

**INTERNATIONAL ASSOCIATION OF JUDGES  
STUDY COMMISSION (CRIMINAL LAW)  
QUESTIONNAIRE, 14 MAY 2021  
SUBMISSION OF THE AUSTRALIAN JUDICIAL OFFICERS ASSOCIATION**

**Interpretation of Criminal Courts**

**1. What criteria must be met for an interpreter to be appointed? Does this differ if it is for a party to the case, or a witness?**

The starting point concerning the appointment of interpreters is derived from the duty to afford natural justice to those who are a party to a judicial proceeding.<sup>1</sup> Although the provisions differ between the states and territories of Australia, generally, an interpreter is appointed where a complainant, defendant or witness needs the aid of an interpreter to understand and participate in proceedings properly.<sup>2</sup>

When it comes to deciding whether the accused is actually in need of an interpreter, it was held in *R v Johnson*<sup>3</sup> that this question would be answered in light of the fundamental proposition that the accused must have a fair trial, so that should communication problems emerge during the trial, it will ultimately be for the trial judge to exercise a discretion to determine whether or not an interpreter is called for.

**2. Is the interpretation limited to certain languages?**

The National Accreditation Authority for Translators and Interpreters (NAATI) is the national standards and certifying authority for translators and interpreters in Australia.<sup>4</sup> NAATI have credentialed practitioners providing interpretation services in more than 170 languages.<sup>5</sup>

**3. Who appoints the interpreter?**

The Court has the power to order that the State provide an interpreter provided that the Court is satisfied that it is in the interests of justice.<sup>6</sup>

**4. Are there standard requirements for the quality of the interpretation or qualifications of the interpreter?**

The standard of “competent interpreting” was considered in *Perera v Minister for Immigration and Multicultural Affairs*<sup>7</sup>, where Kenny J said:

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<sup>1</sup> *Kioa v West* (1985) 159 CLR 550, 583-586 per Mason J.

<sup>2</sup> See, for example, *Evidence Act 1977* (Qld) s 131A; *Evidence Act 1995* (NSW) s 30.

<sup>3</sup> (1987) 25 A Crim R 433.

<sup>4</sup> ‘About Us’, *National Accreditation Authority for Translators and Interpreters* (Web Page, 12 May 2021) <<https://www.naati.com.au/about-us/>>.

<sup>5</sup> *National Accreditation Authority for Translators and Interpreters* (Web Page, 12 May 2021) <<https://www.naati.com.au/>>.

<sup>6</sup> *Evidence Act 1977* (Qld) s 131A; *Evidence Act 1929* (SA) s 14; *Evidence Act 1909* (WA) ss 102, 103; Stephen Odgers, *Uniform Evidence Law* (Lawbook Co, 12<sup>th</sup> ed, 2016) 1.

<sup>7</sup> (1999) 92 FCR 6.

“... there is rarely an exact lexical correspondence but, even so, some interpretations are better than others. Whilst the interpretation at a Tribunal hearing need not be at the very highest standard of a first-flight interpreter, the interpretation must, nonetheless, express in one language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the other language.”<sup>8</sup>

Her Honour’s summary of the standard of interpretation can be respectfully adopted for this response.<sup>9</sup>

The ‘Recommended National Standards for Working with Interpreters in Courts and Tribunals’ were published in 2017.<sup>10</sup> The Judicial Council on Cultural Diversity developed the Standards ‘to establish recommended standards and optimal practices in Australia’.<sup>11</sup> The Standards aim to provide clarity to courts and tribunals, judicial officers, interpreters and members of the legal profession ‘on engaging and working with interpreters to ensure fairness for people with limited or no English proficiency’.<sup>12</sup>

The Standards defines a “qualified interpreter” as someone who has all the following attributes:

- (a) a tertiary (VET or university) qualification in interpreting; and
- (b) accreditation from NAATI; and
- (c) membership with a professional body (e.g. a recognised State or Territory based interpreter association); and
- (d) experience interpreting in court.<sup>13</sup>

Jurisdictions throughout Australia have adopted the Standards to different extents.<sup>14</sup>

#### **(a) If so, how does the Judge ensure compliance?**

Challenges to the standard of interpretation made by a party to a judicial proceeding can be dealt with in a separate hearing.<sup>15</sup> Judges often assess the adequacy of the interpretation based on the transcript alone.<sup>16</sup> However, there are cases where a tribunal has reached a conclusion based on the interpreter’s error and resulted in an adverse decision to the applicant.<sup>17</sup> In any event, the interpreter is required to take an oath or affirmation stating that they will interpret everything to the best of their skill and ability.<sup>18</sup>

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<sup>8</sup> Ibid at 19 [29].

<sup>9</sup> Ibid at 18-20 [27]-[31].

<sup>10</sup> Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Report, 2017).

<sup>11</sup> Ibid iv.

<sup>12</sup> Ibid 6.

<sup>13</sup> Ibid 4.

<sup>14</sup> See, for example, *Uniform Civil Procedure Rules 2005* (NSW) div 3, pt 31; Queensland Courts and Tribunals, *Guideline: Working with Interpreters in Queensland Courts and Tribunals*, 28 June 2019.

<sup>15</sup> *De La Espreilla-Velasco v The Queen* (2006) 31 WAR 291 at 314-315, 370 [80], [335] per Roberts-Smith JA and Miller AJA.

<sup>16</sup> *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6.

<sup>17</sup> *WACO v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511.

<sup>18</sup> *Oaths Act 1867* (Qld) ss 28-30.

**(b) In any event, how does the Judge ensure that the interpretation is accurate and meets good standards?**

There is no formal requirement for a Judge to ensure that the ongoing interpretation is accurate and meets good standards beyond an application brought by a party to a judicial proceeding for a separate hearing on that issue. However, some courts have partly adopted the Standards which recognises the independence of the interpreter and the overriding duties of accuracy and impartiality owed by an interpreter to the court.<sup>19</sup> The Standard obliges an interpreter engaged in proceedings to familiarise themselves with the Court and Tribunal Interpreters' Code of Conduct.<sup>20</sup>

**5. Are there legal obligations for court interpreters?**

Interpreters working in Courts and Tribunals will be required to make an oath, or affirmation, in the appropriate form before the interpreter commences to undertake their role.

**6. For the main hearing of the case is the translation of the whole hearing or only part of the hearing? If it is only part, which parts, and why is the whole hearing not translated?**

In *De La Espriella-Velasco v The Queen*<sup>21</sup>, the question of the extent to which the assistance of an interpreter may be required during a criminal trial was considered. 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 also to apprising a party of what is happening in the court and what procedures are being conducted at a particular time. It is quite wrong to imagine that all an interpreter is supposed to do is to interpret questions for a person in the witness box.”<sup>22</sup>

Notwithstanding, the question of whether an interpreter is required for the entire hearing or only part of the hearing is considered on a case-by-case basis. The principle that the denial of a fair trial constitutes a miscarriage of justice such that a conviction following it must be quashed was made clear by the High Court in *Dietrich v The Queen*<sup>23</sup>. Therefore, judicial officers are likely to consider whether an interpreter is required for the entire hearing or only part of the hearing by determining whether, if the request for an interpreter were not granted, it would constitute a miscarriage of justice.<sup>24</sup>

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<sup>19</sup> Queensland Courts and Tribunals, *Guideline: Working with Interpreters in Queensland Courts and Tribunals*, 28 June 2019, 11.

<sup>20</sup> *Ibid* 13-14.

<sup>21</sup> (2006) 31 WAR 291.

<sup>22</sup> *Ibid* at 305 [36].

<sup>23</sup> (1992) 177 CLR 292.

<sup>24</sup> *Ibid* at 299 per Mason CJ and McHugh J.

## **The Importance of Good Interpretation and Good Communication for the Verdict**

### **7. Assuming that the quality of interpretation could affect the outcome of a case:**

- (a) Do you consider this applies more in certain types of cases than others and, if so, what types of cases?**

In all cases, it will be fundamental to a fair trial for an accused with limited or no English proficiency to understand and be understood in court proceedings.<sup>25</sup> Criminal proceedings that decide an accused's fate, which may result in loss of liberty, heighten the need for competent interpreters.

- (b) Is it a problem that can be remedied, or a problem that the judiciary must live with? And if yes, how do we secure that no one is wrongfully convicted?**

The standard of interpretation will be an ongoing issue across Australia. The varying levels of resources available in different jurisdictions will require courts to be flexible. Courts should continue to operate to the best of their ability with the Standards by engaging the appropriate NAATI accredited practitioner when and where the court provides. When the court engages an interpreter, all interpretation should be audio-recorded and transcribed to be replayed and re-read if there is a dispute regarding the standard of interpretation.

### **8. Is there a risk that people who have difficulty explaining themselves, possibly due to low intelligence or poor education, suffer disadvantages at the court? If yes, what remedies exist?**

Some provisions that are designed to protect witnesses at court include:

- (a) The accused person be excluded from the room or obscured from the view of the witness while the witness is required to appear in court;<sup>26</sup>
- (b) evidence of an affected child is to be pre-recorded wherever possible before trial, in the presence of a judicial officer, and played to the jury at the trial;<sup>27</sup>
- (c) The public and any person not required by the court are excluded from the courtroom when the complainant is giving evidence.<sup>28</sup>

Other jurisdictions across Australia have the same or similar provisions to assist vulnerable witnesses.

### **9. Is intercultural communication a subject of training for judges or part of the instruction of juries?**

Intercultural communication, mainly related to Aboriginal peoples and Torres Strait Islanders, is a subject of training for judges who attend the National Judicial College of Australia's National Judicial Orientation Program. Instructions may be given to a jury about intercultural communication beyond the ordinary jury directions given at a trial. It

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<sup>25</sup> *R v Rostom* (2007) 98 SASR 528 at 538, 541-542 [41], [59]-[61] per Gray and Sulan JJ.

<sup>26</sup> *Evidence Act 1977* (Qld) s 21A.

<sup>27</sup> *Ibid* pt 2 div 4A.

<sup>28</sup> *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5.

sometimes occurs that a judge will alert the jury to the fact that they must all consider the same evidence and, even if a person is personally aware of cultural difficulties suffered by an accused person, victim or witness, they must disregard that and only consider the evidence placed before them.

### **Nonverbal Communication in the Courtroom**

#### **10. Can the body language of accused persons, victims, or witnesses influence the outcome of a case?**

The language of witnesses can affect the result of a case. There is a need for caution concerning assessing the credibility of a witness who gives evidence via an interpreter. Their cultural background may influence the witnesses body language and because it is impossible to gauge a witness's demeanour from the tone of an interpreter's speech.<sup>29</sup>

Due to the multicultural nature of contemporary Australian society, it would not be possible for judges to be fully aware of the nuances of every culture which she or he might conceivably encounter in the courtroom. Judges must therefore be prepared to consider the influence of cultures with which they have had no direct experience. Judges must be alert to ethnocentrism and the potential for culturally-based misunderstanding. Body language is an area of potential misunderstanding.<sup>30</sup>

#### **11. Is nonverbal communication a subject of training for judges or part of the instruction of juries?**

A misunderstanding based on nonverbal communication could occur when an accused person is sitting in the dock with their head down and looking between their knees. To the ordinary person, this can look like guilt. However, in many courtrooms, the viewing screen in the accused's dock is located at their feet. Therefore, it is common for a trial judge to advise the jury of the location of the accused viewing screen to prevent them from making an inference as to their guilt based on a miscommunication. There is no standard jury direction concerning this. Nor is there any training specifically directed to this point.

14 May 2021

The Honourable Justice Glenn Martin AM  
Judge of the Supreme Court of Queensland  
Brisbane, Queensland, Australia

On behalf of the Australian Judicial Officers Association

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<sup>29</sup> *Kathiresan v Minister for Immigration & Multicultural Affairs* [1998] FCA 159; *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* [1997] FCA 324.

<sup>30</sup> Roland Sussex, 'Intercultural communication and the language of the law' (2004) 78 *Australian Law Journal* 530, 535-538.