



**INTERPRETERS AND THE COURTS
QUEENSLAND LAW SOCIETY SYMPOSIUM – CRIMINAL LAW STREAM**

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Justice Margaret Wilson

It is critical to the administration of justice according to law that all persons who come before the Courts, whether as litigants or witnesses, be treated fairly and consistently, and that they be able to understand and play an active part in proceedings.

That the language of our Courts is English can pose a considerable challenge in the application of these principles.

Where a litigant or a witness cannot comprehend English and communicate in English with sufficient proficiency to understand and participate in a Court proceeding, an interpreter is required.

Because I am speaking in the Criminal Law Stream, I shall direct my observations particularly to the use of interpreters in criminal trials.

A fair trial

An accused person should be present at his or her trial for a criminal offence – not just physically present, but present, too, in the sense of being able to understand the proceeding and the nature of the evidence against him or her. If he or she does not understand and speak the language in which the proceeding is conducted, in the absence of a competent interpreter the trial will not be a fair trial.¹

¹ *Ebatarinja v Deland* (1998) 194 CLR 444 at 454; *Johnson v The Queen* (1987) 25 A Crim R 433.

The Court may stay the proceeding until a competent interpreter is found.

Interpreting and translating

An interpreter's role is to interpret the spoken word (and perhaps to do some sight translation of a document). But the translation of documents, of the written word, from one language to another is the role of a translator. Interpreting and translating are different skills.

Types of interpreting

In a criminal trial there are commonly two types of interpreting required -

- (i) Simultaneous interpreting of the proceeding to the accused in the dock. This is done by "whispering": *chuchotage*.
- (ii) Consecutive interpreting of questions directed to persons in the witness box and their responses. This interpreting is two directional and audible to everyone in the courtroom.

The interpreter's role

An interpreter is required to swear an oath or make an affirmation to "well and truly interpret and true explanation make" between the non-English speaking person and the Court. This does not mean that the interpreter is obliged to provide literal, word for word, translation of what is said. There may not be an exact linguistic equivalent of an expression. It is sufficient for the interpreter to express the idea or concept in the other language, as accurately as the language and the circumstances permit.

An interpreter is a linguistic facilitator – not a party or a witness. The advocate should direct questions to the witness, not to the interpreter. The witness's response should be directed not to the interpreter, but to the advocate (or the judge) who asked the question. The response should be interpreted in the first person ("I did ...") and not in the third person ("He says he did ...").

Where there is a dispute about the particular language or dialect spoken by a witness, the interpreter should not be asked to confirm that the witness is speaking a particular language or dialect. The interpreter's function is to comprehend and communicate, not to assess or analyse. His or her skills lie in the ability to understand what is being said in one language (or dialect) and communicate it accurately in another. An interpreter needs to maintain impartiality and the confidence of those with whom he or she deals. Thus it is undesirable that the interpreter contribute to the determination of a disputed issue.²

An interpreter is not a cultural facilitator or someone who should be asked to give evidence on cultural differences. In some cases it may be helpful to have the expert evidence of a linguist or an anthropologist.³

Engaging an interpreter

In preparing a case legal representatives should consider at an early stage whether an interpreter may be required for the accused and/or a witness.

Generally, the prosecution will assume responsibility for engaging an interpreter required for any of its witnesses and the defence will assume responsibility for engaging an interpreter for the accused and any witness for the defence.

It is undesirable that an interpreter used in police investigations or in preparation for trial be used to interpret for an accused at trial. This is because a Court interpreter needs to be, and to be seen to be, impartial.

In criminal proceedings, the Court has power to order the State to provide an interpreter for a complainant, the accused or a witness, if satisfied that the interests of justice so require.⁴

In the Supreme Court, an application for an order that the State provide an interpreter should be made by filing an application and supporting affidavit. This will usually be heard pre-trial. The material should specify the language and dialect (if any) in

² *AA v Secretary of State for the Home Department* [2008] UKAIT 00029.

³ See generally *R v Watt* [2007] QCA 286.

⁴ *Evidence Act 1977*, s 131A.

question and any special requirements (eg. gender). Usually the order will direct the registrar to locate and retain a competent interpreter.

Where possible, a Court interpreter should have NAATI accreditation at “Interpreter/Translator” level (Level 3). This is good practice rather than a legislative requirement. In relation to some languages (indigenous and others), there are no interpreters with that qualification. The essential requirement is knowledge of English and the other language sufficient to comprehend and communicate. In extreme cases the judge may have to determine whether the proposed interpreter is competent.

Locating and retaining an interpreter can take time, and it can be a costly exercise. It is important to give early notification that an interpreter is required. Where, after such notification has been given, it becomes apparent that an interpreter is not required after all, it is important to let the registrar know as soon as possible, so that cancellation fees may be avoided or at least minimised.

Preparation for trial

Where one side intends using an interpreter but the Court is not asked to direct the State to provide the interpreter, it is still important to alert the Court and other side as early as possible that an interpreter will be used. Preferably this should be done pre-trial. The Court can then give any directions necessary or desirable for the conduct of the proceeding. Administrative arrangements can be put in place – for example, the position of the interpreter in the courtroom, extra microphones, any requirements of the court reporters.

The legal representatives should ensure the interpreter knows where and when to attend Court, that he or she has been briefed with any relevant documents and that he or she has had an opportunity to speak with the witness or the accused in advance (for linguistic reasons – to familiarise himself or herself with the accent, rhythm and speech patterns of the non-English speaking person and ensure he or she can adequately interpret).

The advocate should prepare what he or she will say in Court and the questions he or she will ask having regard to the presence of an interpreter. Matters such as the structure of sentences and the speed of delivery may require modification.

Duty of interpreter

The fundamental duty of an interpreter is to relate questions to the accused or witness accurately and to relate the response to the Court accurately. The interpreter's duty is to the Court, rather than to the non-English speaking accused or the party who engages him or her.

The interpreter should avoid conflict of interest or bias, whether actual or perceived. It is generally inappropriate that a friend, associate or relative of a party or a lawyer in the case be retained. It is generally inappropriate that someone who was involved in the police investigation or in preparation of the prosecution or defence case be engaged. And it is always inappropriate that someone with a direct or indirect financial or other interest in the outcome of the case be engaged.

It is quite proper for the interpreter to communicate with the non-English speaking persons informally to ensure he or she can interpret adequately. It is quite proper for the interpreter to be given access to documents and words and phrases likely to be encountered in advance. He or she will usually be assisted by having advance notice of the form of the arraignment, the words used in placing the accused in the charge of the jury, how a verdict will be taken, the allocutus, etc.

But wherever possible the interpreter should refrain from participation in conferences and casual conversations with parties, witnesses and legal representatives.

It is important that the interpreter be professional in presentation and demeanour.

Of course, an interpreter who interprets for the accused in the dock may have been present at pre-trial conferences and may have become a party to privileged communications. So it is undesirable that that person be the interpreter if the accused gives evidence. And of course that interpreter has an ethical obligation to maintain confidentiality.

In Court the interpreter may need to interrupt the proceeding to ask questions, to ask for something to be repeated or clarified. He or she may need to consult a dictionary, a reference book or a glossary. He or she may need regular breaks. All reasonable requests should be accommodated.

Quality

Sometimes questions will arise on appeal about the quality of interpretation at trial level. The State Reporting Bureau produces high quality written transcripts according to a format and style guide. But, of course, they record only the English words spoken. A positive feature of our digital recording system is that actual communications, both in English and in the other language, are recorded. There may be cases where legal practitioners should have a copy of the recording marked for identification and placed with the file, so that it will be available should the quality of interpretation be questioned subsequently.

Conclusion

Judicial officers have a duty to ensure all participants in a Court proceeding are treated with dignity and respect. This extends to non-English speaking persons and to the interpreters themselves. Sometimes interpreters leave Court feeling undervalued. Sometimes they have a justified sense of grievance, sometimes not. Courts and legal representatives should strive for better understanding of their role, and of the ethical and practical constraints under which they operate. Better understanding is likely to result in enhanced performance of their function. That will improve access to justice, and can be expected to result in greater public confidence in the way justice is administered.