

Interpreters in Criminal Proceedings

General information

In 2017 the [Judicial Council on Cultural Diversity](#) published Recommended National Standards for Working with Interpreters in Courts and Tribunals (the [JCCD Standards](#)). Many of the Standards have been adopted and implemented in Queensland through the publication of a [Guideline](#) in Queensland for working with interpreters in Queensland Courts and Tribunals. The Standards adopted and implemented in Queensland are set out in schedule 1 to the Guideline.

Section 131A of the *Evidence Act 1977* (Qld) provides that:

“In a criminal proceeding, a court may order the State to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require”.

Although this does not confer a “right” to an interpreter, there is a right to a fair trial and as the High Court said in *Ebataninja v Deland* (1998) 194 CLR 444 at 454 [26]-[27]:

“On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her. In Kunnath v The State, the Judicial Committee of the Privy Council said:

‘It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant. As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of his presence, should be able to understand the proceedings and decide what witnesses he wishes to call, whether or not to give evidence and, if so, upon what matters relevant to the case against him.’

If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial...”

See also *Johnson v The Queen* ([1987](#)) [25 A Crim R 433](#) in which Shepherdson J said, at 453:

“The guiding star is the need to ensure a fair trial for an accused person and that with that guiding star as the backdrop there are two needs to be considered – the need of the jury to hear and understand a witness’s evidence and the need of an accused person to hear and understand a witness’s evidence.”¹

For a case in which a conviction was overturned on appeal, on the basis that the failure of the interpreter to interpret the whole of the proceedings to the accused, including their absence from the courtroom entirely for one part of the trial, was held to have compromised the fairness of the trial, see *R v TAN* [2020] QCA 64.

There are some statutes which make express provision for interpreters in particular types of proceedings. For example:

¹ For further discussion of the law on interpreters in the legal system, see the [JCCD Standards](#) at pp 94-107.

- *Youth Justice Act 1992*, s 72 (in a proceeding before a court in which a child is charged with an offence the court must take steps to ensure that the child and any parent of the child who is present has full opportunity to be heard and participate in the proceeding, with examples of steps the court may take including having an interpreter) and s 158 (the requirement for the court to take steps to ensure the child understands the sentence imposed on them, and consequences for failing to comply with it – again, with an example of steps the court can take including having an interpreter).
- *Domestic and Family Violence Protection Act 2012*, s 84 (requires the court to ensure the aggrieved or respondent understands the nature, purpose and legal implications of the proceeding and any order or ruling made by the court, and gives as an example of a service, or help from other people, that the court may adopt to do that the engagement of a professional interpreter).
- *Mental Health Act 2016*, s 5 (principles which apply to the administration of the Act to a person who has a mental illness, specifically including reference to Aboriginal people and Torres Strait Islanders, and persons from culturally and linguistically diverse backgrounds, with communication to be assisted by an interpreter where practicable and appropriate).

Otherwise, as a matter of practice, where it is required in order for an accused person to properly understand and participate, “[i]n criminal proceedings, the court will bear the cost of interpreting the proceeding to an accused person. Unless the court otherwise orders, the costs of interpreting between the court and a witness are to be borne by the party calling the witness.”²

Each of the Supreme Court, District Court and Magistrates Court have issued practice directions which include requirements where a party, or a witness, requires an interpreter.³

The relevant Australian national standards and certifying authority for interpreters and translators is the National Accreditation Authority for Translators and Interpreters (**NAATI**).

NAATI certification is the only officially accepted qualification for interpreters and translators in Australia.⁴ NAATI certifies interpreters at a number of levels, according to their proficiency and skill.⁵ The certification levels include recognition for specialist legal interpreting.

Prior to 2018, the NAATI credential scheme included levels of accreditation (for example, as a professional or paraprofessional interpreter) and recognition, which remain valid.⁶

It is important to keep in mind the high level of skill required for accurate interpreting, which includes accuracy of both content and manner and style of delivery. It is a common misconception that all that is required is that the person be bilingual and be fluent in the spoken language and English. For a useful discussion of the skills required of an interpreter, see the [JCCD Standards](#) at pp 78-83. See also *DV016 v Minister for Immigration and Border Protection & Anor* [2021] HCA 12 at [4]-[5].

² See standard 3.1 of the Standards forming part of the [Guideline](#).

³ See paragraph 3.2 of the [Guideline](#).

⁴ <https://www.naati.com.au/about-us/>.

⁵ <https://www.naati.com.au/become-certified/certification/>.

⁶ For a helpful summary of the equivalencies between previous NAATI credentials and current NAATI certification, see <https://jccd.org.au/wp-content/uploads/2021/06/Addendum-to-the-Standards-Final.pdf>.

Interpreting and translating are distinct qualifications and skills although a person may be certified as both. For example, in the [JCCD Standards](#) (at pp 3-4):

- “*interpret*” is defined to mean “*the process whereby spoken or signed language is conveyed from one language (the source language) to another (the target language) orally*”; and
- “*translate*” is defined to mean “*the process whereby written language is conveyed from one language (the source language) to another (the target language) in the written form*”.

An interpreter could be employed to interpret court proceedings to a witness, party or defendant. A translator should be used to translate texts, for example a record of conversation or a contract.

Interpreting can be performed using different modes, including the following (as described in the Standards):⁷

- *consecutive interpreting*: When a non-English speaker gives evidence, the most common mode of interpreting in Australian courts is the consecutive mode. The interpreter stands or sits (depending on the length of the testimony) next to the witness and interprets after each short segment. Trained interpreters will know how to take notes and how to coordinate the turns and will commence interpreting at the appropriate intervals. However, there will be interpreters who are not as competent and may not know how to take notes or are not as confident and may be reluctant to interrupt. As a consequence their interpretation may not contain all the elements of the original. For this reason, the judge must be alert to ensure that speakers stop at reasonable intervals to allow the interpreter to interpret.⁸
- *simultaneous interpreting*: a mode of interpreting where the interpreter listens to the speech and interprets at the same time, with only a small lag between the source message and the interpretation in the target language. Interpreters interpret evidence given by other witnesses as well as any discussions or legal arguments to the defendant in the simultaneous mode. In Australia, interpreters usually perform simultaneous interpreting whispering while standing or sitting very close to the person. This is known as ‘chuchotage’ or ‘whispered interpreting’. Auslan interpreters generally work in simultaneous mode throughout the proceedings.
- *tandem interpreting*: involves interpreters working in rotation at agreed intervals in order to avoid fatigue over extended periods of time. Paragraph 8.5 of the Guideline provides that “[w]here Auslan interpreters are engaged to work with a deaf party or witness, they should work in tandem with two (or more) interpreters, given the simultaneous mode of their work and risk of occupational injury”.

Assessing the need for an interpreter

Most often, the need for an interpreter will have been identified by the legal representatives before the trial or sentencing hearing commences. However, if it becomes apparent during the proceedings that an accused’s or a witness’s first language is not English, the Judge should

⁷ [JCCD Standards](#), *ibid* n 4, at pp 90-91 and 109-110.

⁸ It is noted in the [JCCD Standards](#) (for example, at p 25) that where evidence is to be given through an interpreter using the consecutive mode, a party should generally allow 2.5 hours for every hour that would have been estimated if the evidence was being given in English without an interpreter.

raise the matter with the legal representatives, ensure they are aware of the [Guideline](#), and consider whether an interpreter is required before proceeding further.⁹

Checklist

The following is a checklist of matters to assist a Judge presiding over a criminal proceeding in which an interpreter is involved.

Identification of the interpreter

At the commencement of any hearing at which an interpreter is to assist (a party or witness), if the Judge has not already been provided with the following details of the interpreter, the Judge should identify the interpreter and ascertain their qualifications and experience.

- *Full name.*
- *Qualification¹⁰*
- *Membership of a professional body (for example, AUSIT).*
- *What language will you be interpreting from?*
- *Outline experience interpreting generally and particularly in the context of a court proceeding.*

The Judge may also wish to ask the interpreter if they have met the defendant/accused/witness for whom they are to interpret and confirm that they understand each other.

Ensure familiarity with the Guidelines and agreement to comply with the Code of Conduct

The Judge should ensure the interpreter has been provided with, and has read, the Standards for Working with Interpreters in Queensland Courts and Tribunals, which are attached to the [Guideline](#). If not, the interpreter should be given a copy and given time to read it.

The Judge should also confirm that the interpreter agrees to comply with the **Court Interpreters' Code of Conduct** which is set out in schedule 2 to the [Guideline](#).¹¹

The Judge should also ensure the legal practitioners are familiar with the Standards forming part of the [Guideline](#), including the need to speak plainly, and at an appropriate speed to assist the interpreter.

Interpreters in a criminal trial should be sworn

Interpreters in a criminal trial should be sworn pursuant to ss 27, 28, 29 or 30 of the *Oaths Act* 1867 (Qld), as appropriate. Section 28(1) applies on the arraignment of an accused person. Sections 27 and 28(1) apply where an interpreter is required for a witness on a voir dire. Section 29 applies when interpreting in a criminal trial in open court for a prisoner, defendant or witness and others. Section 30 applies where the witness and the defendant speak different

⁹ See standard 16 of the Standards forming part of the [Guideline](#).

¹⁰ See standard 6 and standard 11 of the Standards forming part of the [Guideline](#), in relation to the recommended hierarchy of qualifications.

¹¹ See standard 17.6 of the Standards forming part of the [Guideline](#).

languages, and two interpreters are required to interpret between the witness and the defendant and then into English.

Depending on the preference of the presiding Judge, if the hearing is simply a review, it may not be necessary for the interpreter to be sworn. But for an arraignment, sentencing hearing or trial, the interpreter(s) should be sworn. The identification of the interpreter, and confirmation of their agreement to comply with the Code of Conduct, may take place before or after the interpreter has been sworn.

Appropriate working conditions

The Judge should endeavour to ensure the interpreter has been provided with appropriate and adequate physical working conditions – for example, subject to the logistics of the particular court, a place to wait and work until called; a table and chair in an appropriate position in the court room, where they can see and hear all participants; any necessary equipment (such as headphones), subject to availability; and access to wireless internet services, to enable the interpreter to use online resources such as dictionaries.

The interpreter should be asked if they would be assisted by provision of a headset, to facilitate hearing what is said in the court room with ease. These headsets are readily available, and frequently used, for example, where a juror requires assistance with hearing. The bailiff or judge's associate are able to organise this.

Adequate briefing

The Judge should consider whether and to what extent an interpreter should be briefed on the nature of a matter prior to commencement of proceedings (for example, by the provision of the indictment, statement of facts, particulars, admissions, and other background material).¹² If so, give consideration to the time which an interpreter may reasonably require to become familiar with the briefing materials.¹³

There is an obligation on the legal representatives to ensure that interpreters who are engaged are appropriately briefed and afforded reasonable time to familiarise themselves with materials that are relevant for the process of interpretation in the particular case.¹⁴

Knowledge of the specific subject matter being discussed improves the accuracy of interpretation.¹⁵

Briefing may include the provision of materials which may otherwise have required sight translation.¹⁶ Standard 26 of the standards forming part of the [Guideline](#) recommend that sight unseen translation by interpreters be avoided as far as possible.

The Court Interpreters' Code of Conduct¹⁷ includes an obligation on the interpreter to keep confidential all information which the interpreter acquires in the course of their engagement or appointment in the office of interpreter (see clause 7).

¹² See, further, the [JCCD Standards](#) at pp 91-92.

¹³ See standard 17.2 of the Standards forming part of the [Guideline](#).

¹⁴ See standards 24.2 and 24.3 of the Standards forming part of the [Guideline](#).

¹⁵ See the [JCCD Standards](#) at pp 79, 83.

¹⁶ See standard 26 of the Standards forming part of the [Guideline](#).

¹⁷ Annexure 2 to the [Guideline](#).

Use of plain English and appropriate pace of speaking

Judges and legal practitioners should endeavour to use plain English to communicate clearly and articulately during court proceedings.¹⁸ It may be necessary for the Judge to explain a legal or technical term, to assist the interpreter. Judges and legal practitioners should all endeavour to speak at an appropriate pace, and with appropriate pauses, to facilitate the discharge by the interpreter of her or his duty to interpret accurately.¹⁹

Regular breaks

Interpreting requires a high level of concentration. Regular breaks will be required (generally, every 45 minutes for spoken language interpreters, and every 20 minutes for signed language interpreters). Judges should check with the interpreter how frequently they would like to take a break, and that they should feel free to request a break at any time.

Encourage the interpreter to ask for assistance if required

At the commencement of any proceeding, the interpreter should be asked to alert the Court and interrupt the proceedings if they:

- become aware they may have a conflict of interest in the proceedings;
- cannot interpret the question or answer for any reason;
- did not accurately hear what was said;
- need to correct an error that they have made;
- need to consult a dictionary or other reference material;
- need a concept or term explained;
- are unable to keep up with the evidence; or
- need a break.²⁰

The interpreter should do this by saying: “Your Honour, I am now speaking as the interpreter, I have a difficulty which I would like to raise with you.”

Interpreting in matters where a witness or defendant appears via audio-visual link

Assistance may be gained from the information in annexure 6 to the [JCCD Standards](#).

Explaining the role of the interpreter²¹

The following are the key considerations to bear in mind with respect to the role of the interpreter. The Judge may consider it appropriate to outline this at the commencement of a hearing.

¹⁸ See standard 14.1 and standard 25.1 of the Standards forming part of the [Guideline](#). See also annexure 3 to the [JCCD Standards](#), at pp 113-116, for some plain English strategies.

¹⁹ See standard 17.9 and standard 25.1 of the Standards forming part of the [Guideline](#).

²⁰ See standard 17.7 of the Standards forming part of the [Guideline](#).

²¹ See standard 17.5 of the Standards forming part of the [Guideline](#).

Interpreters owe to the court paramount duties of accuracy and impartiality in the office of interpreter which override any duty that person may have to any party to the proceedings, even if the interpreter is engaged directly by that party.²²

It is the duty of the interpreter to diligently and impartially interpret communications in connection with a court proceeding as accurately and completely as possible.

The role of the interpreter is to interpret everything accurately and impartially, as if they were voice of the person speaking.

It is not the role of the interpreter to advocate for a witness or party; try to explain a concept or question; or try to explain or adapt an answer which is given. If a need for clarification or explanation arises, the interpreter should say: “Your Honour, I am now speaking as the interpreter. I have a difficulty I would like to raise with you.”

In directing questions to the person being interpreted, the questioner should frame questions directly to the person NOT to the interpreter. The judge should ensure counsel’s questioning follows that format. For example “*What did you do next?*” and not “*What did he do next?*” or “*Ask him what he did next?*”. The interpreter should also respond in direct speech. That is “*I did that?*” and not “*He did that?*”.

These general rules of interpreting should also be explained (interpreted) to the witness so that the witness also responds directly [see the sample direction below].

The judge should ensure that questioning is in plain English and is slow and short enough for the interpreter to do their job as well as possible.²³

This may require intervention to stop excessively long questions or to require rephrasing.

Interpreters should not be expected to undertake the role of an expert in cultural matters. Such matters exceed an interpreter’s expertise. Those matters should be addressed by counsel and may require expert evidence.

Where two interpreters are being used (one for a witness and one for an accused) disputes may arise in a matter of interpretation. These should be dealt with in the absence of the jury with perhaps the necessity of evidence on a voir dire being heard.

²² See standard 18.1 of the Standards forming part of the [Guideline](#).

²³ See standard 25.1 of the Standards forming part of the [Guideline](#). See also annexure 3 to the [JCCD Standards](#), at pp 113-116, for some plain English strategies.

Sample Directions to the Jury

At commencement of trial – where interpreter for accused/defendant

[To the jury] Today we are assisted by [name of interpreter], an interpreter who will be interpreting between the English language and [name of language] for the defendant.

The interpreter's role is to interpret everything said in court for the defendant, who does not speak English [or does not speak English well enough to properly understand and participate in this proceeding]. The interpreter plays an important role by removing the language barrier in order for the defendant to fully understand and participate in the court proceedings.

The interpreter has a duty to interpret accurately and impartially. The interpreter does not take sides and has confirmed that she/he will follow the Court Interpreters' Code of Conduct. [If appropriate] The interpreter is sitting next to the accused/defendant so they can hear him/her. The interpreter is not part of the defence team.

The interpreter has made a formal promise to the Court, in the form of an oath / affirmation, to convey accurately the meaning of what is said from one language to the other.

It may be that from time to time the interpreter has an issue they wish to raise. If that occurs, I may need to deal with that in your absence.

Where interpreter for an accused or witness giving evidence

Note: This direction may be given just before the evidence of a witness / accused who is giving evidence.

[To the jury] Today we are assisted by [name of interpreter], an interpreter who will be interpreting between the English language and [name of language] for the witness, [name].

The interpreter's role is to interpret everything said to the witness, and by the witness, accurately and impartially, as if they were the voice of the person speaking.

The interpreter has a duty to interpret accurately and impartially. The interpreter does not take sides and has confirmed that she/he will follow the Court Interpreters' Code of Conduct. The interpreter has made a formal promise to the

Court, in the form of an oath / affirmation, to convey accurately the meaning of what is said from one language to the other.

The evidence you are to consider is that provided through the interpreter. Although some of you may know the non-English language used, all jurors should consider the same evidence. Therefore, you must base your decision on the evidence presented through the interpreter. You must disregard any other meaning of the non-English words, such as may be based on your own understanding of the language.

You should not make any assumptions about a witness or a party based solely on the use of an interpreter to assist the witness or party. [Particularly, in relation to an accused giving evidence through an interpreter, you should not allow any sympathy or prejudice, because of the use of an interpreter, to intrude upon your deliberations about the matter.] You must deal with this evidence, and evaluate the evidence, in the same way you would if the person was speaking directly, without an interpreter.

The process will be that questions will be put directly to the witness through the interpreter and the responses will also be given in direct speech. The questions and answers will not be framed in the third person. For example, the question would be “What did you do next” and not “What did he do next”. The response from the interpreter would be “I did this” not “He did this”.

[To the witness] This person is an interpreter. Her/his job is to interpret everything that the lawyers and I say to you in your language, and to interpret everything you say into English. The interpreter cannot add anything to what you say or leave anything out. Please give your answers in short sections to give the interpreter an opportunity to interpret what you say. If you have any questions about what is happening or do not understand something, please do not ask the interpreter. It is not the interpreter’s job to explain things to you or to answer your questions. If you have a question, ask me directly and the interpreter will interpret your question to me.

Where interpreter for an accused or witness, who has some proficiency in English, giving evidence

There may be cases where there is a legitimate concern that the jury may consider that a witness' or an accused's grasp of English is such that in giving evidence she/he does not really "need" an interpreter, potentially giving rise to a perception of an unfair advantage. In this case it may be appropriate to add a comment effectively giving curial approval to the provision of an interpreter, by adding, after the sentence in the direction above, "The interpreter's role is to interpret everything said to the witness, and by the witness, accurately and impartially, as if they were the voice of the person speaking", the following:

Even when a witness has a good grasp of English it is often considered best that the witness gives evidence in their own language. This is so their evidence is not restricted to the English words they know. It is the Court's experience and well understood that even witnesses who are quite fluent in English as a second language can be disadvantaged when giving evidence in the formality of the court room.

Where it is necessary for a tape recording of a conversation in a language other than English to be played to the jury with a transcript in English being provided.

The usual warning about the conversation being the evidence and not the transcript becomes meaningless. A suggested direction would be:

[To the jury] "You are about to listen to a recording in a language other than English. Each of you has been provided with a transcript of the recording, which has been admitted into evidence. The transcript is a translation of the foreign language recording.

Although some of you may know the non-English language used, it is important that all jurors consider the same evidence. Therefore you must accept the English translation contained in the transcript and disregard any different meaning of the non-English words".

Cultural assumptions, stereotypes, and subconscious bias

A premise of our legal system is that juries are well-equipped for the task of judging human behaviour. This task may pose challenges in the context of accused, complainants or witnesses from culturally and linguistically diverse backgrounds. Cultural norms may impact on a jury's assessment of credibility and there is the risk of the jury misunderstanding demeanour because of cultural difference. The accused or witness may belong to a culture or race which has a negative image or stereotype in some parts of the community. There is a risk of negative bias or that prejudice or assumptions may intrude in the jury's fact-finding. A direction may be appropriate to enable the jury to be aware of the limitations of their knowledge and to guard against subconscious biases. If this is to be done, it would be appropriate to canvass the terms of any proposed direction with counsel in advance.

Useful guidance in relation to drafting jury directions to counter cultural assumptions, stereotypes and cultural bias may be found here:

- Judicial Commission of NSW, *Equality before the Law Benchbook*, 2020, [Aboriginal people](#) [2.1] – [2.5] and for [sample jury directions see \[2.3.6\]](#);
- Judicial Commission of NSW, *Equality before the Law Benchbook*, 2020, [People from culturally and linguistically diverse backgrounds](#) [3.1] – [3.5] and for [sample jury directions see \[3.3.7\]](#);
- Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2021, [Witnesses – Cultural and linguistic factors](#) at [1.900]- [1.910]
- [Equal Treatment Benchbook \(2nd ed\), Supreme Court of Queensland](#) - Has useful jury directions for cases involving speakers of Aboriginal English and Torres Strait Creole in appendix C (which starts on p 194) covering language, cultural differences and demeanour.
- Supreme Court of Western Australia, *Equal Justice Bench Book (2nd edition)*, 2017:
 - [Ch 1: Equal Justice](#)
 - [Ch 7: People from Culturally and Linguistically Diverse Backgrounds](#)