Launch of

National Standards for Working with Interpreters in Australia's Courts and Tribunals

Address

by

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Chief Justice of Western Australia

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David Malcolm Justice Centre, Perth

Acknowledgement of the Traditional Owners

I would like to commence as I always do, by acknowledging the traditional owners of the lands on which we meet, the Whadjuk people who form part of the Noongar clan of South Western Australia. I pay my respects to their elders, past and present, and acknowledge their continuing stewardship of these lands.

The Judicial Council on Cultural Diversity

Some of you may be wondering why a monolingual person like me is talking to you about interpreters. That is because I had the honour of being the inaugural Chair of the Judicial Council on Cultural Diversity (Council), which is a peak body comprising representatives of all levels of Australia's courts and all geographical jurisdictions, set up by the Council of Chief Justices of Australia and New Zealand to provide advice to the courts and to court administrators about the ways in which the courts can improve access to justice for people from multicultural backgrounds.

When I was appointed to that position, a good friend of mine on the Supreme Court of New South Wales sent me a message to the effect that he could not think of anybody less qualified than me to head the Council, and that is obviously right. I am monolingual and monocultural - I typify the problem, rather than the solution. The problem is that Australia's justice system is monocultural and monolingual, but the Australian community is not. The Australian community is multicultural and multilingual and, in fact, we have become one of the world's most culturally diverse nations.

Multicultural Australia

Multiculturalism is one of our country's great strengths, and it is something we should celebrate. We need to make sure that our institutions, like our courts, keep up with the fact that we have become such a culturally diverse and linguistically diverse country. I will give some examples. Aboriginal and Torres Strait Islander peoples comprise

about 700,000 Australians, or 3% of our population.[1] Some of those people residing in the more remote parts of Australia have very limited facility with English, and so services such as Aboriginal Interpreting WA and the Northern Territory Interpreter Service are absolutely essential if those people are to negotiate their way through our justice system or, indeed, our health systems.

One in four Australians, or roughly 5.3 million people were born overseas,[2] increasingly in non-English speaking countries. There are almost 20,000 hearing impaired people in Australia who rely on Auslan to communicate every day.[3] There are more than 300 different languages spoken in Australian households,[4] and in more than 20% of Perth households a language other than English is regularly spoken.[5]

The Importance of Effective Communication

Effective communication is, of course, critical to the fair and effective operation of the justice system. Obviously it is vital in a courtroom environment. I ask you to imagine yourself in a foreign country engaged in a court process in a foreign language, with perhaps a foreign culture and foreign legal environment. How profoundly threatening would that be, and how profoundly intimidating the process would be. But it is not just in the courtroom that communication is essential. It is essential at all points in the justice system.

Effective communication is critical at the point of police apprehension; during any engagement with the police, on the street or wherever it might be; at the interview in the police station that will follow arrest; and in relation to obtaining and receiving legal advice. In relation to the initiation of legal proceedings and to the various steps

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[1] Australian Bureau of Statistics, *2016 Census QuickStats* (released 23 October 2017).
[2] Australian Bureau of Statistics, *2024.0 – Census of Population and Housing: Australia Revealed, 2016* (released 27 June 2017).
[3] National Disability Practitioners, *NDP Factsheet – Auslan: What You Need to Know*, <http://www.ndp.org.au/images/factsheets/NDP_Factsheet04.pdf> (accessed 25 May 2018).
[4] Australian Bureau of Statistics, *2071.0- Census of Population and Housing: Reflecting Australia – Stories from the Census 2016* (released 28 June 2017).
[5] Australian Bureau of Statistics, *2016 Census QuickStats,Perth WA* (updated 22 February 2018).

that are taken prior to trial in both civil and criminal cases, effective communication is absolutely essential if the system is to be truly described as a system of justice.

Effective communication in all the areas I have mentioned is the shared responsibility of a number of different stakeholders. Those stakeholders include courts as institutions, judges and magistrates as judicial officers, court staff, lawyers and, very importantly, interpreters. Until the Council took on the project that I am going to speak about tonight, the arrangements to provide effective communication in the environments to which I am referring have all been ad hoc, and tended to be court specific or jurisdiction specific.

The Judicial Council Project on Interpreters

This is the first national project aimed at producing a coherent national approach to the use of interpreters in courts and tribunals and, in particular, aimed at introducing national standards, which will apply across our entire country. Those standards have been designed to provide flexibility, acknowledging that different places at different times will have different capacities to meet those standards. So they have been designed on the basis that a number of the standards are regarded as the minimum that should be met in every jurisdiction, but others are described as optimal, that is, as aspirational targets to be met as and when resources permit.

The project structure adopted by the Council involved the creation of a committee of the Council headed by the Hon Justice Melissa Perry of the Federal Court of Australia, who put an enormous amount of time and effort into the project. The committee was augmented by co-opted members who were not themselves members of the Council, including, for example, the Hon Justice Francois Kunc of the Supreme Court of New South Wales, who is truly multilingual and is the Chief Executive Officer of National Accreditation Authority for Translators and Interpreters (**NAATI**), who, of course, made a significant contribution.

The project was also assisted by consultants - the two principal consultants being Professor Sandra Hale, who will be known to many of you as one of Australia's, if not Australia's, leading expert in the field of interpretation and translation generally; and the Hon Acting Justice Dean Mildren AM RFD QC, former long-serving judge of the Supreme Court of the Northern Territory, who has written and spoken very widely in relation to Aboriginal language issues in the courts of Australia.

The Project Report

The report which has now been published, and which is available on the website of the Council,[6] has a number of characteristics. It is intended to provide flexibility. It is intended to set out objectives, and targets, although it does include minimum standards. It is aspirational, in the sense that it refers to optimal standards. It accepts that there will be different standards applied to different languages, so that the standards that might reasonably be expected in relation to a widely spoken language in which there are many available interpreters (such as Mandarin) will be quite different to the standards that can be expected in relation to an Aboriginal language (such as Pintupi) where the availability of interpreters will necessarily be limited.

The structure is intended to take account of the differences in languages and the differing availability of specialised interpreting skills in relation to different languages, and also of the circumstances in which interpreters will be required. The standards that might be reasonably expected in the Magistrates Court sitting in Balgo or Kalumburu will be rather different to the standards that might be expected in a very significant and complex commercial case in, say, the Supreme Court of New South Wales.

The standards have been deliberately structured to take account of those necessary differences. The standards also allow for differing

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[6] Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunal*s, < http://jccd.org.au/wp-content/uploads/2018/02/JCCD-Interpreter-Standards.pdf > (accessed 25 May 2018).

levels of resources, and so include provision for simultaneous interpreting where resources permit; for interpreter's booths in courtrooms, again, where infrastructure permits; and for the use of the headsets, which we have now successfully utilised in Western Australia in a number of cases.

The Council's report also refers to tandem (or team) reporting, to the desirability of the provision of professional mentors to interpreters, and to the use of interpreter's portals for the provision of information to and the engagement of interpreters. These are things that do not exist in many cases at the moment, in a number of courts, but things to which we can reasonably aspire, as and when resources permit.

In Western Australia, the response to the Council's report has been to create a committee which contains representatives of all of Western Australia's courts, and representatives of the Department of Justice, charged with the responsibility of providing recommendations with respect to the implementation of the report across all of Western Australia's jurisdictions including the State Administrative Tribunal.

The centrepiece of the Council's report is the recommendation of standards to be adopted in relation to interpretation in courts. The standards are broken down into four areas. These are standards applicable to courts, standards applicable to judicial officers, standards applicable to interpreters (including an interpreter's code of conduct) and standards applicable to legal practitioners. In addition to the recommended standards, there are model rules intended for adoption by different courts around Australia. There is a model practice note explaining the operation of those rules, and there are annotations of the standards. They are, if you like, a guide as to how to implement the standards, and what is intended by the authors of those standards.

There are also a number of very useful annexures. Annexure 3 contains plain English strategies for use by judges and lawyers in courts. I will come back to that later. Annexure 4 contains a four-part test for determining when an interpreter is required. One of the problems in Australia at the moment is the lack of consistent practice in relation to

identifying the circumstances in which an interpreter is required. That is especially the case in relation to Aboriginal Australians, who very commonly have a limited facility with English that enables them to get by with basic things like buying food or drink, but leaves them completely unable to comprehend the more complex language used in a courtroom environment.

Annexure 5 provides practical advice to judicial officers in relation to assisting interpreters, and annexure 6 provides practical guidance as to interpretation when a witness or defendant appears by video link, which is, of course, an increasingly common part of court practice in a country as geographically spread as Australia.

Standards applicable to Courts

I will start with the standards applicable to courts.[7] The standards include the proposition that procedural fairness requires effective interpretation. They embody the notion that court users must be provided with information about the availability of interpreter services, ideally in the different languages commonly spoken by that court's users. The standards for courts contain provisions relating to the training of judicial officers and staff with respect to the use of interpreters, and also make the obvious point that adequate funding must be provided to courts to enable interpreters to be provided where necessary.

The standards for courts also make reference to the need to coordinate the engagement of interpreters properly. Far too often, inadequate notice is given to interpreters, which causes problems and creates unnecessary stress. The standards also deal with the provision of support to interpreters - including practical but important things like providing interpreters with a place to put their personal belongings. They also cover the important issue of properly briefing interpreters in relation to the issues and terms likely to arise in the proceedings.

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[7] Standards 1-12 on pages 8-11 and 27-57 of the Council's report.

Briefing Interpreters

The importance of proper briefing became apparent to me in a case over which I presided in Broome some years ago. It was a long trial - the trial for murder of a French man who did not speak English, which involved a number of Aboriginal witnesses, because the victim was an Aboriginal person. We had simultaneous interpreting using headsets, provided by two excellent French interpreters who were brought in from other parts of Australia.

Before the trial started, I sat with the interpreters for quite a while and told them what the trial was about. Every evening after court had finished, we would spend a half an hour or so together, when I would tell them what was likely to happen the next day. If there were any documents that were likely to be produced, I would give them copies of the documents to take home that night. When it came to my directions to the jury, which after a four-week trial were quite long, I produced those in written form and gave them to the two interpreters a couple of days before they were given to the jury, so that they had the opportunity to go through my directions and prepare translations of what I was going to say. This was highly desirable because of the unavoidable need to refer to technical legal terms during my directions to the jury.

I also consulted the interpreters about the most appropriate position for them within the courtroom, and placed them there. They were right in the centre of the courtroom next to the witnesses, where they could see everything that was going on. That all worked well. I suspect that not enough judges and magistrates understand the importance of thorough preparation to the effective use of interpreters.

The Interpreter as an Officer of the Court

A vital component of the standards is the recognition of the interpreter as a professional officer of the court, rather than as a representative or employee of a party or parties. This proposition is central to many of the reforms that are implemented by the standards.

There is also reference in the standards to:

- the need to provide security for interpreters;
- the need to provide trauma counselling where required;
- the need to provide computer access, ideally Wi-Fi, so that interpreters can use smart phones if they want to obtain access to linguistic resources;
- the need for regular breaks for interpreters;
- the use of interpreter teams where necessary;
- the use of headphones where appropriate;
- the provision of capacity for interpreters to provide feedback and for interpreters to be provided with feedback from the court about the process;
- the need to ensure adequate remuneration for interpreters; and
- the procedures for assessing when an interpreter is required.[8]

The Qualifications of an Interpreter

In relation to the engagement of an interpreter, the standards make differing provisions for four different tiers of language. Tier A[9] relates to 15 languages which are the languages in which there is the greatest availability of trained interpreters. They are Arabic, Auslan, Cantonese, French, German, Greek, Italian, Japanese, Mandarin, Persian, Russian, Serbian, Spanish, Turkish and Vietnamese. The standards specify that where languages within that grouping are involved, a Professional Interpreter should be engaged. "Professional Interpreter" is a defined term, and it involves a particular form of qualification.[10]

The second tier down, tier B,[11] comprises 32 different languages, in respect of which fully qualified interpreters are less numerous and less readily available. In relation to tier B, the optimal standard is a

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[8] Standard 9 on pages 35-39 of the Council's report.
[9] Standard 11.4 and Table 1.1 on pages 42-43 of the Council's report.
[10] The required qualification is accreditation as a Professional Interpreter by NAATI. See the definitions on page 3 of the Council's report.
[11] Standard 11.5 and Table 1.2 on pages 43-45 of the Council's report.

Professional Interpreter, but if a Professional Interpreter cannot be engaged, a Paraprofessional Interpreter is satisfactory. "Paraprofessional Interpreter" is also a defined term, and involves a particular qualification.[12]

Tier C[13] is the next level down. It comprises 43 languages. Many of those languages are Aboriginal and Torres Strait Islander languages. Within that tier, it is recognised that the optimal standard is Paraprofessional Interpreter, but the judicial officer may grant leave to a person to carry out the office of interpreter, where that person does not meet the defined standard but has other training, study or experience.[14]

Tier D[15] includes all of the other 200 or so languages that are not in tiers A, B and C, and, like tier C, the ideal standard is Paraprofessional Interpreter, but again it is recognised that there will be circumstances in which a Paraprofessional Interpreter will not be available. In such cases, a judicial officer may grant leave to somebody who does not meet the defined standard to carry out the office of interpreter.[16]

The Standards applicable to Judicial Officers

The standards applicable to judicial officers[17] require judicial officers to use plain English when an interpreter is engaged. I will come back to that later. The standards also require judicial officers to be given training on how to work with an interpreter, including on the use of plain English and the use of short sentences, the briefing of interpreters, the positioning of interpreters within court, and in relation to the breaks that interpreters will inevitably need.

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[12] The required qualification is accreditation as a Paraprofessional Interpreter by NAATI. See the definitions on page 3 of the Council's report.
[13] Standard 11.5(b) and Tables 1.3 and 1.4 on pages 46-49 of the Council's report.
[14] Standard 11.5(b) on pages 46-48 of the Council's report. Refer also to Model Rule 1.8 on page 18-19 of the Council's report.
[15] Standard 11.5(c) and Tables 1.5 and 1.6 on pages 49-52 of the Council's report.
[16] Standard 11.5(c) on pages 49-52 of the Council's report. Refer also to Model Rule 1.8 on page 18-19 of the Council's report.
[17] Standards 13-17 on pages 58-76 of the Council's report.

The standards provide guidance to judicial officers in relation to the mechanisms that they should use for assessing the occasions upon which an interpreter is required. There is also reference to the interpreters' code of conduct[18] and the need for a judicial officer to check that the interpreter has in fact undertaken to abide by that code of conduct. The standards refer to the judicial officer's obligation to assess whether the interpreter has any possible conflict of interest.

The Standards applicable to Interpreters

The third category of standards relates to the standards applicable to interpreters.[19] As I have already mentioned, critical amongst those standards is the emphasis of the role of the interpreter as an officer of the court, and indeed, as a professional officer of the court. The standards emphasise that the paramount duty of the interpreter is to the court, and not to anybody that may have engaged the interpreter to provide services to the court.

The Code of Conduct

The interpreters' code of conduct[20] which has been promulgated as part of the standards emphasises the interpreter's duty to the court; the duty to comply with directions made by the court (which is something I will come back to); the interpreter's duty of accuracy; the duty of impartiality; the duty of competence - which basically means that if the interpreter doesn't feel they have the capacity to interpret adequately, they should say so, and decline the engagement; and, of course, the duty of confidentiality, which applies to anything an interpreter hears or learns in the course of their duties.

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[18] The Court Interpreters' Code of Conduct is contained in Schedule 1 to the Model Rules on pages 22-23 of the Council's report.
[19] Standards 18-20 on pages 77-87 of the Council's report.
[20] The Court Interpreters' Code of Conduct is contained in Schedule 1 to the Model Rules on pages 22-23 of the Council's report.

The Standards applicable to Legal Practitioners

The last group to whom the standards apply is legal practitioners.[21] The standards require practitioners to assess occasions upon which an interpreter might be required, to give adequate notice of the need for an interpreter, to engage interpreters in accordance with the standards, and to engage interpreters who will comply with the standards.

The standards also impose requirements on legal practitioners to brief interpreters; to use plain English during court proceedings; to identify documents that might be required to be translated, so as to ensure that they are translated before the hearing commences; and if that cannot be done, to give as much notice as possible of any documents that might need to be translated during the course of the hearing.

The Model Rules

The next product of this project is a set of model rules.[22] These are rules that are intended for adoption by various courts around Australia. They cover topics such as the circumstances in which an interpreter will be required, in the two main areas of court work - which are civil work and criminal work. In civil work, the rules proceed on the assumption that the provision of an interpreter will be the obligation of the relevant party. So whichever party has a difficulty with English, or is calling a witness who has a difficulty with English, has the obligation to provide the interpreter. By contrast, in criminal proceedings, the standards presume that the obligation to provide an interpreter will be satisfied by the prosecutor or the court.

The law in criminal cases is clear. The High Court has said many times that if an accused person does not have sufficient capacity in English to understand the proceedings, whether it be a trial or a sentencing hearing, the proceedings are simply invalid because they are

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[21] Standards 21-26 on pages 88-93 of the Council's report.

[22] The Model Rules are on pages 17-23 of the Council's report. Refer also to Standard 1 on page 27 of the Council's report.

unfair. So the ultimate responsibility to ensure that an adequate interpreter is engaged in all criminal cases rests with the court. The model rules also identify who may interpret, and refer to accreditation, the obligations to abide by the code of conduct, to take the interpreter's oath and to ensure that there is no conflict of interest unless there are exceptional circumstances justifying deviation from the standard requirements.

Court Directions

The model rules empower the court to make directions[23] on a raft of subjects including:

- any particular attributes that might be required or not required for an interpreter including gender, age, ethnic, cultural or social background, so as to accommodate particular cultural or other reasonable concerns of a party or witness;
- the number of interpreters required;
- whether simultaneous interpreting should be used;
- establishment of the expertise of an interpreter;
- the steps to be taken to obtain an interpreter who is appropriately accredited;
- the steps which must be taken before an application is made under another rule which enables the court to approve the use of a non-accredited interpreter;
- the information that is to be provided to interpreters in relation to the proceedings;
- the circumstances in which information may be provided to the interpreter;
- whether the interpreter is to interpret the witness's evidence consecutively or simultaneously;
- the extent to which the interpreter can have regard to resources and dictionaries;
- the length of time between breaks;

[23] Model Rule 1.19 on page 20-21 of the Council's report.

- security for the interpreter;
- seating and the location for the interpreter;
- disqualification, removal or withdrawal of an interpreter; and
- the payment of interpreters.

The rule is intended to place all of those matters under the control of the court, which can make directions in relation to them.

The model rules are accompanied by a model practice note[24] which explains their operation to practitioners, and the standards are accompanied by annotated standards which again explains their practical operation.

The Annexures to the Report

I mentioned earlier the annexures to the report, which include such things as plain English strategies.[25] They are of enormous assistance to people like me, who have limited understanding of the particular needs that interpreters have when they are called upon to interpret. They provide a number of practical and useful tips, including such things as using the active voice, and avoiding the passive. So instead of saying "he was arrested", judges and lawyers are encouraged to say "the police arrested him." We are encouraged to avoid abstract nouns so that instead of referring to good behaviour, which is a notion familiar to lawyers, we should use the expression "not break the law", which is more easily translated to people from other cultures.

We are also encouraged to avoid negative questions. So instead of saying "isn't he the boss?" we should say "is he the boss?" We are encouraged to define unfamiliar words. So, for example, while lawyers understand what Crown land is, literally translated that term would not be particularly meaningful to a person from another culture. What we should be saying is "this is land owned by the government."

[24] Model Practice Note on page 24-26 of the Council's report.
[25] Annexure 3 – Plain English Strategies, on page 113-116 of the Council's report.

We are also encouraged to put things in chronological order. So instead of saying "you left the hotel after having a drink", we should be saying "you had a drink, then left the hotel", because it is easier to follow. Short sentences with no more than one idea per sentence should be used. We are encouraged to be careful with hypotheticals. We are encouraged also to put cause before effect. So instead of saying "you were angry because he insulted you", what we should say is "he insulted you, so you got angry", which again makes it easier to follow.

It is important for judges and lawyers to indicate when we change topic, so that both the interpreter and the witness know that we are changing topic. We also need to avoid relying too heavily on propositions involving time, which do not always cross cultural divides very easily. It is also important to avoid figurative language and metaphors. Expressions such as "he exploded", "we're on the same page" and "don't get your knickers in a knot" are not easily translated into other languages.

Another important annexure[26] involves the assessment of the need for an interpreter, and how that should be done. This is one area where I believe current practices are really quite inadequate. There is a lack of standard procedures for assessing when an interpreter is or is not required. Not only Aboriginal people, but also people who come to Australia from other countries, may have some limited facility with English, but lack the language skills that are required to negotiate what can be a quite complex court process.

Guidance is given in this annexure as to how need for an interpreter can be assessed. One way is to ask questions that require a narrative response rather than a yes/no response. So a question such as "what do you think will happen if…?" is a good way of testing somebody's fluency with English. It is also important to assess comprehension and speaking in a forensic context by asking somebody, for example, what an oath is, who the defendant is, what does guilty

[26] Annexure 4 – Four-part Test for Determining Need for an Interpreter, on page 117-120 of the Council's report.

mean and what does bail mean, so that you can test their understanding of legal terms.

Assessing communication skills through a variety of techniques is also important. One technique is to ask somebody to articulate back to you a concept that you put to them, and see how adequately they can do this. You assess whether they are using short or long answers. If they are using short or one word answers, it is probably because they do not feel comfortable in English. You can assess the extent to which a person is agreeing or disagreeing. If they agree with every proposition that is put to them, it is probably because they do not understand what is being said and they are concurring gratuitously. Answers that are inappropriate may reveal an infelicity with English, as might uncertainty, or answers that are contradictory to answers previously given. This guidance is, I think, enormously helpful.

Conclusion

I hope that the Council's report will encourage greater appreciation within the court system of the need to take the use of interpreters seriously, and the need to ensure that interpreters are given every opportunity to be effective. Effective communication is absolutely vital if we are to have a justice system worthy of that description. This project and the standards, rules and guidelines which have been published are intended to improve the efficacy of communication in our justice system, in what has become one of the world's most multicultural and multilingual communities.