, the response may require a *voir 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).

Challenges on appeal based on alleged errors in interpreting

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 their 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 successful appeals on this ground. The real impact of the interpreter's incompetence is difficult to ascertain.[42]

In order to demonstrate that a miscarriage of justice occurred, the appealing party would have to show that the level of interpretation was so poor as to have prevented them from being able to give an effective account of the facts vital to their case. For example, the appellant would need to provide evidence that they failed to understand in important respects what was said against them, failed to understand the questions, or the interpreter did not properly interpret their answers.[43] 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.[44] 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*[45] 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 person (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 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.[46] What also told against the appellant in *De La Espriella Vasco* 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 their barrister in circumstances where they had available to them a check interpreter, elected to proceed with the same interpreter.

39 See, eg, *De La Espriella-Vesco v The Queen* [2006] WASCA 31.

40 Susan Berk-Seligson, *The Bilingual Court Room: Court interpreters in the Judicial Process* (University of Chicago Press, 2nd ed, 2017); Sandra Hale, *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness and the Interpreter* (John Benjamins, 2004).

41 Sandra Hale, 'The Challenges of Court Interpreting: Intricacies, Responsibilities and Ramifications' (2007) 32(4) *Alternative Law Journal* 198.

42 Alejandra Hayes and Sandra Hale, 'Appeals on Incompetent Interpreting' (2010) 20 *Journal of Judicial Administration 119.*

43 *R v Saraya* (1993) 70 A Crim R 515.

44 Ibid; *Chala Sani Abudla v The Queen* [2011] NZSCA 130 at [56].

45 [2006] WASCA 31.

46 John M Conley, Willian M O'Barr and E Allan Lind, 'The Power of Language: Presentational Style in the Courtroom (1979) 27(6) *Duke Law Journal* 1375, 1387.

17.5 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 or tribunal.

When determining whether or not an interpreter is appropriate for the proceedings, the judicial officer should have regard to cultural and other sensitivities, including:

- the language and dialect used by limited English proficiency speaking person(s) for whom the interpreter has been engaged to interpret, particularly in the case of languages with many dialects that are not intelligible by other dialect speakers of the language, such as Arabic, Chinese and Swahili;
- any cultural sensibilities, such as kinship obligations or avoidance relationships in Aboriginal and Torres Strait Islander cultures, or where there may be political, religious or other tensions between different groups of language speakers;
- the gender of the interpreter compared with the limited English proficiency speaker, particularly in domestic or sexual violence cases;
- nature of the proceedings, for example, in domestic violence cases separate interpreters should be engaged for each party.

If it becomes apparent either at the beginning of or during proceedings that an otherwise qualified or suitable interpreter is not appropriate, the judicial officer or the legal representatives should raise the matter and consider whether it may be necessary to adjourn the matter until an appropriate interpreter can be found, or to determine another acceptable strategy.

17.6 Judicial officers should confirm that the interpreter has acknowledged the Court Interpreters Code of Conduct and understands their duties as an officer of the court or tribunal.

The judicial officer should ask the interpreter to depose that they are prepared to comply with the Court Interpreters' Code of Conduct.

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.

Ethical issues

It is important that interpreters be independent from the parties. Lack of impartiality may lead to unfaithful renditions, as the interpreter may filter information to protect the witness or may improperly use information for personal gain.[47] This may work to the disadvantage of either party, depending on whether or not the court or tribunal recognises what has occurred. Similarly, while interpreters may be asked to explain their interpreting choices, interpreters cannot be asked to give their own evidence as witnesses relating to the interpreting task which has been undertaken: they must remain impartial.[48]

Complete independence can be very difficult when there are limited numbers of Qualified 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 or tribunal should take extra steps to satisfy itself that the arrangement is acceptable to the court or tribunal and to the parties, and should closely monitor the situation.

47 Justice Melissa Perry and Kristen Zornada, 'Working with Interpreters: Judicial Perspectives' (2015) 24(4) *Journal of Judicial Administration* 207, 208-209.

48 See *Sook v Minister for Immigration and Multicultural Affairs* (1999) 86 FCR 584. In this case, an interpreter was asked by the Tribunal to express a view about the ethnic origins of the person whose evidence was being interpreted.

In addition, the court or tribunal can put arrangements in place to assure everyone present that interpreting will occur impartially. Strategies include:

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

17.7 Judicial officers should inform the interpreter to alert the court or tribunal, and if necessary to interrupt, if the interpreter:

a. becomes aware that they may have a conflict of interest in the proceedings;
b. cannot interpret the question or answer for any reason;
c. did not accurately hear what was said;
d. needs to correct an error;
e. needs to consult a dictionary or other reference material;
f. needs a concept or term explained;
g. is unable to keep up with the evidence; or
h. needs a break.

The judicial officer should instruct the interpreter not to engage in a conversation with the witness that is not interpreted. When a concept, expression or word is not easily interpreted and needs to be explained to the witness, the interpreter should inform the court or tribunal that an explanation is required and why this is necessary, so that it can be ensured that the proper explanation is given in a manner which can be interpreted. Further, interpreters are entitled to seek to clarify with a witness what they have said if necessary. Interpreters should never hold private conversations with either party without the other party knowing what is being said.

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 language varieties or dialects.[49]

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 they are keeping up with the pace of speech – for example, explaining that the interpreter should signal if there is such a difficulty, or speak out with a request that the speaker 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 or tribunal;
- 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

49 *R v West London Youth Court; Ex parte N* [2000] 1 WLR 2368.

- 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.

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 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 appear to lack candour, this may 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 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 judicial officer 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.[50]

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

17.8 Judicial officers may become aware that an interpreter has a conflict of interest in the proceedings. In such cases, judicial officers should permit the interpreter to withdraw from the proceedings if necessary and adjourn the proceedings until another interpreter can be found or consider another appropriate strategy to address the conflict.

It is intended that the status of the interpreter as an officer of the court or tribunal, in that they owe paramount duties to the court or tribunal, will enhance and promote the independence of the interpreter, as well as acknowledging their vital role in the hearing room. While the form of the introduction is a matter for the court or tribunal, a useful introduction for a court 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/tribunal, whose role is to interpret everything said in court/tribunal. They play an important role by removing the language barrier in order for the court/tribunal to communicate with limited English proficiency speaking accused or witnesses.
>
> The interpreter has promised the court/tribunal 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 Interpreters' 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."[51]

50 *Tsang v DPP* (Cth) [2011] VSCA 336.

51 Based on the Supreme Court of the Northern Territory, *Protocols for Working with Interpreters in the Northern Territory Supreme Court*, 3 June 2013, 13 [8.4].

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. Their 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.[52]

When tandem 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.

Physical and verbal threats to interpreters

Persons present in the court or tribunal (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 their lies for them?" 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 hearing room 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 or tribunal as soon as possible and to seek the assistance of the police if required to assure their safety.

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 or tribunal attracts absolute privilege.

17.9 Judicial officers should speak at a speed and with appropriate pauses so as to facilitate the discharge by the interpreter of their duty to interpret.

52 Based on the Supreme Court of the Northern Territory, *Protocols for Working with Interpreters in the Northern Territory Supreme Court*, 3 June 2013, 13 [8.9].

Recommended Standards for Interpreters

Standard 18 – Interpreters as officers of the court or tribunal

18.1 Interpreters are officers of the court or tribunal in the sense that they owe to the court or tribunal paramount duties of accuracy and impartiality in the office of interpreter which override any duty that person may have to any party to the proceedings, even if that person is engaged directly by that party.

Standard 19 – Court Interpreters' Code of Conduct

19.1 Interpreters must ensure that they are familiar with, and comply with, the Court Interpreters' Code of Conduct.

All interpreters should familiarise themselves with their responsibilities under the Court Interpreters' Code of Conduct and be prepared to swear or affirm that they will adhere to that Code. The Court Interpreters' 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.[53]

AUSIT expect their members to abide by its Code of Ethics and NAATI certified practitioners are required to answer questions on ethics, based on the AUSIT Code as part of their certification process. The Code adopts these standards as the expectation of all interpreters assisting the Court, regardless of whether or not they are members of AUSIT.

If bilinguals are being engaged to fill the office of interpreter during court or tribunal proceedings, 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.

53 Australian Institute of Interpreters and Translators (AUSIT), *Code of Ethics and Code of Conduct* (November 2012). 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.

When establishing interpreting teams that include untrained bilinguals, the court or tribunal should take steps to confirm they understand their responsibilities under the Code. The court or tribunal may fund training for such bilinguals in the main languages of demand for which there is insufficient supply of interpreters.

Similarly, one of the responsibilities of the Professional Mentor (see Optimal Standard 3) is to assist the bilinguals to adhere to the Code.

Standard 20 – Duties of interpreters

20.1 Interpreters must diligently and impartially interpret communications in connection with a proceeding as accurately and completely as possible.

Certified 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 or tribunal staff and legal representatives to:

- take a person to the court or tribunal office and explain the legal process;
- convince a lawyer's client to accept an offer;
- offer lay advice on the credibility of a limited English proficiency speaking witness; or
- serve as experts to the courts or tribunals, by being 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 limited English proficiency 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 limited English proficiency speaking client.

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

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.

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.

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.

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.[54] 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.

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 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, they asked permission from the judicial officer to rectify the mistake and was allowed to do so.[55] However, much time was wasted. Had the interpreter been properly briefed, the misunderstanding could have been avoided.

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?)

54 Sandra Hale, 'Helping Interpreters to Truly and Faithfully Interpret the Evidence: The Importance of Briefing and Preparation Materials' (2013) 37(3) *Australian Bar Review* 307.

55 Sandra Hale, *The Discourse of Court Interpreting: Discourse Practices of the Law, the Witness and the Interpreter* (John Benjamins, 2004).

- 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?)[56]

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.

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: "They grabbed me", rather than in the third person: "They said that they grabbed them". When interpreting in the second person, the interpreter will interpret: "Tell the Court what happened", rather than in the third person: "They are telling you to tell the court what happened".

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.

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 high levels of accuracy.

56 Sandra Hale, *Community Interpreting* (Palgrave Macmillan, 2007).

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 or tribunal.

Ideally, the interpreter should interpret everything said during proceedings. Just as the court or tribunal 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.

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 witnesses, including expert witnesses;
- Direct speech by the party or witness, including any comments addressed to the interpreter;
- Sentences, orders and conditions.

Sight translation

Insofar as Standard 20.1 involves sight translation, Standard 26 is intended to make clear that sight translation in the course of a hearing is to be the exception rather than the rule. Where it is necessary for an interpreter to be asked to sight translate a document in a hearing, that request should be confined to short, simple documents. As has already been observed (see Annotated Standard 16.3 above), translation and interpretation are different skills. Under Model Rule 5.3, an interpreter may decline to translate at sight, "if the interpreter considers 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".

Accuracy in interpreting

A common misconception is that accurate interpreting equates to literal, word for word translation. Due to differences across languages, including grammatical, pragmatic and cultural, literal translations are rarely possible. Most literal translations will simply render non sensical utterances in the target language.

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, some languages do not have specialised jargon for certain domains. A single English word or concept may have no direct equivalent in the other language, and will therefore require elaboration by the interpreter to transfer its meaning.
- **It is not always easy to interpret complex and abstract ideas from English into other languages and vice versa.** 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.** Good interpreters will select a similar idiom that maintains the meaning, the tone and the intention of the original. For example, "It's raining cats and dogs" would be translated as "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), but the translation was accurate.
- **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 interpret accurately, the request may need to be rendered as a direct, specific command in the target language, for example, "Please tell the court what happened".[57]
- **Different languages use different 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). In Auslan, the meaning of a sign or a location in space may be ambiguous if the context is not clearly understood by the interpreter, and will need clarification.

57 Sandra Hale, 'The Challenges of Court Interpreting: Intricacies, Responsibilities and Ramifications' (2007) 32(4) *Alternative Law Journal* 198.

Content and manner are important in hearing room 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.[58]

Example 1

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 Interpreters' Code of Conduct. Interpreter B provides an accurate rendition of the original and abides by the Code.

58 Susan Berk-Seligson, *The Bilingual Courtroom* (n 39); Sandra Hale, *The Discourse of Court Interpreting* (n 39).

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; and
- the time allotted by the court or tribunal.

Communication is a shared responsibility between the interpreter and all other parties in the court or tribunal. 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.

Interpreting in the appropriate mode

The consecutive mode

When the limited English proficiency speaker gives evidence, the most common mode of interpreting in Australian courts and tribunals 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 take notes and how to coordinate the turns and will commence interpreting at the appropriate intervals. However, there will be interpreters who are not as competent and may not know how to take notes or are not as confident and may be reluctant to interrupt. 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.

Simultaneous mode

Currently, most courts and tribunals in Australia are not equipped with simultaneous interpreting equipment, which means the interpreter must sit uncomfortably close to the witness to whisper in their ear. Similarly, when an 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. Auslan interpreters generally work in the simultaneous mode, standing apart from the deaf party (so that both can see each other's signing).

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

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, for example, 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 poor interpretation that are sometimes unjustifiably attributed to cross-cultural differences.[59] 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.[60]

Another example is the use of affirmative head nodding by a deaf party or witness. As the deaf person watches the interpreter's rendition of the English question into sign language, they may nod, as if they are agreeing with the proposition. Often this is an acknowledgement that they are following the signed question, rather than providing an affirmative answer.

It is impossible to list all the cross-cultural differences that may be encountered in court and tribunal 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 or tribunal to a potential cross-cultural misunderstanding, which can be followed up with questions from counsel or the bench.

Interpreting the oath to the witness

Interpreters will also have to interpret the witness' oath or affirmation. Due to grammatical differences across languages, for some languages, it is appropriate to interpret the oath phrase by phrase, but for other languages, it is easier to interpret the oath as a whole. The interpreter should be consulted about what is best for their particular language. The following is recommended when delivering the witness oath that needs to be interpreted into a language that is grammatically very different from English:

- 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);

59 Tatjana R Felberg and Hanne Skaaden, 'The (De) construction of Culture in Interpreter-Mediated Medical Discourse' (2012) 11 *Linguistica Antverpiensia* 95.

60 Justice Dean Mildren, 'Aboriginal in the Criminal Justice System' (2008) 29(1) *Adelaide Law Review* 7.

- the limited English proficiency 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, as many languages have very different syntactic structures to English and sentences cannot be split in the same way as in English.

Basic responsibilities of a court interpreter

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 certification;
- their membership of a professional association requiring adherence to a code of ethics and conduct;
- any formal tertiary interpreting training they may have completed, either at TAFE or university; and
- their experience interpreting in courts and tribunals.

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

20.2 Interpreters must comply with any direction of the court or tribunal.

The purpose of directions made by the court or tribunal is to ensure that matters relevant to the retainer and role of the interpreter are given consideration by the court or tribunal and the parties, ideally before the hearing, and that the interpreter is accommodated appropriately within the proceedings in accordance with these Standards, the Model Rules and the Practice Note. Before making directions, the court or tribunal may hear submissions from the parties on the issues the subject of proposed directions or otherwise make them with the consent of the parties and the interpreter: see also Standard 9.9 as to the list of matters relating to the provision of interpreting services on which a court may make directions.

The court or tribunal will not make directions that direct the interpreter to behave contrary to professional judgment, the Code of Conduct, or any other relevant code of ethics by which they are bound. If an interpreter considers that they cannot comply with proposed directions for professional, ethical or other reasons, this should be raised with the judicial officer as soon as possible.

20.3 Where the interpreter becomes aware that they may have a conflict of interest, the interpreter must alert the court or tribunal to the possible conflict of interest immediately, and if necessary to withdraw from the assignment or proceed as directed by the court or tribunal.

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.

20.4 Requests by the interpreter for repetition, clarification and explanation should be addressed to the judicial officer rather than to the questioning counsel, witness or party.

Seeking repetitions, clarifications and explanations

Interpreters should address judicial officers as "Your Honour". If in doubt, Interpreters should seek to clarify the manner in which they address the presiding judicial officer, which may vary depending on the particular court or tribunal.

Example 2

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.

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.

20.5 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, witness or party.

20.6 If the interpreter recognises a potential cross-cultural misunderstanding, or comprehension or cognitive difficulties on the part of the person for whom the interpreter is interpreting, the interpreter should seek leave from the judicial officer to raise the issue.

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 hearing room 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 or tribunal to a potential cross-cultural misunderstanding. The judicial officer must then decide 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.

20.7 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.

Recommended Standards for Legal Practitioners

Standard 21 – Assessing the need for an interpreter

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

21.2 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 Annexure 4.

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

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

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 hearing room context is required to appear. Legal practitioners should also take steps at an early stage 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 Annexure 4.

Particular care may need to be taken in selecting the interpreter depending on the subject matter of the hearing and characteristics of the limited English proficiency 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.

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.

Standard 22 – Booking interpreters

22.1 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.

22.2 When applying for a hearing date, parties or their legal advisors should draw the availability of the interpreter to the court or tribunal's attention for the judicial officer to take into account where possible.

Whenever possible, interpreters should be booked to start at least 30 minutes prior to commencing their interpreting task in order to be briefed.

Standard 23 – Engaging an interpreter in accordance with these Standards

23.1 Parties engaging an interpreter should select interpreters in accordance with Standard 11 of these Standards.

Standard 24 – Briefing interpreters

24.1 The legal representatives for a party are to use their best endeavours to ensure that interpreters who are engaged are familiar with, understand and are willing to adopt the Court Interpreters' Code of Conduct and understand their role as officers of the court or tribunal.

24.2 The legal representatives for a party should ensure that interpreters (whether or not engaged by those legal representatives) 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, subject to Standard 26.

24.3 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.

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 and the contents of the briefing include:

- the nature of the assignment;
- the interpreter's qualifications and experience;
- the complexity of the case; and
- the role played by the limited English proficiency speaker (for example if the limited English proficiency speaker is only one witness, the briefing will not need to be as thorough as when the limited English proficiency speaker is defendant party).

Preferably, interpreters should be appropriately briefed in advance on the nature of the 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 hearing room 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 or tribunal 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 or tribunal is being delayed and there may be adverse cost orders made against the party who has caused the delay.

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 Aboriginal or Torres Strait Islander language 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 or tribunal 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, subject to Standard 26.

Parties should co-operate 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.[61]

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 their prior convictions).

61 Amy Dixon and Tony Foley, 'Facilitating the Right to Linguistic Presence in Criminal Proceedings' (Presentation of Unpublished Paper, Australian Institute of Judicial Administration Workshop on Interpreters in Courts and Tribunals, 5 April 2013).

For appeals – agreed 'interpreter's bundle' which may include:

- Copy of notice of appeal;
- Written submissions;
- Précis of the proceeding.

For civil matters:

- Copy of the application or originating motion;
- The applicant's points of claim or statement of claim;
- The defendant's defence and, if applicable, counterclaim;
- Copy of any written submissions for the hearing;
- Any witness statements of the witness for whom the interpreter is interpreting;
- Any expert witness statements, where it is likely the witness for whom the interpreter is interpreting will be asked questions relating to issues in the expert witness statements.

Any confidential documents that are provided to the interpreter as part of the briefing process must be returned to the court/tribunal or the legal practitioner.

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.

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.

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.[62] 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 more accurate interpreting outcomes, a more efficient hearing and potential savings in court time and therefore costs.

62 Sandra Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey* (Survey Report, Australian Institute of Judicial Administration, 2011).

Qualified Interpreters abide by the AUSIT 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 Interpreters' 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.

Standard 25 – Plain English

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

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; and
- speaking at a reasonable pace and in an audible, clear voice.

Annexure 3 provides detailed plain English strategies and examples of how to phrase questions and statements in plain English. See also the annotation to Standard 14.1 above.

Standard 26 – Documents

26.1 Legal practitioners should ensure that any document in a language other than English which is to be referred to or tendered into evidence in proceedings has been translated into English or the other language by a NAATI Certified Translator, where available.

26.2 Legal practitioners should not require interpreters to sight translate during the course of a hearing without prior notice ("sight unseen") long, complex or technical documents. Sight unseen translation by interpreters of even simple or short documents should be avoided as far as possible.

See annotation to Standard 20.1 (Duties of interpreters) regarding sight translation.

Legal Appendix: Engagement of interpreters to ensure procedural fairness – legal requirements for interpreting

This Appendix is intended as a summary for judicial officers and practitioners regarding the current law on interpreters in the legal system.

Australian courts and tribunals must accommodate the language needs of court and tribunal users with limited English proficiency in accordance with the requirements of procedural fairness, as premised in international and domestic law.

It is notable that reference has been made to the 2017 version of the Recommended National Standards for Working with Interpreters in Courts and Tribunals in the High Court of Australia,[63] Federal Court of Australia,[64] Federal Circuit Court of Australia,[65] South Australian Court of Criminal Appeal,[66] and the New South Wales Supreme Court.[67] There is growing acceptance in Australian courts and tribunals of the Standards as a "best practice benchmark".[68] However, as Kerr J observed in *DYK17 v Minister for Home Affairs*, the "consequence of any such falling short will necessarily depend on the statutory setting and context in which such a falling short occurs".[69]

1.1 – International legal rights framework

The General Assembly adopted the *Universal Declaration of Human Rights* in 1948. While not a treaty, many of its provisions reflect customary international law and its influence on the development of human rights has been significant.[70] The Universal Declaration recognises that everyone has a right to equality before the law[71] and the right to a fair hearing in the determination of rights and obligations or of any criminal charges.[72]

Australia is also a party to a range of international instruments obliging Australia to promote and observe these fundamental human rights, as well as specific rights requiring access to interpreters in criminal and civil proceedings. While Australia has agreed to be bound by these treaties under international law, they do not form part of Australia's domestic law unless the treaties have been specifically incorporated into Australian law through legislation.[73]

A failure by Australia to comply with the provisions of certain human rights obligations enacted into Australian law can form the basis of a complaint to the Australian Human Rights Commission[74] or, once domestic remedies have been exhausted, to a relevant treaty body.

An example of the latter is the United Nations Human Rights Committee established by the *International Covenant on Civil and Political Rights* (1966)[75] (*"ICCPR"*) which may consider complaints by individuals that rights enumerated in the Covenant have been violated where a State party to the Covenant has also subscribed to the "jurisdiction" of the Committee by becoming a party to the Optional Protocol to the Covenant, as did Australia in 1991. Australia's human rights record is also subject to the Universal Periodic Review every four years by the Human Rights Council established by UNGA Res 60/251 on 15 March 2006.

Relevant provisions in international conventions to which Australia is a party include the following:

1. The *International Convention on the Elimination of All Forms of Racial Discrimination (1965)*[76] provides that State parties agree to respect and ensure the human rights set out therein, including that everyone has the right to equal treatment before tribunals and courts without distinction as to race, national or ethnic origin.[77]
2. The ICCPR 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,[78] and under article 14 the right to equality before courts and tribunals and to a fair hearing in the determination of criminal charges.[79]
3. The *United Nations Convention on the Rights of Persons with Disabilities* (2007) was ratified by Australia in 2008 which also acceded to the Optional Protocol in 2009.[80] 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.[81]

In 2007, the Human Rights Committee[82] clarified the jurisprudence on the right to equality before courts and tribunals and to a fair trial under Article 14 of the ICCPR,[83] stating that:

- 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";[84]
- the principle of equality between parties applies in criminal and civil proceedings;[85]

63 *DVO16 v Minister for Immigration and Border Protection*; *BNB17 v Minister for Immigration and Border Protection* (2021) 95 ALJR 375, 378.

64 *Roberts-Smith v Fairfax Media Publications Pty Limited (No 19)* [2021] FCA 818, [6]; *ASI17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1235, [35]; *DEF17 v Minister for Immigration and Border Protection* [2019] FCA 1923, [42], [44]; *DYK17 v Minister for Home Affairs* [2019] FCA 943, [2], [3], [31], [33]; *CHM16 v Minister for Immigration and Border Protection* [2018] FCA 1132, [37]; *ETD17 v Minister for Immigration and Border Protection* [2018] FCA 1373, [23]; *Singh v Minister for Immigration and Border Protection* [2017] FCA 1347, [21].

65 *DYU17 v Minister for Immigration* [2019] FCCA 824, [15].

66 *R v Trabolsi* (2018) 131 SASR 297, 300.

67 *Rogic v Samaan* [2018] NSWSC 1464, [157], [163].

68 See, eg, *DYK17 v Minister for Home Affairs* [2019] FCA 943, [3] (Kerr J); *Rogic v Samaan* [2018] NSWSC 1464, [163].

69 *DYK17 v Minister for Home Affairs* [2019] FCA 943, [3].

70 James R Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 636.

71 *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (*'UNDHR'*) art 7.

72 Ibid art 10.

73 *Victoria v Commonwealth ('Industrial Relations Act Case')* (1996) 187 CLR 416, 480-481; *Kruger v Commonwealth ('Stolen Generations Case')* (1997) 146 ALR 126, 161 (Dawson J) and 174 (Toohey J); *Chow Hung Ching v The King* (1948) 77 CLR 449, 478-479 (Dixon J); *Simsek v MacPhee* (1982) 148 CLR 636, 641-642 (Stephen J); *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274 (Mason J); *Dietrich v The Queen* (1992) 177 CLR 292, 304-305 (Mason CJ and McHugh J), 359-360 (Toohey J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288 (Mason CJ and Deane J), 298 (Toohey J), 304 (Gaudron J) and 315 (McHugh J). Cf the position in the United States where treaties are self-executing and create rights and liabilities without the need for Congress to legislate for their implementation: *Foster v. Neilson* 27 US 164, 202 (1829). 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.

74 *Australian Human Rights Commission Act 1986* (Cth) s 20(1)(b), when read with s 3 definition of 'human rights' and the definition of 'Covenant'. However, the provisions of the *International Covenant on Civil and Political Rights* ('ICCPR') are not part of Australia's domestic law enforceable by a court: *Dietrich v The Queen* (1992) 177 CLR 292, 305.

75 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'); *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976). Australia signed the *ICCPR* on 18 December 1972 and ratified on 13 August 1980. The ICCPR came into force in Australia on 13 November 1980. Australia became a party to the Optional Protocol with effect on 25 December 1991.

76 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature on 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

77 Ibid art 5.

78 *ICCPR* (n 67) art 14(3).

79 Ibid artic 14.

80 *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008); *Optional Protocol to the Convention on the Rights of Persons with Disabilities* opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). 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.

81 Ibid art 9.

82 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.

83 Human Rights Committee, *General Comment No 32: Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007).

84 Ibid [13].

85 Ibid.

- "In exceptional cases, [the right] 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";[86] 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.[87]

In addition, while Australia did not sign the United Nations Declaration on the Rights of Indigenous Peoples in 2007,[88] Australia formally endorsed the Declaration on 3 April 2009. Among other things, 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 interpreters or by other appropriate means.[89]

1.2 – Statutory sources of the right to an interpreter in criminal and civil proceedings

Commonwealth laws prescribing the use of interpreters include the following.

- The *Evidence Act 1995* (Cth) 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.[90]
- Section 366C of the *Migration Act 1958* (Cth) 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 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.
- Section 158 of the *Native Title Act 1993* (Cth) permits witnesses to give evidence or make submissions to the National Native Title Tribunal through an interpreter.

Following the enactment of the *Evidence Act 1995* (Cth), New South Wales, Tasmania, Norfolk Island, Victoria and the Northern Territory enacted virtually identical laws based upon the uniform evidence legislation.[91] The other State and Territory jurisdictions in Australia also have various statutory provisions concerning the use of interpreting services.

- For example, in Queensland, s 131A 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, s 14 of the *Evidence Act 1929* (SA) creates an entitlement for a witness to give evidence through an interpreter if the witness' native language is not English and 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;[92] or where the witness is a vulnerable witness and special arrangements are necessary.[93]
- In Western Australia, ss 102 and 103 of the *Evidence Act 1906* (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, s 119 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 an accused, it is common to find legislative provisions which require a sentencing hearing to be conducted in the presence of the accused.[94] This must mean that the accused is both physically and linguistically present. In Queensland the legislation permits a sentencing hearing to be conducted by audio-visual link or audio link in certain cases.[95]

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.[96] Some jurisdictions provide for a right for the appellant to be present except where the appeal is on a question of law.[97] Others provide that the respondent to an appeal by the Crown is entitled to be present unless they are legally represented.[98] In Victoria, a party to a criminal appeal must attend the hearing of an appeal unless excused from attendance.[99] In Western Australia an appellant who is in custody is entitled to be present whether or not they are legally represented, but the appellant is not required to be present.[100] In the ACT there are no statutory provisions relating to a party's right to attend the hearing of an appeal.

It is important to note that tribunals are not subject to Evidence Act in the applicable jurisdiction. There may, however, be obligations regarding the provisions of interpreters in their constituent legislation, or under human rights or equal opportunity laws applicable in their jurisdiction (see Legal Appendix 1.5).

1.3 – Criminal trials

1.3.1 – The "right" to an interpreter

As the High Court of Australia said in *Ebataringa v Deland*,[101] 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.[102] As such, the 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 that 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 is an immunity against conviction after an unfair trial.[103] Nevertheless, provided that these caveats are borne in mind, it is convenient in a shorthand manner to refer to the "right" to an interpreter.

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 they might understand the nature of the case made against them and be able to answer it.[104] Mere corporeal presence is insufficient. The accused must be able to understand what evidence is given against them to enable a decision to be made as to whether or not to call witnesses on their behalf and whether or not to give evidence.[105]

The *High Court in Dietrich v The Queen*[106] discussed the mechanisms by which courts exercise control where such rights are breached or would be

86 Ibid.

87 Ibid [32].

88 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAORm 61st sess, 107th plen mtg, Supp No 49 (13 September 2007).

89 Ibid art 13.

90 *Provisions identical to the Evidence Act 1995* (Cth) ss 30 and 31 are contained in the: *Evidence Act 1995* (NSW); *Evidence (National Uniform Evidence) Act 2016* (NT); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT). In addition, in criminal proceedings in the ACT, 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* (ACT) s 55.

91 Stephen Odgers, Uniform Evidence Law (Lawbook Co, 12th ed, 2016) 1.

92 Evidence Act 1929 (SA) s 13(3).

93 Ibid s 13A(9).

94 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 25 (applies to the Local Court only); *Sentencing Act* (NT) s 117; *Sentencing Act 2017* (SA) s 21.

95 *Penalties and Sentences Act 1992* (Qld) s 15A.

96 *Criminal Code Act 1983* (NT) s 420.

97 *Criminal Appeal Act 1912* (NSW) s 14; *Criminal Code Act 1899* (Qld) s 671D; *Criminal Procedure Act 1921* (SA) s 167; *Criminal Code 1924 Act* (Tas) s 411(1).

98 Criminal Code Act 1983 (NT) s 421; Criminal Appeal Act 1912 (NSW) s 14A.

99 *Criminal Procedure Act 2009* (Vic) s 329.

100 *Criminal Appeals Act 2004* (WA) s 43.

101 (1998) 194 CLR 444, [27] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ), citing Johnson v The Queen (1987) 25 A Crim R 433 at 435; R v Lee Kun [1916] 1 KB 337 at 341; R v Lars (1994) 73 A Crim R 91, 115.

102 *Ebataringa v Deland* (1998) 194 CLR 444.

103 *Dietrich v The Queen* (1992) 177 CLR 292, [7] (Mason CJ and McHugh J).

104 An example of "special circumstances" is if the accused has deliberately absented themself from the trial, or has been excluded from the trial due to misbehaviour in court.

105 *R v Lee Kun* [1916] 1 KB 337; *Kunnath v The State* [1934] 4 All ER 30.

106 (1992) 177 CLR 292.

breached if the trial were to proceed. These mechanisms are procedural in nature. Thus, a court may order that a trial be adjourned, or proceedings stayed until an interpreter is provided for the accused. It follows that, while at common law courts cannot compel the provision of public funds to provide interpreter services, nevertheless the courts have the power and the duty to act to prevent or on appeal to remedy grave miscarriages of justice. As Deane J explained in *Dietrich v The Queen*:[107]

> 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 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.

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.

1.3.2 – How should a judicial officer discharge the duty to ensure an interpreter for an accused who cannot understand or be understood in court proceedings?

In criminal trials, the judicial officer must ensure that the accused 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 both where the accused is represented or self-represented. However, if the accused is legally represented and waives their 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 them.[108]

The accused's right to an interpreter at their trial is intended to cover the whole of the proceedings. Thus, not only must the interpreter be available when the accused is arraigned and asked to plead to the charge, but the interpreter must interpret everything that is said in the courtroom whether by counsel, witnesses or the trial judge, as well as the accused's evidence if they decide 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 be interpreted. If there is a *voir 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 be interpreted. When the verdict is announced, that too must be interpreted, as must all aspects of a sentencing hearing.

107 Ibid 330-331.

108 *R v Lee Kun* [1916] 1 KB 337; *Kunnath v The State* [1993] 1 WLR 1315.

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

The right to be linguistically present at a criminal trial has been recognised in other jurisdictions abroad. As the Supreme Court of New Zealand explained in Chala Sani Abdula v The Queen,109 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:

> 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.[110]

The same conclusion was reached by the Supreme Court of Canada in *Quoc Dun Tran v The Queen ('Tran')*.[111] *Tran* was a case involving a right to an interpreter which is constitutionally enshrined in s 14 of the Canadian Charter of Rights and Freedoms. Section 14 provides 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 s 14 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 Hertrich*[112] 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.[113] [emphasis added in *Quoc Dun Tran v The Queen* judgment]

The Court in *Tran* also quoted with approval[114] the following passage from the American decision of the Second Circuit Court of Appeals, *Negron v New York*[115]:

> …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, unless by his own conduct he waives that right. 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." Otherwise, "*[t]he adjudication loses its character as a reasoned interaction and becomes an invective against an insensible object.*"
>
> [Citations omitted; emphasis in the original]

The Court in *Tran* 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

109 [2011] NZSC 130.

110 Ibid [43].

111 [1994] 2 SCR 951 *('Tran')*.

112 (1982) 137 DLR (3rd) 400 (Ontario Court of Appeal).

113 *Tran* (n 103) 974.

114 Ibid 975.

115 434 F 2d 386, 389 (2nd Cir,1970).

> 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, she or he 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.[116]

In *De La Espreilla-Velasco v The Queen*[117] 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, unlike Canada, 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.[118]

After referring to *Tran*, 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 that at some extrinsic or collateral point"[119] Roberts-Smith JA 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 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.[120]

1.3.3 – When should an accused's application for an interpreter be granted?

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 their 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 *voir dire* (i.e. a hearing in the absence of the jury).

Although the authorities suggest that the trial judge has a discretion whether or not to allow a witness to utilise an interpreter,[121] 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. As the Supreme Court of New Zealand said in *Chala Sani Abdulla v The Queen* 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.[122]

When taking into account whether or not a person requires an interpreter, especially a person who may appear to speak and understand English, Kirby P (as his Honour then was) warned in *Adamopoulos and Another v Olympic Airways SA* that:

> 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 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.[123]

Thus in *R v Wurramara*,[124] 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. Wurramarra is obviously [not] within that category and therefore it is unlikely a fair trial will be provided unless he has an interpreter.[125]

That 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 as to whether an interpreter is needed for the issues involved. As explained in the above Standards, a judge who declines interpretive assistance where it is requested should document their reasons for doing so: see Annotated Standards at 15.2.

1.3.4 – What are the consequences of refusing a request for an interpreter or poor interpretation on trial proceedings?

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. However, as 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*[126] 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. Although the trial in that case was into its 115th 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 order in those circumstances even

116 *Tran* (n 103), 975.
117 [2006] WASCA 31.
118 Ibid [36].
119 Ibid [69].
120 Ibid [76].
121 *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464 [13].
122 *Chala Sani Abudla v The Queen* [2011] NZSCA 130, [45].
123 (1991) 25 NSWLR 75, 77-78.
124 (2011) 213 A Crim R 440.
125 Ibid 446, [31].
126 [2000] NSWCA 52.

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.[127]

Finally, even if a trial proceeds with an interpreter, deficiencies in the quality of the interpretation may give rise to a ground for appeal where it can be shown that the trial was unfair as a result of those deficiencies.

In *R v Tan*,[128] the Queensland Court of Appeal overturned the accused's conviction and ordered a re-trial on the basis that the absence of his interpreter for part of the trial compromised its fairness and occasioned a miscarriage of justice.

1.3.5 – Deaf jurors

In *Lyons v Queensland* [2016] HCA 38 the High Court held that a deaf juror who required the services of Auslan interpreters to communicate with other persons was not eligible for jury service in Queensland. This was because Queensland law did not permit the interpreters to be present while the jury was being kept apart to consider the verdict. Nor was there any power to administer an oath to an interpreter who was assisting a juror.

On 26 April 2018, amendments to the *Juries Act 1967* (ACT) commenced to facilitate the participation of deaf jurors in that jurisdiction.[129] In specified circumstances, judges must consider if support that would enable the person to properly discharge the duties of a juror can reasonably be given.[130] Section 16(2) lists "an interpreter, including an Auslan interpreter" as an example of relevant "support".

127 See, eg, *Criminal Code Act 1983* (NT) s 408.

128 [2020] QCA 64.

129 *Courts and Other Justice Legislation Amendment Act 2018* (ACT).

130 *Juries Act 1967* (ACT) s 16.

1.4 – Civil proceedings

At common law, a party or witness whose English skills are lacking may apply to the court or tribunal to give evidence through an interpreter. The court or tribunal has a discretion to allow the interpreter if the party or witness is at a disadvantage.[131] 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 the hearing room at their own expense to interpret the proceedings to that party as they unfold.

In *Gradidge v Grace Brothers Pty Ltd*[132] 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 woman 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 they needed an interpreter and through their 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 procedural fairness (or natural justice as the rules are also known) and in particular the *audi alteram partem* rule, that is, that each party is given an opportunity to make submissions and lead evidence including to respond to the evidence against them. Consequently, it would be inimical to natural justice for a civil court or tribunal 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 or tribunal to appoint and pay for an interpreter, the only remedy would be for the court or tribunal to grant an adjournment until the party was able to engage an interpreter at their own expense.

131 *Gradidge v Grace Brothers* Pty Ltd (1988) 93 FLR 414; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, 81 (Mahoney JA); *Perera v Minister for Immigration and Multicultural Affairs* [1999] FCA 507, [19] (Kenny J). 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 (4 July 1991).

132 (1988) 93 FLR 414.

Absent statutory abrogation or derogation from the common law requirements of procedural fairness, it is a jurisdictional error for an administrative tribunal to fail to comply with the requirement to afford to a person whose interests are affected by a decision an opportunity to deal with matters adverse to their interests which the decision-maker proposes to take into account.[133] As the error is jurisdictional, it will invalidate the decision made in breach of procedural fairness.[134] However, not all administrative tribunals are bound to afford the individual procedural fairness in line with common law requirements. In some cases, those requirements have been replaced by statutory codes which prescribe set rules and may afford greater or lesser rights to procedural fairness than at common law.[135] These may include an express or implied requirement for an interpreter to be engaged where the affected individual requires or requests such assistance. In such cases, the question whether a failure to comply with such a requirement constitutes a jurisdictional error which invalidates the decision will depend upon the proper construction of the law in question.[136] For some tribunals, the obligation to accord with the requirements of procedural fairness may also be included in their constituent legislation or any human rights legislation in the applicable jurisdiction.

Where a curial or administrative hearing proceeds with an interpreter and as is the case in criminal proceedings, questions may arise as the effect of mistranslation. In the context of administrative decision-making, it has been observed that those questions "cannot be answered though the application of a simple or uniform mode of analysis".[137] In *DVO16 v Minister for Immigration and Border Protection*,[138] a majority of the High Court of Australia affirmed that:

> Whether and if so in what circumstances mistranslation might result in invalidity of an administrative decision turns necessarily on whether and if so in what circumstances mistranslation might result in non-compliance with a condition expressed in or implied into the statute which authorises the decision-making process and sets the limits of decision-making authority.[139]

The High Court elaborated that the effect of mistranslation in a decision-making process conditioned by the requirement to afford procedural fairness will turn on whether the result has been unfairness amounting to "practical injustice". In contrast, where the duty to provide procedural fairness is excluded or sufficiently met in specified circumstances, the effect of a mistranslation will turn on whether the mistranslation has resulted in non-compliance with specific statutory requirements and may ultimately constitute jurisdictional error.[140] With respect to the former, the Full Court of the Federal Court of Australia has indicated that an unsuccessful party cannot rely on an interpreter's lack of specified accreditation (such as NAATI accreditation) to make out procedural unfairness in the absence of clearly identified (and material) deficiencies in interpreting.[141]

In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17*,[142] the High Court drew a distinction between "general fairness" and the independent legal duty to afford procedural fairness. At the Federal Circuit Court hearing, the first respondent had been self-represented and assisted by an interpreter. While the primary judge's final orders were interpreted, his ex tempore reasons were not and the first respondent did not receive a

133 *Kioa v West* (1985) 159 CLR 550.

134 *Craig v South Australia* (1995) 184 CLR 163.

135 See, eg, *Migration Act 1958* (Cth) div 4, pt 7. See especially, *Migration Act 1958* (Cth) s 422B which provides that the decision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

136 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

137 *DVO16 v Minister for Immigration and Border Protection*; *BNB17 v Minister for Immigration and Border Protection* (2021) 95 ALJR 375, 379 [7] (Kiefel CJ, Gageler, Gordon and Steward JJ).

138 (2021) 95 ALJR 375.

139 Ibid 379 [8] (Kiefel CJ, Gageler, Gordon and Steward JJ).

140 Ibid.

141 *MZAHK v Minister for Immigration and Border Protection* [2017] FCAFC 87, [43] (The Court).

142 (2021) 95 ALJR 292.

transcript. Written reasons were published in English subsequent to the first respondent commencing appeal proceedings.[143] The High Court overturned the Federal Court's decision that the failure to interpret the ex tempore reasons amounted to a denial of procedural fairness necessitating a re-hearing by another judge. It was accepted that as a matter of general fairness, the first respondent ought to have had the benefit of interpreted ex tempore reasons or translated written reasons at an earlier point in time.[144] However, the High Court held that adjourning the hearing of the appeal to allow the transcript to be obtained or inviting the first respondent to amend his grounds of appeal to address the contents of the published reasons would have supplied the necessary "practical justice or fairness" in the conduct of the Federal Court proceeding.[145]

1.5 – Commonwealth and State and Territory government access and equity legislation policies and guidelines

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 Act 2016, Anti-Discrimination Act 1991 and Human Rights Act 2019*;
- **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 Australian Government Language Services;[146]
- Australian Capital Territory Language Services Policy;[147]
- New South Wales Government's Multicultural Policies and Services Programme;[148]
- Northern Territory Language Services Policy;[149]
- Queensland Government Language Services Policy;[150]
- South Australian Government Interpreting and Translating Policy for Migrant and Non-Verbal (Sign) Languages;[151]
- Victorian Language Services Policy;[152] and
- Western Australia Language Services Policy.[153]

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. For example, the Federal Court of Australia will provide a court-funded interpreter to a party if they are represented under a recognised pro bono scheme or entitled to an exemption from (or reduction of) court fees under the Court's regulations. Individuals in immigration detention fall within the latter category, even if they are privately legally represented.[154]

143 Ibid [5].

144 Ibid [22].

145 Ibid [40]–[41].

146 See Australian Government, *Australian Government Language Services Guidelines: Supporting access and equity for people with limited English* (Department of Home Affairs, 2019) <https://immi.homeaffairs.gov.au/settlement-services-subsite/files/language-services-guidelines.pdf>.

147 See ACT Government, *ACT Language Services Policy* (Community Services Directorate, November 2018) <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0011/1286993/Language-Services-Policy_v1.pdf>.

148 See Multicultural NSW, *Multicultural Policies and Services Program* (New South Wales Government, 2016) <https://multicultural.nsw.gov.au/policy/>.

149 See Northern Territory Government, *Language Services Policy* (Department of Local Government and Housing, 2009) <https://dlghcd.nt.gov.au/__data/assets/pdf_file/0004/440563/language_services_poilcy_web.pdf>.

150 See Queensland Government, *Queensland Language Services Policy* (Department of Communities, Child Safety and Disability Services, 2016) <https://www.cyjma.qld.gov.au/resources/dcsyw/multicultural-affairs/policy-governance/language-services-policy-policy.pdf>; Multicultural Affairs Queensland, *Language Services Guidelines* (Queensland Government, 2016) <https://www.cyjma.qld.gov.au/resources/dcsyw/multicultural-affairs/policy-governance/language-services-policy-guidelines.pdf>.

151 See Department of Premier and Cabinet, *South Australian Interpreting and Translating Policy for Migrant and Non-Verbal (Sign) Languages* (Government of South Australia, 2020) <https://www.dpc.sa.gov.au/__data/assets/pdf_file/0017/43127/South-Australian-Interpreting-and-Translating-Policy.pdf>.

152 See Department of Health and Human Services, *Language services policy* (Victoria State Government, January 2017) <https://www.dhhs.vic.gov.au/publications/language-services-policy-and-guidelines>.

153 See Department of Local Government, Sport and Cultural Industries, *Western Australian Language Services Policy 2020* (Government of Western Australia, 2020) <https://www.omi.wa.gov.au/resources-and-statistics/publications/publication/language-services-policy-2020>.

154 *Federal Court and Federal Circuit and Family Court Regulations* 2012 (Cth) reg 2.05(1)(c).

Annexure 1 – Top languages spoken at home by State and Territory

	NSW	VIC	QLD	WA	SA	ACT	TAS	NT
Non-English Language Spoken	26.5	27.8	13.5	19.4	17.4	23.8	6.5	24.4
English Only	68.5	67.9	81.2	75.2	78.2	72.7	88.3	58.0
Arabic	2.7	1.3						
Mandarin	3.2	3.2	1.5	1.9	1.7	3.1	0.8	
Cantonese	1.9		0.5	0.8	0.6	1.0		
Vietnamese	1.4	1.7	0.6	0.8	1.1	1.1		
Greek	1.1	1.9			1.4		0.2	1.4
Italian		1.9	0.4	1.2	1.7		0.2	
German							0.3	
Spanish			0.4			0.8		
Hindi						0.9		
Nepali							0.3	
Tagalog				0.6				1.3
Kriol								1.9
Djambarrpuyngu								1.9
Warlpiri								0.9
Other	16.2	17.8	10.1	14.1	10.9	16.9	4.7	17.0

Source: Australian Bureau of Statistics 2016 Census QuickStats

Annexure 2 – An Overview of the Profession of Interpreting and Translating

A2.1 – Key terms

Interpreting and translating involves many different activities. Below we list four of them. Each 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.
- **Captioning:** the process of conveying the meaning of spoken words into written text.

Interpreting can be performed using different modes:

- **Consecutive interpreting:** the interpreter stands or sits near the party 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 party 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'.[155] In international settings, including international courts, interpreters interpret the whole of the proceedings in the simultaneous mode. Auslan interpreters generally work in simultaneous mode throughout the proceedings. The simultaneous production of a signed and spoken language do not create the same aural interference as with two competing spoken languages.
- **Team interpreting:** when two or more interpreters are engaged to work together as a team to improve accuracy and fidelity. For example, team interpreting will be necessary when a Certified Interpreter cannot be sourced and a mentor is appointed to support an interpreter or bilinguals of lesser competence.
- **Tandem interpreting:** involves interpreters working in rotation at agreed intervals in order to avoid fatigue over extended periods of time.
- **Adversarial interpreting:** when one interpreter is hired to check on the quality of another interpreter.
- **Relay interpreting:** when one interpreter interprets from language A to language B and another interpreter interprets from language B to language C. One variation of relay interpreting is the use of Deaf Interpreters, who work alongside Auslan-English interpreters and deaf clients who have specialised language needs.

A2.2 – Interpreter qualifications, certifications and professional associations

A2.2.1 – Qualifications

Interpreting qualifications are offered by the Higher Education and Vocational Education and Training (VET) sectors. Formal interpreter qualifications range from TAFE diplomas to university postgraduate degrees. The qualification levels will reflect practitioners' skills at different levels of complexity. In ascending order of qualification, the available training programs in Australia include:

155 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 of Interpreting;
- Vocational Education and Training Advanced Diploma of Interpreting;
- Bachelor of Arts in Interpreting & Translation;
- Graduate Certificate, Graduate Diploma, Master of Interpreting;
- Doctor of Philosophy in Interpreting.

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 certification system. NAATI certification is separate from formal qualifications, however the level of formal qualification or training required determines the relevant certification test a candidate can apply for.

Certification can only be obtained by passing a NAATI certification test.

In 2018, NAATI reviewed their credential scheme and replaced it with a certification model which provides greater consistency in assessments and improved validity in the relationship between NAATI standards and the professional roles to which they relate.

NAATI's certification system is designed to evaluate whether an individual is competent to practice as a translator or interpreter. It does this by setting minimum standards of performance across a number of areas of competency. Certification is an acknowledgement that an individual has demonstrated the ability to meet the professional standards required by the translation and interpreting industry in Australia.

NAATI certifies interpreters at a number of levels, according to their proficiency and skill. The NAATI certification model specifies the following relevant levels:

- Certified Conference Interpreter;
- Certified Specialist Legal Interpreter and Certified Specialist Health Interpreter;
- Certified Interpreter;
- Certified Provisional Interpreter; and
- Recognised Practising Interpreter (not certified).

NAATI certifications are language specific. Each certification assesses distinct skills and different levels of ability. The most common certifications for interpreters are Certified Interpreter and Certified Provisional Interpreter.

- **Certified Interpreter:** This is the minimum level recommended for work in legal interpreting. A Certified Interpreter transfers complex, non-specialised messages from a source language into a target language that accurately reflects the meaning.
- **Certified Provisional Interpreter:** This represents a level of competence in interpreting for the purpose of general conversations. Certified Provisional Interpreters generally undertake the interpretation of non-specialist dialogues.

NAATI also offers the Recognised Practising credential. This is an award, not a certification. It is only granted in languages for which NAATI does not test, or for which NAATI has only recently commenced certification 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.

Interpreters certified by NAATI can interpret across a wide range of subjects involving dialogues in complex scenarios. Certified Interpreter is the minimum level recommended by NAATI and Commonwealth and State and Territory language policies for work in complex settings such as courts and tribunals. However, as noted above, there are many languages in Australia where Certified Provisional Interpreter is the highest certification available in that language and many more languages where no credentialed interpreters are available at all.

With the introduction of the national Certification system in 2018, all NAATI credentials are issued with an expiry date and require recertification. If a practitioner does not apply for recertification or does not meet the recertification criteria, the credential will lapse. The process of recertifying requires the practitioner to demonstrate that they remain current in their practice and engage in a minimum level of continuing professional development.

While there is no legal requirement for practitioners to be certified 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 certification. No similar oversight exists with respect to practitioners who have only acquired tertiary qualification. Courts and tribunals can verify the interpreter's certification by checking the practitioner's "Certified Practitioner Number" at https://www.naati.com.au/online.

NAATI certification model	Suitability
Certified Conference Interpreter	Suitable for international or highly complex, specialised contexts involving conference type settings that require consecutive or simultaneous interpreting. Please note, the use of conference interpreting booths and equipment are often required by the interpreter to deliver such interpreting services.
Certified Specialist Legal Interpreter	Suitable for high level technical interpreting tasks in complex, specialised legal contexts.
Certified Specialist Health Interpreter	Suitable for high level technical interpreting tasks in complex, specialised health contexts.
Certified Interpreter	Suitable for: • working in a broad range of complex contexts, in domains including legal, health, education, police and other contexts supporting access to general public services • formal proceedings (such as courts, tribunals and other formal settings including commerce) • covering dialogue interpreting, monologue consecutive interpreting, chuchotage and sight translation
Certified Provisional Interpreter	Suitable for general conversations and interpreting in a broad range of non-complex, non-specialised contexts, and for covering dialogue interpreting.
Recognised Practising Interpreter	Granted in languages with low community demand for which NAATI does not offer certification testing. Interpreters with this credential have recent and regular experience working as an interpreter and are required to complete regular professional development. In the absence of interpreter certification for a language, Recognised Practising Interpreters may be asked to interpret in the same types of situations as Certified Interpreters.

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.
- **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.
- **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

There are also State, Territory or specialist language associations which provide advice, support, professional development and advocacy for interpreters and translators.

Annexure 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:
They were arrested.	The police arrested them.
'You will be paid extra for overtime work.'	'If you work overtime, they will pay you more money.'
'They broke the law, so they were jailed.'	'They broke the law, so they put them in jail.'
'Their money was stolen.'	'Somebody stole their 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.[156]

156 Steve Swartz, 'Unpacking English Abstract Nouns' (Presentation of Paper, Language and the Law Conference, 2012).

Instead of:	Try:
Provision of the Act	The Act tells me what to do
Interpret my direction that	Interpret what I say to the defendant…
Sentence be suspended after 5 months	You stay in prison just five months
Good behaviour	(you are) not to break the law
It has no strength	It is not strong (adjective)
Their patience has run out	They will not be patient any more (adjective)
They enjoy going for a run	They like running (verb)

3. Avoid negative questions

Instead of:	Try:
Aren't they the boss	Are they the boss?
You never did that before, did you?	Have you ever done this before?
So you didn't report trouble?	Have you reported the trouble?

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 approves, you can go to the football game.	You must ask the corrections officer about going to the football game. Maybe they will say that you can go. Maybe they will say you cannot go. You must do what they say.

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 they insulted your sister?	They 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 propositions 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, they just exploded.	When I said that, they 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 them.	Keep watching them closely.

Annexure 4 – Four-part test for determining need for an interpreter

This test has been adopted from the Northern Territory Aboriginal Interpreter Service.

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

Ask 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 example '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 themself 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.

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 they can tell their story using their own language, and to make sure they understand 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 they 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, they will wait outside of jail for their court case. Bail is like this: The police or judge decide to let the defendant out of jail to wait for their 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, they will wait in jail for their court case. Can you tell me back what I said to you?

Example 4:

An oath is a promise. When a witness tells their story (gives evidence) in Court they must promise to tell the true story. To show that they will keep that promise, the witness might promise God that they will tell the true story in court. The witness will put their hand on a Bible when they promises to tell the true story. When they do that, their promise is called an oath. When a witness lies after they speak an oath, they are breaking the law and maybe the judge will punish them. 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 their name on that paper and that means they agrees that they 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 them a different order. In a sentencing order, the judge writes down all the rules the offender must obey as part of their 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
Articulating back	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.
Short or long answers	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.
Agrees or disagrees	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.
Inappropriate responses	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.
Unsure of meaning	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.
Contradictions	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.
Uses new vocabulary	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.
Good grammar	The person does not use English grammatically. E.g. mixes up pronouns ("he" instead of "she"); uses the past tense incorrectly ("they look at me").	The person uses English grammatically.
Repeating and simplifying	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.

Annexure 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 Standard 9), that they can hear all parties and have a clear view of all persons speaking.
- Ask interpreters to introduce themselves and state the level of their NAATI certification, their formal qualifications, membership of a professional interpreting association requiring adherence to a code of ethics and conduct, and court experience, namely how often they have worked in a court or tribunal and their understanding of their ethical obligations, including the Code of Conduct (Schedule 1).
- Explain the interpreter's role as an officer of the court or tribunal 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 they would like to take their breaks – ideally breaks should be provided at least every 45 minutes. For trials and long hearings, ensure that two interpreters work together as a team, where possible, taking turns every 30 minutes.
- Remember that interpreting accurately does not mean interpreting word-for-word. Interpreters are required to interpret what is said – including swearing and evasive and confusing statements.
- Instruct parties 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 or tribunal's role to explain terms, not the interpreters. 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. A Qualified Interpreter should have tertiary (VET or higher education) qualification in interpreting, a NAATI certification and be a member of a professional interpreting association that requires adherence to a code of ethics and conduct, and court or tribunal experience. Another person performing the office of interpreter may have some combination of these attributes. When assessing the merit of the criticism, take into account the extent to which the bilingual possesses these attributes compared with the interpreter, and give the interpreter the opportunity to respond to the criticism.

Annexure 6 – Interpreting in matters where a party or the interpreter appears via audio-visual link (AVL), or where the entire hearing takes place via AVL

Adapted in part from the Northern Territory Magistrates Court, Interpreter Protocols, 2019, page 20, and updated in 2021 to reflect increased use of AVL by courts and tribunals.

A6.1 – Interpreting for a party who appears via audio-visual link (AVL) in an otherwise face-to-face hearing:

- Where the matter is listed for a short mention or directions hearing, such as an application for an adjournment, the interpreter will ordinarily be present and interpret from the hearing room or via the interpreter's own technology from a remote location, rather than being present with the party (including a defendant in a criminal proceeding who is in a correctional facility.
- In cases where the matter is longer or more complex, it is preferable that the interpreter be physically present with the party, using the same AV connection.
- Where the party is represented, and the interpreter is arranged by the party's legal representative, 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 hearing room, with the party on the same AV connection, or via their own technology.
- All participants in any remote interpreting situation should wear adequate headphones with a microphone.

A6.2 – Interpreting for a witness who gives evidence via AVL in an otherwise face-to-face hearing:

- Ordinarily, the interpreter should be located with the witness when the witness gives evidence via AVL. If this is not possible, the principles in A6.1 are applicable.

A6.3 – Interpreting when the interpreter is present with a party off-site in an otherwise face-to-face hearing:

- Prior to the matter commencing, court or tribunal staff should ensure that the interpreter is able to see all people in the hearing who will speak. The camera should be set up so that the interpreter can see the judicial officer, other parties, and any legal practitioners on screen at the same time.
- Prior to the matter commencing, court or tribunal staff should ensure that the interpreter is able to hear people speaking from each location in the hearing room where speech will occur.
- The screen in the hearing room showing the interpreter and the 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 may provide additional guidance on how to position the camera.
- The volume of the AVL in the hearing room should be sufficiently loud so that all parties can hear the interpreter when the interpreter interrupts to seek clarification. In addition, where possible, all speakers in the hearing room should speak into a microphone that is connected to the AVL feed, so that the interpreter can hear everything that is being said properly and to minimise the need for the interpreter to interrupt for clarification about what was said.
- All participants in the courtroom/tribunal should speak into a microphone that is connected to the AVL feed so that the interpreter can adequately hear and interpret simultaneously to the limited English proficiency speaking party.
- The interpreter should wear headphones and speak into a microphone that is connected to the AVL feed.
- If a briefing has not previously occurred, the legal practitioner or, if the court or tribunal has engaged the interpreter, the judicial officer, should ensure that the interpreter receives a briefing as to the general nature of the proceeding and the interpreter's role prior to the matter commencing.
- If any documents will be read onto the record or shown to a witness, it is desirable that copies of these documents have been provided to the interpreter prior to the matter commencing. If it not possible to provide these documents prior to the matter commencing, they should be shared with the interpreter via AVL or some other technology at the relevant time.

A6.4 – Interpreting when the interpreter is present in the hearing room and the party appears via AVL:

- Prior to the matter commencing, court or tribunal staff should ensure that the interpreter is given time to speak with the party or witness via AVL to ensure that the interpreter and the party or 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 hearing room. When interpreting for a witness, the interpreter will ordinarily sit in the witness box in the hearing room. When interpreting for a party, the interpreter will ordinarily sit next to the party's legal representative, or otherwise at the bar table, provided that the interpreter has clear access to a microphone.
- Court or tribunal staff should ensure that the interpreter has an unobstructed view of a screen that clearly shows the face of the party or witness.
- If the hearing room is equipped with a hearing loop, this should be offered to the interpreter. This will often provide better sound quality to the interpreter for what the remotely located witness is saying rather than relying on the sound produced by the AVL equipment. The remotely located witness should endeavour to speak directly into a microphone to ensure the interpreter can properly hear and understand everything that is said.
- When working with an Auslan or Sign Language interpreter, the interpreter may provide guidance on how to position the camera. When the party or witness is deaf or hard of hearing, the interpreter must have a clear unobstructed view of the upper body, face, and hands. Some settings are not yet suitable for remote signed language interpreting,[157] due to the technical limitations of AV cameras or monitors at either site. The system should be tested beforehand whenever an interpreter is not able to be present with the deaf defendant/witness to ensure it will function appropriately.
- Unless a party or witness requests otherwise, the camera should be set up so that the party or witness sees the entire hearing room, rather than just seeing the interpreter.
- At the start of a matter, the judicial officer should 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 hearing room, simultaneous interpreting may be difficult or impossible without the adequate equipment, as the party or witness will hear two languages simultaneously through the AVL. For simultaneous interpreting, specialist interpreting platforms are recommended. Microsoft Teams can be used with a plug-in to the Zoom interpreting facility. This way, participants will hear only the language that they understand, without interference from the other language.
- As the interpreter will not be present with the party, the court or tribunal registry should determine if the AVL allows for simultaneous interpretation. In any event, the court or tribunal registry should ensure that the proceeding is listed for a period of time that is sufficient with regard to the additional time likely to be required to enable the party to fully participate in the hearing with assistance of the interpreter.

157 Jemina Napier, 'Here or There? An Assessment of Video Remote Signed Language Interpret-Mediated Interaction in Court' in Sabine Braun and Judith L Taylor (eds), *Videoconference and Remote Interpreting in Criminal Proceedings* (Intersentia Publishing Ltd, 2012) 145.

A6.5 – Interpreting when the entire hearing takes place via AVL:

- The court or tribunal registry should determine if the AVL in use allows for simultaneous interpretation and, in any event, ensure that the proceeding is listed for a period of time that is sufficient having regard to the additional time likely to be required to enable the party to fully participate in the hearing with the assistance of the interpreter. If simultaneous interpreting is not possible, the proceedings will need to be interpreted in the consecutive mode, which will increase the duration of the proceedings by a factor of at least 2.5.
- The judicial officer should ensure that the interpreter is given enough time to interpret what is being said and that they have an opportunity to raise any issues and ask any questions they may have.
- The interpreter should ensure that they join the AVL not less than 5 minutes prior to the hearing time and, if the interpreter is only booked for a particular period and is unable to extend that period should that be required, this is brought to the attention of the judicial officer at the start of the hearing or as soon as it becomes apparent in the course of the hearing.
- The judicial officer or court or tribunal registry should ensure that all parties, including the interpreter, can see and hear all other parties in the hearing.
- Interpreting remotely can lead to higher levels of fatigue. Interpreters may require more frequent breaks when interpreting remotely.
- Where possible, videoconferencing technology with features that best facilitate interpreting, such as remote simultaneous interpreting platforms, should be the preferred platforms for hearings that must take place wholly via videoconference.