International Journal of Language & Law

Loiacono, JLL 12 (2023): F10–F26
www.languageandlaw.eu

The Recommended National Standards for Working with Interpreters in Australian Courts and Tribunals

— An Overview of Their History, Key Provisions and Implementation

*Rocco Loiacono**

Abstract
The second edition of the Recommended National Standards for Working with Interpreters in Australian Courts and Tribunals (Standards) was launched in April 2022, with the first edition published in late 2017. The Standards recognise the critical role that interpreters play in the administration of justice in courts and tribunals in Australia. This article reviews the development of the Standards, and gives an overview of the Standards and their importance in ensuring procedural fairness for those involved in the justice system with limited or no proficiency in English. The article also provides an overview of the implementation of the Standards by courts and tribunals in Australia.

Keywords
interpreters, procedural fairness, Recommended National Standards

Submitted: 4 August 2023, accepted: 14 November 2023, published online: 21 December 2023

*Curtin University Law School, Perth, Australia, R.Loiacono@curtin.edu.au.

1. Introduction

As a matter of legal principle, ensuring that a party or a witness who lacks sufficient competence in English is able to effectively participate in a hearing or give evidence with the assistance of a competent interpreter is an aspect of the requirements of procedural fairness (Perry & Zornada, 2014: 776). As such, a failure to comply with this requirement, may, in the case of proceedings in a court, result in a miscarriage of justice and, in the case of a tribunal, in an invalid decision.

In the "Hale Report" commissioned by the Australasian Institute of Judicial Administration published in 2011, Sandra Hale recommended a national reform to ensure the quality of interpretation services across Australia across a broad range of areas including interpreters' working conditions, remuneration and support from the legal profession. The major initiative of this report that has come to fruition is the publication and implementation of the *Recommended National Standards for Working with Interpreters in Courts and Tribunals*[2] (Standards).[1] The Standards are intended to provide key actors, namely, courts and tribunals, judicial officers, the legal profession, and interpreters, with guidance on working together so as to ensure procedural fairness for those who lack proficiency in spoken English, including the hearing impaired.

The Standards are a necessary response to Australia's linguistic diversity and fulfil a need in its justice system that has become increasingly apparent, given the many people who come before the courts and tribunals requiring the assistance of an interpreter. In addition, they recognise the tireless work undertaken by interpreters, often under difficult circumstances, and the need to promote a better understanding of the role of interpreters and how best to facilitate their task. The publication of the Standards represents a significant step forward not only for access to justice, but also for the interpreting profession.

This article will first provide a background to the interpreting profession in Australia and the deficiencies in interpreter training, certification and working conditions, along with a lack of understanding of the role of the interpreter in the legal profession which led to the recognition of the need for the development of recommended national standards. It then gives an overview of the Standards and their main provisions, demonstrating their importance in ensuring procedural fairness for those involved in the justice system with limited or no proficiency in English, with a view to raising awareness of the vital role that interpreters play in the administration of justice in Australia. The article also provides an overview of the implementation of the Standards by courts and tribunals in Australia.

[1] Judicial Council on Cultural Diversity (JCCD), *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (1st edition, 2017). The Standards were launched at Old Parliament House, Canberra, on 20 October 2017 by the then Minister for Multicultural Affairs, Senator the Hon. Zed Seselja. The second edition of the Standards, launched in April 2022, is available at jccd.org.au/wp-content/uploads/2022/05/JCDD- Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second- edition.pdf.

2. History and Background

2.1. The Right to a Fair Trial

In a speech given at the launch of the Standards, the Chair of the Specialist Committee of the Judicial Council on Cultural Diversity (JCCD) for the preparation of the Standards, Justice Melissa Perry of the Federal Court of Australia, outlined the role interpreters play in ensuring procedural fairness in legal proceedings (Perry, 2017):

> Integral to the right to a fair trial is the right of a person to the free assistance of an interpreter if they do not speak the language of the court in criminal proceedings.[2] Correlative to that right is the positive obligation upon State parties to ensure that an accused is able to understand the proceedings and to be understood – to enable, in other words, an accused to be present in the proceedings in a meaningful sense.
>
> Further, language may be a barrier not only to justice in a criminal context, but equally to access to courts and tribunals in civil matters. For those with no or limited proficiency in the language of our courts and tribunals, interpreters therefore make their participation possible, and play an essential role in ensuring that justice is done and can be seen to be done in civil and criminal matters.

As outlined in the Preamble to the Standards, over 300 languages are spoken in Australian households, and this presents issues in relation to access to justice. It is not uncommon, therefore, "for people coming before the courts to require the assistance of an interpreter" (JCCD, 2022: 13).

As Justice Perry noted at the launch of the Standards (Perry, 2017):

> The consequences of a failure to meet the standard required by procedural fairness may lead to an invalid administrative decision or a miscarriage of justice with consequential delays and economic and social costs. For example, the State may have to bear the cost of a retrial, while the accused, victims and witnesses are put through the trauma of a rehearing. There are also broader social costs. These costs are significant.

The role of the interpreter is thus essential in the administration of justice in this country. Where court interpreting is not of the highest standards, this has implications for the administration of justice. In fact, incompetent interpreting was the basis for appeal in 287 Australian cases in the period 1991–2008 (Hayes & Hale, 2010: 122). These concerned criminal and refugee matters. For example, in 2017 in Western Australia, a manslaughter conviction was overturned on appeal due to incompetent interpreting.[3]

It is therefore not surprising that in the 2018–2019 financial year, approximately

[2] General Comment No 32, n 18, [40]. On the other hand, as the Human Rights Committee explains at that paragraph that "accused persons whose mother tongue differs from the official court language are, in principle, not entitled to the free assistance of an interpreter if they know the official language sufficiently to defend themselves effectively". See also: Julia Sherman (2017). The Right to an Interpreter under Customary International Law. *Columbia Human Rights Law Review*, *48*(3): 257–289 ('Sherman'); Parliament and Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1; and Human Rights Committee, Communication No 219/1986, 39th sess, UN Doc CCPR/C/39/D/219/1986 (23 August 1990) [10.2].

[3] Gibson v Western Australia (2017) 51 WAR 199.

3,600 parties requested interpreter services for hearings before the New South Wales Civil and Administrative Tribunal (New South Wales Civil and Administrative Tribunal, *Annual Report 2018–2019*: 16). Similarly, in the 2014–2015 financial year, before its amalgamation with the Administrative Appeals Tribunal, an interpreter was required in over 8,450 hearings in the Refugee Review and Migration Tribunals spanning approximately 92 languages and dialects (Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2014–2015*: 20). As a further example the Federal Circuit Court (FCC) noted in its 2020–2021 Annual Report that most applicants in migration matters were unrepresented and required an interpreter to present their matters to the Court. The Annual Report for the FCC also noted that migration was the second largest area of workload for the Court, there having been 5,236 filings in that jurisdiction in the 2020–2021 financial year, and 6,555 filings in the previous financial year (Federal Circuit Court, *Annual Report 2020–2021*: 10).

As was the experience in the FCC, in the vast majority of these hearings, the individuals concerned appeared without legal representation and were reliant upon an interpreter in order to understand what was happening, to communicate with the court or tribunal, to give evidence, and to understand the outcome. It is not therefore difficult to appreciate that the impression of justice that such litigants will take away with them will be affected in large part by the respect with which they are treated, and by how well they understand the proceedings and are understood (Perry, 2019: 275). In each of these respects, the interpreter plays a vital role.

The American experience also points to potential risks to the community where an interpreter is required but not provided. A United States Department of Justice Report refers to a 2013 case in which a rape survivor with LEP, who testified against her alleged attacker, informed the court that she did not fully understand English and requested an interpreter (United States Department of Justice, 2016: 7). In that case, the judge asked counsel to rephrase the question, instead of providing an interpreter, and continued with the proceeding. In these circumstances, the survivor provided insufficient testimony, with the judge dismissing the charge against the alleged perpetrator, who was arrested for the sexual assault of a fifteen-year-old girl six months later (United States Department of Justice, 2016: 7).

Importantly, Justice Perry also outlined the research underlining the impact negative experiences of litigants will have on the justice system, and how interpreters are vital to addressing this impact (Perry, 2017):

> As this research also suggests, the impression of justice which litigants will take away with them will be affected in large part by the respect with which they are treated, how well they understand the proceedings, and how well they are understood.

Providing competent interpreters, therefore, has the capacity to build confidence in Australian courts and tribunals.

Many of the recommended measures in turn can be implemented by changes in

practices without additional resources and costs, such as providing appropriate materials to the interpreter in advance of the hearing to facilitate the discharge of their task, explaining the role of the interpreter at the start of proceedings, applying the guidelines for assessing whether an interpreter is necessary, allowing appropriate breaks for the interpreter, and using plain English in submissions and asking questions of the witness whose evidence is being interpreted. It is also envisaged that the Standards can be implemented incrementally and adapted to the needs and resources of different jurisdictions.

Ultimately, the purpose of the Standards is to recommend means by which to ensure the provision of competent interpreters in Australian courts and tribunals so as to improve access to justice and to meet the requirements of procedural fairness imposed already by law. Importantly, in this regard it suffices to establish a denial of procedural fairness if it is shown that errors in interpretation could have affected the outcome, and not that they in fact did so (Perry & Zornada, 2014: 211–212).[4]

2.2. The Complexity of Interpreting Including in a Legal Context

The interpreter's role is to remove language barriers so that the party or witness can be made linguistically present in the proceeding and thereby be placed in the same position as an English-speaking person. This enables a party to participate in the proceedings in their own language (JCCD, 2002: 1). Further, in the case of criminal proceedings, if the accused needs an interpreter, the trial cannot proceed unless and until an interpreter is provided. Thus, it is vital, in order to facilitate the proper administration of justice, that the court system have access to highly trained, competent interpreters.

Thus far, legal systems have generally speaking failed to recognise the complexities of court interpreting, and at times been content to 'make do' with less than adequate interpreting by unqualified bilinguals. Such bilinguals, however, are not subject to a code of ethics, may not be impartial and independent, do not necessarily understand the proper role of the interpreter and the limits on that role, and are often subject to unrealistic expectations. The inadequate performance of these bilingual speakers has at best led to appeals on the grounds of poor interpretation, and at worst, to no action at all, with unknown consequences for the administration of justice (Hale, 2011: 257).

Unfortunately, reliance on unqualified bilinguals stems from a general misunderstanding of the role and responsibility of a qualified interpreter who is a member of the

[4] *SZRMQ v Minister for Immigration and Border Protection* (2013) 219 FCR 212 at [24]–[25] (Allsop CJ), with whom Robertson J agreed at [67]–[69]; applied in *SZSEI v Minister for Immigration and Border Protection* [2014] FCA 465 [74],[76]–[77] (Griffiths J). See also *WACO v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 131 FCR 511 at [58] (Lee, Hill and Carr JJ).

interpreting profession. The Code of Ethics and Code of Conduct[5] prepared by the Australian Institute of Interpreters and Translators Inc (AUSIT) (together, the AUSIT Code) defines the proper role and responsibility of the interpreter. This is summed up in the ethical principle of accuracy at paragraph 5 of the AUSIT Code: "[i]nterpreters and translators use their best professional judgement in remaining faithful at all times to the meaning of texts and messages." Paragraph 5 of the AUSIT Code of Conduct elaborates on the general principle of accuracy by outlining the complexity of interpreting as an activity, as follows:

1. Interpreters and translators provide accurate renditions of the source utterance or text in the target language. Accurate is defined for this purpose as optimal and complete, without distortion or omission and preserving the content and intent of the source message or text. Interpreters and translators are able to provide an accurate and complete rendition of the source message using the skills and understanding they have acquired through their training and education.
2. Interpreters and translators do not alter, add to, or omit anything from the content and intent of the source message.
3. Interpreters and translators acknowledge and promptly rectify any interpreting or translation mistakes.
4. Where circumstances permit, interpreters and translators ask for repetition, rephrasing or explanation if anything is unclear.

"Accuracy" for the purpose of the AUSIT Code is defined to mean "optimal and complete message transfer into the target language preserving the content and intent of the source message or text without omission or distortion". Therefore, this means that interpreters must interpret everything that is said, including swear words or statements directing the interpreter (e.g., "Don't say that") or retracting what has been said. However, despite popular misconceptions, accuracy in interpreting does not entail interpreting literally. Interpreting is not about relaying utterances word-for-word, without taking into account the context or the speaker's style, culture and intention. As Hayes and Hale explain, accurate interpreting includes "the meaning of the words in context, the appropriate use of language according to tongue, culture and situation […] the intended meaning behind the surface" (Hayes & Hale, 2010: 127).

Thus, often the relationship between a particular word and a legal concept is not the same across different languages and different legal systems, or there may not be a cor-

[5] Australian Institute of Interpreters and Translators Inc, *Code of Ethics*, (Guidelines, November 2012), ausit.org/wp-content/uploads/2020/02/Code Of Ethics Full.pdf. The Code of Ethics is divided into two sections: the *Code of Ethics* and the *Code of Conduct*. The latter outlines the professional conduct obligations of members of AUSIT with respect to the ethical principles contained in the *Code of Ethics*.

responding legal term, concept or institution in the target language. Such terms, concepts and institutions must be further interpreted in the context of the relevant legal system to ascertain their meaning for parties who are unfamiliar with the legal system. In this regard, the Finnish legal linguist Heikki Mattila (2006: 3) notes:

> Legal language does not qualify as a language in the same way as French, Finnish or Arabic, for example. It operates as a functional variant of natural language, with its own domain of use and particular linguistic norms (phraseology, vocabulary, hierarchy of terms and meanings).

In addition to bridging the linguistic divide, interpreters must also bridge the cultural divide, without compromising the ethical principle of accuracy. This issue was raised by the appellant in *De La Espriella Velasco v The Queen*,[6] who claimed that the trial miscarried due to the poor quality of interpretation provided by the court-appointed interpreter. The appellant submitted that the jury's assessment of his credibility as a witness was adversely affected by the interpreter's incompetency in Spanish, which among other things made him appear ill-educated or lacking in candour.[7]

What is more, cross-cultural pragmatic differences may lead to incorrect perceptions being formed by the target audience. As Hayes and Hale point out, what may sound like an aggressive or argumentative tone in one language may be considered to be neutral in another. What may appear to be evasive in one language may be considered to be polite in another. An interpreter of the highest calibre must be capable of rendering these differences (Hayes & Hale, 2010: 128).

Given the nature of legal proceedings, where the rights and responsibilities of citizens are at stake, there is a higher premium on accuracy on the part of the interpreter than there would be in other situations. In fact, in no other field does language determine the establishment of rights and obligations, and the failure to respect said rights and obligations can result, in most cases, in implications of a criminal nature (Longinotti, 2009: 8). Accordingly, there is a higher premium on the principle of fidelity (or accuracy) than there would be in other situations.[8] Thus, there is no room for misinterpretation or error on the part of the interpreter in this context, given the possibility that the quality of interpretation could be a critical factor in the determination of the guilt or innocence of a party by the jury or judge.

At a more practical level, the complexity of interpreting is also due to the different speaking styles of the various actors in legal proceedings. Witnesses, counsel and judges may speak rapidly or be unclear, making the interpreter's task to uphold the principle of accuracy more difficult. It is the trial judge's overarching responsibility to ensure that there is a fair trial. If any interpreted evidence is not conveyed clearly, then

[6] *De La Espriella-Velasco v The Queen* (2006) 31 WAR 291 ('DELV').

[7] DELV, [93]–[100]. The Court, while it accepted that there were some deficiencies in the interpreting, was not persuaded that they rendered the trial unfair.

[8] In this regard, although they deal more specifically with translation as opposed to interpreting, see generally, Deborah Cao (2007), *Translating law*; Susan Šarčević (1997), *New approach to legal translation*.

this may lead to deficiencies in the procedural fairness of the trial, and to that extent the trial judge is responsible for ensuring that the evidence is correctly understood. In such circumstances, it would be incumbent upon the judge to offer the interpreter a break, or ask the witness to slow down when speaking, or invite counsel to repeat the question, as the case may be. If the situation was so adverse to a party or witness that it may potentially result in an unfair trial, it would be appropriate for the judge to adjourn proceedings to see if another interpreter would be available.

As underscored by Sandra Hale, much has been said and written about incompetent interpreting in courtrooms. Yet, little has been done to achieve systematic improvements leading to the better administration of justice (Hale, 2011: 238). Multiple factors contribute to this impasse, but its underlying cause seems to be the general lack of recognition of the nature of court interpreting as a highly complex activity (Christensen, 2008: 99). It would appear that no other profession is subject to such lack of scrutiny with regard to qualifications as the interpreting profession. In fact, Hale explains that training is not compulsory in any country before interpreters are allowed to practice, which was the case in Australia prior to 2018 (Hale, 2011: 238). As one commentator points out with respect to the American context, lawyers rarely subject interpreters to the level of scrutiny regarding qualifications and reliability to which they would subject other types of experts. Indeed, it is inconceivable that untrained, untested, unpaid volunteers would be used as "expert" witnesses with the frequency with which such volunteers are used for legal interpretation (Ahmad, 2007: 1059). To this end, in a study of court interpreters in New York City, Angermeyer notes that, in the courtroom in particular, novices face an unfamiliar register and rigid turn-taking rules, as well as particular requirements on the organization of discourse and the presentation of evidence. They are regularly blamed for their failure to adhere to such institutional norms or for events of miscommunication, while few efforts are made to accommodate to their needs (Angermeyer, 2009: 23).

Hale (2011: 258) also notes that while many are quick to criticise the interpreter's performance, few are willing to advocate rigorous pre-service university training, to provide adequate working conditions and to pay professional rates that are commensurate with the difficulty of the task. On the one hand, untrained bilinguals may be engaged to act as interpreters at very little expense; on the other, these poorly paid, untrained individuals are not performing satisfactorily (Hale, 2011: 258). As Hlavac discusses, this outcome stems from the pragmatic, needs-based and socially-focused policies of translation and interpreting services in some New World countries such as Australia, Canada, and the United States, which mean that a demonstration of ability level is performed in single, performance based tests or exams, whereby a minimal level of competency in interpreting (or translation) must be demonstrated through performance of the tasks. Successful completion of a test is the usual minimum requirement for official or professional recognition of the ability to translate or interpret and to practise pro-

fessionally – commonly known as "certification". Such a certification itself may be specified according to general or specialised ability, or mode and context of inter-lingual transfer (e.g., "healthcare interpreter certification", "telephone interpreter certification") (Hlavac, 2013).

The key competencies for court interpreters include not only a high level of bilingual competence, but also an understanding of: the interpreting process; cross-linguistic differences; the discourse strategies of the courtroom; and the nature of his or her role; as well as the expertise to know when and how to intervene during the interpreting process (Hale, 2011: 237). Very few professions require such demanding prerequisites to train in their field. This view is echoed by Giambruno (2008: 27):

> [C]ourt interpreters must be properly trained, the difficulty and importance of their work fully recognized, their pivotal role in the judicial process acknowledged and accepted by judicial authorities, and their compensation established in accordance with their responsibilities.

Indeed, while testing alone had previously been the common pathway for community interpreters in Australia and Canada to gain certification, training allows a degree of specialization in the areas of health, law and public services that are a feature also of Norwegian and UK certification. At a supranational level, the 2014 ISO Guidelines for Community Interpreting also list as required attributes the ability to simultaneously interpret, negotiate cross-cultural pragmatic and discourse features, manage interactions, and formal training. These further skills are likely to be best ascertained through training that is co-requisite or supplementary (Hlavac, 2015: 4).

In response to the need for highly qualified and trained interpreters in a court setting, and in response to the recommendations made in the report published by the Australasian Institute for Judicial Administration (AIJA) in 2011, the National Accreditation Authority for Translators and Interpreters (NAATI) has now introduced a specialist legal interpreter certification which will require compulsory pre-certification training.[9]

In this regard the AIJA Report recommended, among other things, the recognition of the complexity of legal interpreting and specialised legal interpreter training. It noted in particular at p. xii:

> Quality of interpreting is closely linked to the conditions under which interpreters are expected to work. Interpreters expressed very strong views about their professional needs, which included the provision of preparation background materials prior to the assignment and adequate physical working conditions during the assignment.

The AIJA Report found that judicial officers (JOs) were in the main against providing interpreters with any background materials or information, many due to the misconception that interpreters simply interpret word for word, are not party to the proceedings and do not need to know anything about it before the commencement of the hearing. On the other hand, the interpreters pleaded for understanding of the nature of

[9] 'Certified Specialist Legal Interpreter', *NAATI* (Web Page) naati.com.au/become- certified/certification/certified-specialist-legal-interpreter/.

their role, which requires contextual information for them to prepare content and terminology in order to be ready to perform optimally. Further, the AIJA Report (2011: xiii) declared that many interpreters expressed frustration at being mistrusted by those with whom they have to work and being made to feel uncomfortable or incompetent if they requested clarification of any kind:

> There were some interesting correlations found between providing background materials to interpreters and other variables. Adjournments are more likely to occur when interpreters are not provided with materials; JOs who accept interpreters regardless of their qualifications are less likely to provide them with preparation materials and JOs who explain the interpreter's role are more likely to provide background materials.

The Standards were thus also developed in response to the AIJA Report to address such needs. This article will now provide an outline of the most significant provisions contained in the Standards.

3. Main Provisions of the Recommended National Standards

3.1. Summary

As outlined in the preamble to the Standards (JCCD, 2022), effective communication in courts and tribunals is a responsibility shared between judicial officers or tribunal members, court staff, interpreters, and members of the legal profession. As such the Standards are directed to the following, each of which will be briefly considered below:

1. The courts and tribunals as institutions (including those responsible for court and tribunal administration);
2. judicial or tribunal officers responsible for the day-to-day work of the relevant court or tribunal;
3. interpreters; and
4. the legal profession.

Further and significantly, the Standards are accompanied by draft Model Rules and a draft Model Practice Note to give effect to the Standards, which can be modified, for example, to meet resource constraints.

In the context of court and tribunal proceedings, the Standards acknowledge that proceedings are conducted in English, and thus the engagement of interpreters is required to ensure procedural fairness (JCCD, 2022, Introduction). The Standards also require the provision of information to the public about the availability of interpreters, along with the training of judicial/tribunal officers and court/tribunal staff to work with interpreters (JCCD, 2022: Standards 2 to 6). In particular, courts and tribunals are

required to engage an interpreter in accordance with the Standards, and provide adequate support for interpreters, which extends to providing adequate and appropriate working conditions, including the provision of a dedicated work space, regular breaks and for interpreters to be appropriately briefed and debriefed on an assignment (JCCD, 2022: Standard 9.2).

As far as they apply to judicial and tribunal officers (JCCD, 2022: Standards 13 to 17), the Standards provide that judicial and tribunal officers should apply the Model Rules for working with interpreters and endeavour to give effect to the Standards. This requires judicial and tribunal officers to:

- ascertain the competence of the interpreter;
- ensure the interpreter is provided in advance with briefing material and allow reasonable time for this, including sight translation (noting that if an interpreter is properly briefed, she or he will be more likely to accept an assignment);
- ensure the language employed is accessible and readily comprehensible to the interpreter by using plain English to communicate clearly and articulately during court proceedings;
- where appropriate, advise the interpreter when they need not interpret, for example, where there is legal argument in full on the admissibility of evidence. In such cases, the interpreter can instead interpret the judicial officer's summary or discussion between the parties about logistical or procedural matters.
- Undertake training on assessing the need for interpreters and working with interpreters.

Notably, to this end, the Standards state the preference for the engagement of a Certified Specialist Legal Interpreter or a Certified Interpreter wherever they are available (JCCD, 2022: Standard 11.2). In short, it is incumbent on judicial and tribunal officers to ensure that proceedings are conducted fairly by ensuring an interpreter is available and to 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 (JCCD, 2022: Annexure 4).

In accordance with the Standards, judicial and tribunal officers are also to ensure adequate working conditions for an interpreter (JCCD, 2022: Standard 17.1). Importantly, they should explain the interpreter's role to all present as an impartial officer of the court or tribunal (JCCD, 2022: Standard 17.5). Judicial and tribunal officers should also confirm that an interpreter has acknowledged the Court or Tribunal Interpreters' Code of Conduct, and allow interpreters to seek clarification or make a correction where necessary during proceedings (JCCD, 2022: Standard 17).

As far as the Standards for interpreters are concerned (JCCD, 2022: Standards 18 to

20), these focus on their role as officers of the court or tribunal.[10] In accordance with Standard 19 and Schedule 1 to the Model Rules, interpreters are required to observe the Court or Tribunal Interpreters' Code of Conduct, which is based on the AUSIT Code of Conduct and outlines the interpreter's paramount duties to the court or tribunal, including to comply with any directions. An interpreter has a duty of accuracy at all times, to use her or his best judgement to be accurate in interpretation, and to make corrections as soon as she or he is aware of any inaccuracy. Further, as stipulated in Schedule 1 to the Model Rules, interpreters have a duty of impartiality 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. Equally, in accordance with the Duty of Impartiality outlined in Section 5 (1) of Schedule 1 to the Model Rules – Code of Conduct for Interpreters in Legal Proceedings, an interpreter is not an advocate, agent or assistant for a party or witness. The duty of competence is included to ensure that interpreters must only undertake work that they are competent to perform in the languages for which they are qualified by reason of their training, qualifications or experience (JCCD, Section 6, Schedule 1 to the Model Rules). Interpreters are also bound by a duty of confidentiality with regard to all information in any form whatsoever which they acquire in the course of their engagement or appointment in the office of interpreter, unless that information is in the public domain (JCCD, Section 7, Schedule 1 to the Model Rules).

Similar standards to those applying to judicial and tribunal officers also apply to legal practitioners with regard to assessing the need for an interpreter, these being Standards 21 to 26. Legal practitioners must also ensure interpreters are booked in time so as they can be properly briefed on the proceedings. Legal practitioners should also use plain English at all times to assist the interpreter and provide any and all documentation beforehand that is to be sight translated.

3.2. Looking After the Wellbeing of Interpreters

Interpreters' wellbeing is also key to the proper administration of justice. Interpreting evidence in certain kinds of matters can give rise to vicarious trauma. This is rarely appreciated but potentially impacts upon the quality of interpreting and availability of interpreters in the justice system. A study of more than 270 interpreters in Victoria published in 2015 found that 78 per cent of interpreters have experienced distress following assignment to matters involving traumatic material, with one in five reporting

[10] See Standard 18: 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.

that the emotional distress was so severe that it reduced the quality of their performance (Lai, Heydon & Mulayim, 2015: 11–12; Carisbrooke, 2015). Further, protection visa applications before the AAT or the courts often involve details of internal conflicts and wars in their country of origin and/or transit countries, which may be particularly traumatic for the interpreters providing those services. Interpreters may have had similar experiences as those for whom they are interpreting, compounding the potential impact on the interpreter's emotional and mental wellbeing (Australian Broadcasting Corporation: 2015). Given that interpreters have a split second to consider the possible options for interpretation and choose only the one which they feel best expresses the sentiment, one can imagine the impact that stress and trauma may have upon interpreters in such cases.

As discussed by Lai et al., the potential for vicarious trauma to affect the emotional well-being of trauma workers is well documented. As found based on a survey on the impact of traumatic client content in interpreting assignments on professional interpreters in Victoria, some client material may be confrontational, upsetting or even disconcerting to the interpreter with the soundest mind, let alone to those interpreters whose personal experiences may leave them more vulnerable to the disturbing nature of the material (Lai, Heydon & Mulayim, 2015: 15). The authors importantly note that the quality of the interpreting service also suffers, with 21.36% of respondents in the above-mentioned survey reporting that they felt their response to traumatic content had a negative impact on the quality of their interpretation, impacting upon the interpreter's perceived cognitive process and emotional reactions during and after their interpreting assignment (Lai, Heydon & Mulayim, 2015: 15). This figure is most likely affected by underreporting, given the sensitivity of judgments of competence for any professional, and so must be taken very seriously indeed. This study also highlights the lack of professional support for interpreters by the interpreting and translating agencies and public services that hire them. These factors, if not addressed, will lead to a continued shortage of competent, well-trained interpreters for court and tribunal settings (Lai, Heydon & Mulayim, 2015: 15).

In order to address such concerns, the Standards provide detailed guidance concerning the working conditions and training that should be provided for interpreters, as well as for court and tribunal officers and staff. For example, guidance is provided with regard to providing information to the public about the availability of interpreters, and assessing the need for an interpreter and working with interpreters.[11] The Model Rules recognise and affirm the important role of interpreters by confirming their status as officers of the court or tribunal, owing their paramount duty as such to the court or tribunal. This is laid out in detail in Standard 18. Further, as noted above, the Standards take into account the ethical obligations of interpreters as set out in the AUSIT Code,

[11] See Standards 4 to 11, 15 to 17 and 21 to 24.

which are incorporated into the Interpreters' Code of Conduct in the Model Rules.[12] In order to address issues related to working conditions and remuneration, as identified in the AIJA Report, Standard 9 also provides that interpreters should be adequately remunerated for their services, bearing in mind their qualifications, skill and experience, as well as preparation and travelling time, as appropriate. This Standard also requires courts and tribunals to provide adequate support and breaks for interpreters during proceedings.

4. Implementation of the Standards

Given that the Standards were designed with flexible implementation in mind, many of the recommended measures can be implemented by changes in practice, without additional resources and costs, and irrespective of whether the Standards have been formally adopted by the court or tribunal concerned. It is also envisaged that the Standards could be implemented incrementally and adapted to the needs and resources of different jurisdictions. It is not possible within the scope of this article to examine the impact of the Standards across the complex network of courts and tribunals in Australia and the extent to which and the manner in which they have been implemented.

However, by way of example, on 28 June 2019, her Honour Chief Justice Holmes of the Supreme Court of Queensland promulgated a guideline that gives effect to the Standards. The guideline, *Working with Interpreters in Queensland Courts and Tribunals* (the Queensland Guideline) applies to civil and criminal proceedings in Queensland courts and tribunals.

As a further example, the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) gives effect to the Standards for the New South Wales court system through the *Uniform Civil Procedure (Amendment No 92) Rule 2019*, which came into effect on 8 November 2019. The UCPR applies to the Supreme Court, Land & Environment Court, District Court and Local Court in their civil jurisdictions. The inclusion of a new division for interpreters in the UCPR under Part 31 regarding evidence gives full effect to the aims of the Model Rules, but departs from the language in certain limited respects. In particular, rather than describing interpreters as officers of the court, the r 31.55 of the UCPR recognises their "special status […] in the administration of justice [with] duties […] in relation to the court and the parties to proceedings". The UCPR also provides for the Interpreters' Code of Conduct under Schedule 7A. The Standards are further implemented and applied by way of *Practice Notice SC Gen 21 – Interpreters in Civil Proceedings*, which commenced on 4 March 2020.

In the Federal Court of Australia, the Standards have been adopted in 2022 by way

[12] Schedule 1 to the Model Rules.

of Practice Note.[13] While the Model Rules have not been adopted, the Practice Note implements Standards 2 to 12 (with regard to Standards for the Court), while adding that some additional standards are aspirational or long-term strategies or objectives to be implemented as and when resources become available.[14] Additionally, Standards 13 to 17 have been adopted with regard to judicial officers. Standards 18, 19 and 20 have been adopted with regard to interpreters, and Standards 21 to 26 have been adopted in relation to legal practitioners.

In the state of Western Australia, at the time of writing, a Practice Note, drafted in similar terms, is being proposed to come into effect for all courts in that jurisdiction.

5. Conclusion

This article commenced by providing a background to the recognition in Australia of the need for the Standards. Deficiencies in interpreter training, certification and working conditions, along with a lack of understanding of the role of the interpreter in the legal profession were issues that needed to be addressed in order to ensure procedural fairness for those actors in the justice system, be they parties or witnesses, in Australia whose first language is not English. The Standards, therefore, envisage a continuing collaborative approach between the justice system, the interpreting profession and peak professional bodies to promote a judicial and administrative system that better affords procedural fairness to individuals from culturally and linguistically diverse backgrounds. At the same time, the initiative by the JCCD recognises that this cannot be achieved without the services of competent, highly-trained and appropriately remunerated professional interpreters. This initiative is thus unique in its scope, requirements and application in that it necessitates co-operation between all players in the justice system to achieve these vital aims.

References

Ahmad, Muneer I. (2007). Interpreting communities: lawyering across language difference. *UCLA Law Review*, *45*, 999–1086.

Angermeyer, Philipp S. (2009). Translation style and participant roles in court interpreting. *Journal of Sociolinguistics*, *13*(1), 3–28.

[13] See Federal Court of Australia, Practice Note: Working with Interpreters (GPN-INTERP), fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-interpret/gpn-interpret- annexb.

[14] Specifically, these are 1) Simultaneous interpreting equipment; 2) Provision of tandem interpreting or team interpreting; 3) Provision of certified mentors; and 4) Establishment of an interpreters' portal.

Australian Broadcasting Corporation (10 February 2015): Interpreters in the justice system. Available at: abc.net.au/radionational/programs/lawreport/intepreters-in-the-justice-system/6061848 (accessed 14 December 2023).

Australian Institute of Interpreters and Translators (2012). *Code of Ethics and Code of Conduct* (*AUSIT Code*). Available at: ausit.org/wp-content/uploads/2020/02/Code Of Ethics Full.pdf (accessed 14 December 2023).

Cao, Deborah (2007). *Translating Law*. Bristol: Multilingual Matters.

Christensen, Tina P. (2008). Judges' deviations from norm-based direct speech in court. *Interpreting*, *10*(1), 99–127.

Carisbrooke, Philippa (2015). Trauma takes toll on interpreters in confronting cases. *Special Broadcasting Service*. Available at: sbs.com.au/news/article/2015/02/10/trauma-takes-toll-interpreters-confronting-cases (accessed 14 December 2023).

Federal Court of Australia. Practice Note Working with Interpreters (GPN-INTERP). Annexure B: FCA Standards. Available at: fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-interpret/gpn-interpret-annexb (accessed 14 December 2023).

Federal Court of Australia. 2020–21 Federal Circuit Court Annual Report. Available at: fcfcoa.gov.au/fcc-annual-reports/2020-21/toc (accessed: 14 December 2023).

Giambruno, Cynthia (2008). The role of the interpreter in the governance of sixteenth and seventeenth century Spanish colonies in the 'New World': Lessons from the past to the present. In Valero Garcés & Martin (Eds.), *Crossing Borders in Community Interpreting: Definitions and Dilemmas* (pp. 27–49).

Hale, Sandra (2011). The need to raise the bar: Court interpreters as specialised experts. *TJR, 10*, 237–258. Available at: coat.asn.au/wp-content/uploads/2019/01/2011.theneedtoraisethebar.hale_.pdf (accessed 14 December 2023).

Hayes, Alejandra & Hale, Sandra (2010). Appeals on incompetent interpreting. *Journal of Judicial Administration, 20*, 119–130.

Hlavac, Jim (2013). A cross-national overview of translator and interpreter certification procedures. *The International Journal for Translation & Interpreting Research*, *5*(1), 32–65.

Hlavac, Jim (2015). Formalizing community interpreting standards: A cross-national comparison of testing systems, certification conventions and recent ISO guidelines. *International Journal of Interpreter Education*, *7*(2), 4–38.

Judicial Council on Cultural Diversity (2017). *Recommended National Standards for Working with Interpreters in Australian Courts and Tribunals*. Available at: jccd.org.au/publications/ (accessed 14 December 223).

Judicial Council on Cultural Diversity (2022). *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2nd edition). Available at: jccd.org.au/wp- content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf (accessed 14 December 2023).

Lai, Miranda, Heydon, Georgina & Mulayim, Sedat (2015). Vicarious trauma among interpreters. *International Journal of Interpreter Education*, *7*(1), 3–23.

Longinotti, Daniela (2009). *Problemi specifici della traduzione giuridica: Traduzione di sentenze dal Tedesco e dall'inglese*. Università di Genova. Available at: disclic.unige.it/pub/17/longinotti.pdf (accessed 14 December 2023).

Mattila, Heikki (2006): *Comparative Legal Linguistics*. Aldershot: Ashgate.

New South Wales Civil and Administrative Tribunal. *Annual Report 2018–19*. Available at: ncat.nsw.gov.au/documents/reports/ncat_annual_report_2018_2019.pdf (accessed 14 December 2023).

Perry, Melissa (20 October 2017). Address at the Launch of the Recommended National Standards on Working with Interpreters in Australian Courts and Tribunals. Available at: fedcourt.gov.au/digital-law-library/judges-speeches/justice-perry (accessed 14 December 2023).

Perry, Melissa (2019). The Law, Equality and Inclusiveness in a Culturally and Linguistically Diverse Society. *Adelaide Law Review, 40,* 273–284.

Perry, Melissa & Zornada, Kristen (2014). Unfairness in Practice: Recent Decisions in Migration. *Australian Law Journal, 88*, 1–8.

Migration Review Tribunal and Refugee Review Tribunal. *Annual Report 2014–15*. Available at: aat.gov.au/aat/files/MRDAnnualReports/MRTRRTAR201415.pdf (accessed 14 December 2023).

National Accreditation Authority for Interpreters and Translators. *Certified Specialist Legal Interpreter*. Availabe at: naati.com.au/become-certified/certification/certified-specialist-legal-interpreter/ (accessed 14 December 2023).

Šarčević, Susan (1997). *New Approach to Legal Translation*. The Hague et al.: Kluwer Law International.

Sherman, Julia (2017). The Right to an Interpreter under Customary International Law. *Columbia Human Rights Law Review, 48*, 257–289.

United States Department of Justice, Civil Rights Division (2016). *Language Access in State Courts* (Report, September 2016).

Cases

De La Espriella-Velasco v The Queen (2006) 31 WAR 291.

Gibson v Western Australia (2017) 51 WAR 199.

SZRMQ v Minister for Immigration and Border Protection (2013) 219 FCR 212.

SZSEI v Minister for Immigration and Border Protection [2014] FCA 465.

WACO v Minister for Immigration & Multicultural & Indigenous Affairs (2003) 131 FCR 511.

European Union Directives

Parliament and Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1.

United Nations documents

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).

Human Rights Committee, *Communication No 219/1986*, 39th sess, UN Doc CCPR/C/39/D/219/1986 (23 August 1990).